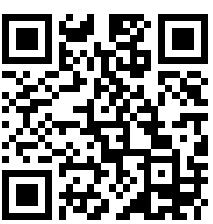

MINNESOTA DIGEST

SUPPLEMENT

1916

BY

MARK B. DUNNELL

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PREFACE

The original edition of Dunnell's Minnesota Digest was published in November, 1910, and covered Minnesota Reports, 1–109; Northwestern Reporter, 1–125. In 1912 a temporary pamphlet supplement was published, bringing the Digest down to October 1, 1912, and covering Minnesota Reports, 110–117; Northwestern Reporter, 124–137. This supplement supersedes the pamphlet supplement of 1912 and brings the Digest down to January 1, 1916. It covers Minnesota Reports, 110–130; Northwestern Reporter, 124–154, and includes most of the cases in 131 Minnesota and 155 Northwestern. 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

2. Loss of rights by—A perfect legal title to realty is never lost by abandonment. Krueger v. Market, 124 Minn. 393, 145 N. W. 30; Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899. See Note, 135 Am. St. Rep. 889.

An easement of a railroad right of way may be lost by abandonment. Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W. 907. See § 2855.

(3) See Simons v. Munch, 115 Minn. 360, 132 N. W. 321.

ABATEMENT AND REVIVAL

ANOTHER ACTION PENDING

4. Nature and object of plea—The rule is not absolute and inflexible, but may be applied with reference to the facts of the particular case. The court may look into the circumstances in order to determine, as a question of fact, whether justice and orderly procedure require that the second action should be abated as vexatious. The determination of the trial court, as to the matter of vexatiousness, will rarely be set aside on appeal. Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

(5) Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

5. When plea allowable—It is immaterial that the position of the parties is reversed in the second action. Disbrow Mfg. Co. v. Creamery Package Mfg. Co., 115 Minn. 434, 132 N. W. 913; Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

The pendency of proceedings for the registration of a title to land may be interposed as a defence to an action to determine adverse claims involving the title to the same land. Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

In an action to recover money, the plaintiff is not entitled to judgment, where the money sought to be recovered is subject to an undetermined garnishment, though as between the plaintiff and the defendant the right to recover is complete. First Nat. Bank v. State Bank, 125 Minn. 262, 146 N. W. 1093.

(6) Disbrow Mfg. Co. v. Creamery Package Mfg. Co., 115 Minn. 434, 132 N. W. 913.

6. Former action must be still pending—It must affirmatively appear that the former action is still pending, but its pendency need not be proved by direct evidence. The proof may be aided by the presumption as to the continuance of a state of things once shown to exist. An

action is deemed pending until its final determination. Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

When former action is pending. Note, 52 L. R. A. (N. S.) 79.

7. Action pending in another state—(18) Brennan v. Keating, 128 Minn. 49, 150 N. W. 397; Note, 82 Am. St. Rep. 587.

(19) See Digest, § 3960.

8. Action pending in federal court—(20) See Brennan v. Keating, 128 Minn. 49, 150 N. W. 397.

10. Ground for a stay—(22) See Seeger v. Young, 127 Minn. 416, 424, 149 N. W. 735.

11. Pleading—Where a defendant attempts to plead in abatement the pendency of a former action which has been dismissed by the court below, but which he claims is pending on appeal in the supreme court, it is necessary to allege at least that such appeal was taken and the supersedeas bond filed prior to the commencement of the second action. Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018.

12. Dismissal of former action after plea—(25) Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

DEATH OF PARTY

14. What causes of action survive—When a person lives an appreciable length of time after receiving an injury through a defendant's negligence, even though in a state of unconsciousness, his cause of action survives under section 9 of the federal Employers' Liability Act. Testimony that plaintiff's intestate after the injury moaned and breathed for ten minutes justified the court in submitting the question of the survival of his cause of action to the jury. Capital Trust Co. v. Great Northern Ry. Co., 127 Minn. 144, 149 N. W. 14.

A cause of action for the breach of a saloon-keeper's bond survives and the action may be prosecuted against his estate. Koski v. Pakkala, 121 Minn. 450, 141 N. W. 793.

In determining whether a right of action for tort survives, the statutes in force at the time of the death of the wrongdoer control, rather than those at the time of the injury. Gorlitzer v. Wolffberg, 208 N. Y. 475, 102 N. E. 528.

15. Action does not abate—G. S. 1913, § 7685, provides that: "No action shall abate by reason of the death * * * of a party * * * if the cause of action continues or survives. In such cases the court, on motion, may substitute the representative or successor in interest. * * *" Under the provisions of this statute, a suit in equity, brought during the lifetime of the insured to cancel a certificate of membership

in respondent association, does not abate by reason of the death of the insured, nor does it abate because plaintiff now has an adequate remedy at law. National Council v. Weisler, 131 Minn. ——, 155 N. W. 396.

16a. Dissolution of foreign corporation—Where a corporation organized under the laws of another state was dissolved by operation of the laws of that state, and its property became vested in its trustees, an action begun in this state prior to the dissolution cannot be revived and continued by receivers of the corporation appointed by the trial court. If it can be revived at all, it must be at the instance of the trustees, who succeeded to the property and rights of the corporation. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992.

ABDUCTION

22a. Civil action—Civil action for abduction of child. Note, 45 L. R. A. (N. S.) 867.

ABORTION

27. Evidence—Admissibility—(51) State v. Mueller, 122 Minn. 91, 141 N. W. 1113 (dying declaration of woman held admissible—note books of physicians holding autopsy held inadmissible—account book of defendant held inadmissible); State v. Hunter, 131 Minn. ——, 154 N. W. 1083 (declarations, made by the woman during the time she was under treatment and before the final act of abortion was committed, to the effect that defendant was her physician, had treated her for the purpose of bringing about a miscarriage, and was to administer to her further treatment for that purpose, held properly admitted in evidence as a part of the res gestæ—statements of the woman to one not called as a witness to the effect that she had applied to the defendant for relief and that he had refused to perform an abortion, held inadmissible).

28. Evidence—Sufficiency—Evidence held to justify a conviction. State v. Mueller, 122 Minn. 91, 141 N. W. 1113; State v. Hunter, 131 Minn. ——, 154 N. W. 1083.

ABSTRACTS OF TITLE

33. Liability of abstracter—Negligence—(59) Note, 12 L. R. A. (N. S.) 449.

33a. Contracts—Where a contract for a loan to be secured by a real estate mortgage provided for an abstract of title, a failure to furnish the abstract in time to afford a reasonable opportunity to examine the title, defeated an action for breach of the contract. Colliton v. Warden, 111 Minn. 435, 127 N. W. 1.

ACCORD AND SATISFACTION

39. Part payment of liquidated claim—It is not a consideration for an agreement to accept a less sum in satisfaction of the whole amount due on a promissory note that the maker agrees after maturity of the note to pay such lesser sum at a place other than that specified in the note. Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501.

(75) Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501; Allen v. Batz, 116 Minn. 38, 133 N. W. 79. See 13 Col. L. Rev. 156; 27 Harv. Law Rev. 677 (effect of retaining and cashing a check tendered as payment in full).

47. Pleading—(4) Wilson v. N. W. Nat. Life Ins. Co., 103 Minn. 35, 114 N. W. 251 (action for services in soliciting applications for insurance—answer held to allege properly a settlement of the claim); Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501 (acceptance of less than whole amount due on claim—answer held not to show a bona fide dispute).

ACCOUNTS

ACCOUNT STATED

50. What constitutes—In order to constitute an account stated, it must be mutually agreed between the parties that the balance stated is due from the debtor to the creditor on the final adjustment of the dealings to which the account relates. The mere transmission of an account to the debtor is insufficient to show an account stated, it being essential that there should be some form of assent to the account; but such assent may be implied from the circumstances and the acts of the parties. Retention by the debtor of an account received by him, without objection, for an unreasonable time, is evidence of assent thereto, and is also an admission of its correctness, from which the law will imply a promise to pay the sum stated therein to be due. Evidence considered, and held sufficient to warrant the action of the trial court in concluding that it was a question for the jury whether there was an account rendered by the plaintiff on the transaction alleged in the complaint, and also whether the defendant seasonably made objection thereto. Western Newspaper Union v. Segerstrom Piano Mfg. Co., 118 Minn. 230, 136 N. W. 752.

Parties holding mutual and open claims against each other may agree as to some of such items, leaving other items for future adjustment, and an action upon an account stated may be maintained for the balance arrived at from the items considered. In such action the party against whom the balance is claimed may offset against it any balance which he claims from the items not included in the settlement. Ingle v. Angell, 111 Minn. 63, 126 N. W. 400.

(11) Note, 136 Am. St. Rep. 37.

(12) Western Newspaper Union v. Segerstrom Piano Mfg. Co., 118 Minn. 230, 136 N. W. 752. See Note, 29 L. R. A. (N. S.) 334.

(13) Archer v. Whitten, 117 Minn. 122, 134 N. W. 508.

53. Effect—Impeaching—An account stated or settled is prima facie to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of its statement. Nor will the parties be concluded by such presumption as to matters which were not contemplated by them or which were not in fact included in the statement or settlement, though they existed at the time; but the presumption will be destroyed when the details of the settlement show that the matter in controversy was not included. Either party may show that the balance found was struck upon a partial, and not a general, accounting and either party may thereafter avail himself of a matter outside of the settlement by showing that it was not included therein. Treacy v. Power, 112 Minn. 226, 127 N. W. 936.

56. Pleading—(30) Bouck v. Shere, 125 Minn. 122, 145 N. W. 808 (action on an express promise to pay the value of plaintiff's interest in a firm on its dissolution and for an account stated for the same amount—no election on the trial—recovery on either cause of action allowable).

ACKNOWLEDGMENT

65. Nature and sufficiency—Acknowledgment by telephone. Note, 127 Am. St. Rep. 554.

66. Necessity—An acknowledgment is not essential to the validity of an assignment of a mortgage on realty, as between the parties. Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812.

71. Seal—(64) Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

78. Conclusiveness—(79, 80) Note, 41 L. R. A. (N. S.) 1161; Note, 54 Am. St. Rep. 150.

79. By married women—(81) Form and sufficiency of certificate of married woman's acknowledgment. Note, 45 L. R. A. (N. S.) 1109.

83. Liability of officer for negligence—(85) Note, 49 L. R. A. (N. S.) 45.

83a. Pleading—In declaring on an acknowledged instrument it is not essential to allege that it was acknowledged unless that fact is involved in the action. Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14. See Dunnell, Minn. Pl. 2 ed. § 541.

The fact of acknowledgment may be inferred from an allegation that the instrument was recorded. Smith v. Dennett, 15 Minn. 81 (59).

ACTION

IN GENERAL

84. Definition—What constitutes—In this state the term "action" includes an action at law and a suit in equity. Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67.

A statutory ditch proceeding is not a civil action. McLeod County v. Nutter, 111 Minn. 345, 126 N. W. 1110.

85. Remedy—Definition—Since the abolition of the common-law forms of action a party may resort to any judicial remedy for the enforcement or protection of his rights, legal or equitable, which is adequate and appropriate to the relief sought, except where a statute pro-

vides an exclusive remedy. Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128.

85a. Injury as basis of an action—A legal injury is the basis of an action. One who has not been damaged cannot recover in an ordinary action at law for damages. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

85b. Cumulative remedies—A party should not be deprived of a remedy simply because he may also have another. The denial of a remedy, because it is claimed that another and more appropriate one exists, frequently results in the deprivation of a right. Corey v. Corey, 120 Minn. 304, 139 N. W. 509.

86. Remedies for new statutory rights—The creation of an obligation carries with it by necessary implication the right to its enforcement. Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325.

(90) United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112; Sullivan v. Minneapolis & Rainy River Ry. Co., 121 Minn. 488, 142 N. W. 3. See Way v. Barney, 116 Minn. 285, 133 N. W. 801; Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128.

86a. Statutory remedies—Loss—Restoration—Where a statutory remedy is lost through omission to observe a prescribed requirement, courts have no power to restore it, unless the one seeking to reap an advantage therefrom in some manner induced the omission. Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

87. Statutory remedies—When exclusive—(91) Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128; Tenn. Coal etc. Co. v. George, 233 U. S. 354. See § 90; 29 Harv. L. Rev. 93.

(92) Merz v. Wright County, 114 Minn. 448, 131 N. W. 635; Zetterberg v. Great Northern Ry. Co., 117 Minn. 495, 136 N. W. 295; Sullivan v. Minneapolis & Rainy River Ry. Co., 121 Minn. 488, 142 N. W. 3.

88. Actions ex contractu and ex delicto distinguished—Where the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is in substance, whatever may be the form of the pleading, an action on the contract. The foundation of the action is the contract, and the gravamen of it is its breach. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632; East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181. See Koski v. Pakkala, 121 Minn. 450, 141 N. W. 793; Lynch v. Brennan, 131 Minn. ——, 154 N. W. 795.

An action to recover damages arising from the negligence of an expert employed to audit certain accounts is founded on breach of contract, and not in tort. The cause of action is the breach of the contract, and

the different items of damage resulting therefrom do not constitute separate causes of action. East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181.

89. How and when commenced—The provisions of the code relating to the commencement of actions must be construed as a whole and so as to give effect to the intention to provide a single uniform course of procedure which shall apply alike to all civil actions. An action is deemed as commenced when the summons is delivered to the proper officer for service, if such service be completed within the prescribed time. Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

An action is commenced as to each defendant when a summons is served upon him, or when he appears without service, and is deemed pending until its final determination. Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

90. Creation of new procedure by courts—If for any reason it is impossible to enforce the liability of stockholders of a corporation to creditors under the statutory procedure, the court will, in the exercise of its general equity powers, give to creditors an adequate remedy in an action in equity to enforce the liability, and may appoint a receiver and authorize him to enforce the liability, as provided by sections 3184–3190, R. L. 1905. Way v. Barney, 116 Minn. 285, 133 N. W. 801.

(97) J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 149, 124 N. W. 828.

91. Consolidation of actions—(98) Davis v. Forrestal, 124 Minn. 10, 18, 144 N. W. 423.

ONE FORM OF ACTION

94. Forms of action abolished—One form—Statute—Since the adoption of the code we have but one form of action, called a civil action, and but one method of procedure in all ordinary civil actions. Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

Since the abolition of the common-law forms of action a party may resort to any judicial remedy for the enforcement or protection of his rights, legal or equitable, which is adequate and appropriate to the relief sought, except where a statute provides an exclusive remedy. Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128.

(2) Bonham v. Weymouth, 39 Minn. 92, 96, 38 N. W. 805 (effect of abolition of distinction between actions at law and suits in equity in broadening the action for partition); Gregory Co. v. Cale, 115 Minn. 508, 513, 133 N. W. 75.

See Dunnell, Minn. Pl. 2 ed. §§ 22–26.

95. Law and equity administered by same court—In this state law and equity are administered by the same court, and the rules of both are

applied in disposing of all controversies, when applicable. Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265.

So far as possible the rules of pleading and practice should be the same in legal and equitable actions. Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

(9) See Digest, § 5041.

(10) Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265. See Digest, § 3140.

ADEMPTION—See Wills, 10234.

ADJOINING LANDOWNERS

LATERAL SUPPORT

96. Nature of right—Express agreements for lateral support, 48 L. R. A. (N. S.) 474.

(18) Note, 33 Am. St. Rep. 446.

ADMINISTRATIVE LAW—See Constitutional Law, 1600.

ADOPTION

99. Procedure—Statute—A person may be adopted, within the meaning of an insurance policy, though there has been no statutory adoption. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

See Note, 39 Am. St. Rep. 210.

99a. By agreement—Evidence considered, and held to show that a child, unrelated to intestate by blood, was taken into the latter's home under an agreement by her and her husband to make such child their child and heir, which agreement was evidenced by a writing subsequently lost. Proofs necessary to establish such agreements must be clear, positive, and convincing in all particulars; relief should be cautiously granted; and each case must rest on its own facts. Absence of the child's father's consent to the "adoption" held, under the circumstances of the case, not available to the legal heir of intestate for the purpose of defeating the child's rights under the contract. The contract was valid in Ohio, where it was made, and when executed, the deceased dying intestate, it entitled the child, pursuant to the equitable maxim that equity regards that as done which ought to be done, to the same share in decedent's estate as a natural child; the remedies there-

under being governed, however, by our laws. Upon the child's death, leaving lawful issue, the latter inherited through her a share in the estate of the deceased "adopting" parent as if she, the "adopted" child, had been a daughter by blood. Intestate's estate having been reduced to personalty, the probate court had power to adjudge to whom the same should be apportioned, and, as an incident thereto, to determine the rights of appellant, the daughter of the "adopted" child, under the contract, and, further, by its final decree to award to appellant the share of the estate to which she was equitably entitled under the contract whereby her mother was "adopted." Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

Where, under an oral contract to adopt an infant and to give her a specified portion of the property of her foster parents at their death in consideration of the relinquishment of all parental rights by her natural parents, the child is reared as the child of her foster parents and renders to them all the duties and services of a daughter until she attains her majority, and such foster parents die without having legally adopted her and without making any provision for her by will or otherwise, the property rights provided for in such contract may be enforced in equity; and where the property consists of real estate, or such rights have not been submitted to the probate court for determination, they are not barred by a final decree of the probate court assigning the property to others. If the contract merely provided that she should be adopted, and contained no express provision in respect to property rights, she became entitled to the property rights given by statute to an adopted child. The property rights of an adopted child are now the same as those of a natural child. The allegations of the complaint fail to show that the contract in controversy contained any express provision to give plaintiff a portion of the property of her foster parents. Consequently she has no greater rights in such property than are given by statute to an adopted child, and such rights were barred by the final decree of the probate court assigning the property to the devisee named in the will. Odenbreit v. Utheim, 131 Minn. ——, 154 N. W. 741.

ADULTERATION

101. Oils—Adulteration of linseed oil—linsol—complainant held not entitled to injunction against food commissioner. American Linseed Oil Co. v. French, 193 Fed. 207.

101a. Liability of manufacturer and seller—Negligence—The sale of adulterated or poisonous cooking oil by a wholesale dealer is prima facie evidence of negligence in failing to ascertain its true character, though the package was properly labeled as cotton seed oil. A manufacturer, or dealer, who sells adulterated or poisonous cooking oil to a retail merchant, is liable to the vendee for his consequent loss of business in selling the oil to his customers. A company which advertises itself as a manufacturer and seller of pure articles of food must be deemed to have knowledge of the contents of the articles offered for sale. Neiman v. Channellene O. & M. Co., 112 Minn. 11, 127 N. W. 394.

ADULTERY

103. Indictment—An indictment which complies with the requirements of the statutes is sufficient. State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

(37) State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

104a. Statute of limitations—Proceedings before an examining magistrate by which the accused is held to answer in the district court for the crime of adultery constitute the commencement of a prosecution therefor within the meaning of section 4951, R. L. 1905. Such proceedings are required to be certified to and filed in the district court, and thereafter the prosecution is pending in that court. If no prosecution has been commenced before an examining magistrate, and the indictment shows that the offence was committed more than one year before the return thereof, a motion to quash will lie. If defendant has been held to answer by an examining magistrate, and the offence proved at the trial was committed more than one year before the return of the indictment, whether such offence was the same offence for which he had been held to answer was a question for the jury. State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

ADVANCEMENTS—See Descent and Distribution, 2724b.

ADVERSE POSSESSION

107. Statute—Ejectment—The adverse possession must be proved for the full statutory period of fifteen years. Krueger v. Market, 124 Minn. 393, 145 N. W. 30.

(43) Morris v. Svor, 118 Minn. 344, 136 N. W. 852.

110. Public lands—(51) State v. District Court, 119 Minn. 132, 137 N. W. 298. See Note, 76 Am. St. Rep. 479.

(53) See Union Pacific R. Co. v. Laramie Stock Yards, 231 U. S. 190; 27 Harv. L. Rev. 277.

111. Public streets, parks, etc.—(54) State v. District Court, 119 Minn. 132, 137 N. W. 298.

(55) Record v. Farmington, 126 Minn. 488, 148 N. W. 296; Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532.

113. Essentials of adverse possession—(58) Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127; Krueger v. Market, 124 Minn. 393, 145 N. W. 30.

114. Possession must be hostile and under claim of right—A donee's possession of land under a parol gift, accompanied by a claim of ownership, is adverse to the donor. Sinclair v. Matter, 125 Minn. 484, 147 N. W. 655.

A grantee of a life tenant held to have acquired adverse possession against a remainderman. Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

(59) Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127; Mitchell v. Green, 125 Minn. 24, 145 N. W. 404 (if one in possession recognizes and concedes that the title is in another his possession is not adverse). See 24 Harv. L. Rev. 232.

(63) Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127.

(68) Note, 33 L. R. A. (N. S.) 923.

(70) Hayes v. Hayes, 119 Minn. 1, 137 N. W. 162. See Note, 44 L. R. A. (N. S.) 89.

(75) Note, 32 L. R. A. (N. S.) 702.

(78) See Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

(81) See 24 Harv. L. Rev. 495.

(82, 85) Chavez v. Bergere, 231 U. S. 482.

115. Possession must be actual—(90) Krueger v. Market, 124 Minn. 393, 145 N. W. 30; Sinclair v. Matter, 125 Minn. 484, 147 N. W. 655.

(91) Gaston v. May, 120 Minn. 154, 138 N. W. 1025; Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170; Sinclair v. Matter, 125 Minn. 484, 147 N. W. 655.

(94) McCauley v. McCauleyville, 111 Minn. 423, 127 N. W. 190; Gaston v. May, 120 Minn. 154, 138 N. W. 1025; Sinclair v. Matter, 125 Minn. 484, 147 N. W. 655.

117. Possession must be continuous—Tacking—(3) Cluss v. Hackett, 127 Minn. 397, 149 N. W. 647.

(9) See Ames, Lectures on Legal History, 205.

(10) Marek v. Holey, 119 Minn. 216, 137 N. W. 969; Cluss v. Hackett, 127 Minn. 397, 149 N. W. 647.

119. Color of title—(15) Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127.

(22) Note, 125 Am. St. Rep. 302.

(23) Houston Oil Co. v. Goodrich, 213 Fed. 136. See 25 Harv. L. Rev. 183.

See Note, 15 L. R. A. (N. S.) 1178.

120. Nature of title acquired—(26) See Ames, Lectures on Legal History, 199.

121. Easements—(28) Simmons v. Munch, 115 Minn. 360, 132 N. W. 321; Dryer v. Kistler, 118 Minn. 112, 136 N. W. 750. See Digest, § 2853; Note, 44 L. R. A. (N. S.) 89, 98 (by licensee).

123. By overflowing land—(31) Simons v. Munch, 115 Minn. 360, 132 N. W. 321.

124. When statute begins to run—(32) See 3 Mich. L. Rev. 152.

125. Pleading—See Digest, §§ 2875, 2884, 2893; Dunnell, Minn. Pl. 2 ed. §§ 542, 653n.

126. Evidence—Admissibility—Payment of taxes—The failure to pay taxes on the land is strong evidence against a claim of title. Peters v. Tackaberry, 117 Minn. 373, 135 N. W. 805.

The rule that the payment of taxes by the person claiming title to land by adverse possession is strong evidence in support of his claim of adverse occupancy applies with less force when the land is assessed under a description which includes land with reference to which such person is under legal duty to pay the taxes as actual owner. Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

Though payment of taxes is evidence of a claim of title it is not evidence of adverse possession. Krueger v. Market, 124 Minn. 393, 145 N. W. 30.

A road order of a town board in laying out a cartway is no evidence of the boundary line between parties beyond its limit. Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788.

(35) Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127; Gaston v. May, 120 Minn. 154, 138 N. W. 1025; Mitchell v. Mitchell, 125 Minn. 24, 145 N. W. 404; Cluss v. Hackett, 125 Minn. 397, 149 N. W. 647.

127. Evidence must be clear and convincing—(40) Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127; Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170; Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788; Sinclair v. Matter, 125 Minn. 484, 147 N. W. 655.

128. Law and fact—(41) Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127; Marek v. Holey, 119 Minn. 216, 137 N. W. 969.

129. Burden of proof—The adverse possession must be proved for the full statutory period. Krueger v. Market, 124 Minn. 393, 145 N. W. 30.

130. Facts held sufficient to constitute adverse possession—Cultivating and using land up to a tree, rock pile ridge, and fences claimed to be on the boundary line. Cerveny v. Uherka, 112 Minn. 417, 128 N. W. 457.

Occupying and using a wall of a building—inserting windows. Fire Proof Storage Co. v. St. Paul Bethel Assn., 118 Minn. 47, 136 N. W. 407.

Paying taxes—using land for pasture—inclosing it with a fence—gathering cranberry crops—cutting fence posts—fences removed, but fence posts remained—summer cottage. Gaston v. May, 120 Minn. 154, 138 N. W. 1025.

Lot in a city—low and largely in the channel of a river—subject to annual overflows—soil sandy—not suited for residence or cultivation—some filling in and use for a garden. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

Acts of a municipality in relation to land claimed to have been donated to it as a site for a fire engine house. Sinclair v. Matter, 125 Minn. 484, 147 N. W. 655.

131. Facts held insufficient to constitute adverse possession—A party cannot acquire adverse possession by reason of a fence constructed by an adjacent owner unless he maintains actual possession up to the line of the fence. Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788. See Roy v. Dannehr, 124 Minn. 233, 144 N. W. 758.

Giving permission to a third party to cut hoop poles on the land and receiving pay for such poles held insufficient. Krueger v. Market, 124 Minn. 393, 145 N. W. 30.

AFFIDAVITS

135. Seal—(62) Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292 (indistinct impression of a seal held an impression of the seal of the notary before whom the affidavit was made).

AGENCY

IN GENERAL

145. Existence of agency—Miscellaneous cases—(78) Baskerville v. Bates, 123 Minn. 339, 143 N. W. 909 (a contract for the sale and peddling of certain proprietary medicines held not a contract of sale but a contract of agency); Jones v. Burgess, 124 Minn. 265, 144 N. W. 954 (party held agent of defendant in sale of a horse); Farmer v. Studebaker Corp., 126 Minn. 346, 148 N. W. 285 (agency for sale of automobiles within certain territory).

PROOF OF AGENCY

149. How proved—In general—It has been held not error to allow a witness to testify that he was "working for" another in a certain transaction. Jones v. Burgess, 124 Minn. 265, 144 N. W. 954.

Where the issue is the belief of the alleged agent that he was such, or whether another party believed him such, the acts and declarations of the alleged agent are admissible. See Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63.

(85) Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63.

(90) See Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63.

POWERS OF AGENT

153. Implied authority—An agent or servant left in charge of premises has implied authority to preserve order on the premises and to expel disorderly persons therefrom. Burnham v. Elk Laundry Co., 121 Minn. 1, 139 N. W. 1069.

An agent by implied appointment is a real agent, with all his rights and liabilities. An apparent agent, an agent by estoppel, is no agent at all. Dispatch Printing Co. v. Nat. Bank of Commerce, 115 Minn. 157, 132 N. W. 2.

(99) American Seeding Machine Co. v. Holzbauer, 117 Minn. 278, 135 N. W. 807.

156. Apparent or ostensible authority—Estoppel—(6) Dispatch Printing Co. v. Nat. Bank of Commerce, 115 Minn. 157, 132 N. W. 2; Sinclair

v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109. See Gardner v. Hermann, 116 Minn. 161, 133 N. W. 558 (person answering telephone call as agent of proprietor of business establishment).

161. Authority to receive payment or collect debts—Apparent authority, attributed to a party to whom is intrusted an instrument to secure the payment of money, permits payment to be made only according to the terms of the instrument. A payee who gives his agent credit with the payor, by employing him to obtain the obligation and allowing him to retain possession of it, clothes him with apparent authority to receive the payments of interest and principal according to the tenor of the instrument. McMahon v. German-Am. Nat. Bank, 111 Minn. 313, 127 N. W. 7.

Authority on the part of defendant to receive payment of the principal of a loan, secured by notes and mortgage which were not in defendant's possession, cannot be inferred from the fact that the loan was originally made through him and that he had transmitted payments of interest to the mortgagee as they became due. State v. Lawrence, 130 Minn. 10, 153 N. W. 123. See Digest, § 6262.

(37) McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542.

163. Authority to employ—(41) Pink v. Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725.

165. Authority to do particular things—Miscellaneous cases—Shipping clerk of mercantile house held to have no authority to insure goods stored. Megaarden v. Hartman Furniture & Carpet Co., 114 Minn. 224, 130 N. W. 1027.

Agent held to have authority to compromise a claim. Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112.

(43) Note, 29 Am. St. Rep. 94.

(50) Dispatch Printing Co. v. Nat. Bank of Commerce, 115 Minn. 157, 132 N. W. 2.

168. Presumption that agent acts with authority—(69) See North Star Land Co. v. Taylor, 129 Minn. 438, 152 N. W. 837.

169. Third parties charged with notice of agent's powers—(71) First Nat. Bank v. Flour City Trunk Co., 118 Minn. 151, 136 N. W. 563.

170. Powers of attorney—Construction—In general—(73) Roy v. Harrison Iron Mining Co., 113 Minn. 143, 129 N. W. 154.

172. Particular powers of attorney construed—(78) Roy v. Harrison Iron Mining Co., 113 Minn. 143, 129 N. W. 154 (power construed to authorize sale of husband's land only and not the separate property of his wife); Kipp v. Love, 128 Minn. 498, 151 N. W. 201 (to donee of rights to public land under the Chippewa treaty of February 22, 1855).

RATIFICATION OF UNAUTHORIZED ACTS OF AGENT

178. Formal requisites—Necessity of writing—(89, 90) Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997. See Digest, § 8882.

184. Accepting and retaining benefits—One who accepts a sale of property negotiated through the medium of another is bound by the representations made to accomplish the sale. Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 N. W. 1110.

190. Evidence—Sufficiency—A statement of a principal that he would "stand by" whatever his agent agreed is sufficient to show ratification. Smith & Dixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637.

(16) Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

191. Effect—(17) State v. Torinus, 26 Minn. 1, 49 N. W. 259 (act of state officer—ratification by legislature). See 12 Col. L. Rev. 454 (relation of principal and third party on ratification of unauthorized contracts).

RIGHTS AND LIABILITIES INTER SE

193. Conflict of duty and interest—(21) Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

194. Agent cannot make profit—(23) Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812; Sandoval v. Randolph, 222 U. S. 161.

198. Acting for both parties—(31) Steinmueller v. Williams, 113 Minn. 91, 129 N. W. 145; Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

(32, 33) See Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469.

200. Sales between principal and agent—(36) Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812. See Note, 80 Am. St. Rep. 555.

201. Conversion by agent—(38) See 50 L. R. A. (N. S.) 52 and Digest, § 1935.

203. Compensation of agent—(42) McBrady v. Monarch Elevator Co., 113 Minn. 104, 129 N. W. 163 (agent in charge of grain elevator—dockage—credit for overage—contract construed); Bruner v. Jacobson, 115 Minn. 425, 132 N. W. 995 (agency for platting and sale of land); Bruner v. Jacobson, 122 Minn. 66, 141 N. W. 1097 (agency for platting and sale of land—agent held entitled to one-half the net profits from sales but not to one-half the value of the land).

205a. Wrongful assumption of agency—Liability to principal—The evidence justifies the finding of the court that the defendant without au-

thority represented himself to be the agent of the plaintiff and directed a third party, who was wholly insolvent, to apply to his own use a check in his hands belonging to the plaintiff; that he was without authority so to do, and that thereby the same was lost to the plaintiff. Larson v. Slette, 125 Minn. 270, 146 N. W. 1095.

206. Accounting in equity—(45) See Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

208. Duty of principal to indemnify agent—(47) Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715. See Digest, § 5854.

LIABILITY OF PRINCIPAL TO THIRD PARTIES

212. Torts of agent—Courts are not agreed upon the basis of the rule holding a principal liable for the torts of his agent. See comments of Justice Holmes in Guy v. Donald, 203 U. S. 399.

It has been said that the rule of respondeat superior is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings with the principal through the instrumentality of agents. In every such case the principal holds out his agent as competent, and fit to be trusted; and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency. Meyers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184.

(51) Atherton v. Barber, 112 Minn. 523, 128 N. W. 827 (a wife is liable for the false representations of her husband acting as her agent in the exchange of realty); Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930 (general rule stated—misrepresentation as to goods or business of competitor); Lammers v. Mason, 123 Minn. 204, 143 N. W. 359 (malicious prosecution). See Huffcut, Agency, 2 ed., §§ 148–161.

(54) Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 216, 127 N. W. 926.

(55) Atherton v. Barber, 112 Minn. 523, 128 N. W. 827.

215. Notice to agent notice to principal—(58) Lindgren v. William Bros Boiler Mfg. Co., 112 Minn. 186, 127 N. W. 626; Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946; State v. Stroup, 131 Minn. —, 155 N. W. 90. See Digest, §§ 777, 2119, 4709; 7 Mich. L. Rev. 113, Note, 24 Am. St. Rep. 228.

(61) See Quinn v. Johnson, 117 Minn. 378, 135 N. W. 1000.

216. Undisclosed principal—(66) See Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862.

(67) Efta v. Swanson, 115 Minn. 373, 132 N. W. 335; Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862.

LIABILITY OF AGENT TO THIRD PARTIES

218. Acting as agent without authority—When, without authority, a person assumes to act as agent, he creates a liability for himself; his pretended principal is not bound. In ordinary executory contracts such person does not bind himself to perform the terms of the contract which on its face purports to be the agreement of another, but he nevertheless becomes bound to make good the loss to the party who entered the contract supposing the agent had authority from his alleged principal. As to executed contracts of sales, where the title purports to be transferred and the purchaser obtains possession, the terms and covenants of such contracts become binding upon the one who, without authority, executed the same as agent to the extent, at least, that he cannot take either title or possession away in virtue of the ownership he had when, as ostensible agent for a presumed owner, he transferred or conveyed it to the purchaser. It makes no difference whether the sale relates to personal property or real estate. North Star Land Co. v. Taylor, 129 Minn. 438, 152 N. W. 837.

Where one makes a contract in a representative capacity, such as agent, trustee, or assignee, he cannot, as a general rule, be sued upon it as his personal contract, though he had no authority as representative to make it. Hayes v. Crane, 48 Minn. 39, 50 N. W. 925.

(72, 73) See Wilkinson v. Mercer, 125 Minn. 201, 146 N. W. 362; Note, 34 L. R. A. (N. S.) 518.

219. Failure to disclose agency—If an agent contracts in his own name without disclosing his principal, the other contracting party is entitled to hold either, but not both. If he sues both, however, the only remedy of defendants is by motion to compel him to elect. They cannot move a dismissal as to either. The option as to which shall be held rests with plaintiff, not with defendants. Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

221. Irresponsible principal—(81) See Wilkinson v. Mercer, 125 Minn. 201, 146 N. W. 362.

224. Torts—An agent acting for his principal is personally liable for conversion when he is a party to the wrongful purpose and participates in the wrongful act. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

TERMINATION OF AGENCY

225. Principal may revoke agency at will—General rule—(87) Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

227. Power coupled with an interest—If the interest, or estate, passes with the power, and vests in the person by whom the power is to be ex-

ercised, such person is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. It is not enough to constitute a power coupled with an interest that plaintiff was to have an interest in the proceeds arising from the execution of the agency. There must be an interest in the thing itself which is the subject-matter of the power. A power coupled with an interest is one ingrafted on an estate or on the thing itself, and the power and the estate must be united and coexist. To determine whether an agency is revocable it is an important, if not a decisive, question whether the act authorized could be performed by the agent in his own name, or only by him as agent, and in the name of the principal. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178. See Taylor v. Barns, 203 U. S. 120.

229. Death of principal—(92) See Glennan v. Rochester Trust & Safe Deposit Co., 209 N. Y. 12, 102 N. E. 537 (exception to general rule in case of bank checks).

ACTIONS

236. Parties—(99) Lake v. Albert, 37 Minn. 453, 35 N. W. 177; Cremer v. Wimmer, 40 Minn. 511, 42 N. W. 467; Close v. Hodges, 44 Minn. 204, 46 N. W. 335; Murphin v. Scovell, 44 Minn. 530, 47 N. W. 256; Struckmeyer v. Lamb, 64 Minn. 57, 65 N. W. 930; Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415. See Digest, § 1894.

See Dunnell, Minn. Pl. 2 ed. §§ 67–74.

237. Undisclosed principal—If an agent contracts in his own name without disclosing his principal, the other contracting party is entitled to hold either, but not both. If he sues both, however, the only remedy of defendants is by motion to compel him to elect. They cannot move a dismissal as to either. The option as to which shall be held rests with plaintiff, not with defendants. Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

(3) Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862; Dunnell, Minn. Pl. 2 ed. § 67; Note, 55 Am. St. Rep. 916. See, for a criticism of the common-law rule, Ames, Lectures on Legal History, 453.

239. Pleading—An admission in an answer that the defendant executed a bond sued on in the form and manner set out in the complaint carries with it an admission of all that is essential to a valid execution of the bond, with the terms contained therein, including the full authority of the agents by whom it was executed. First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

(9) Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462. See Hammer v. Forde, 125 Minn. 146, 145 N. W. 810.

241. Evidence—Admissibility—In an action for goods sold by plaintiff to defendant, a letter written by plaintiff to his agent, the contents not being communicated to defendant, held inadmissible. N. W. Fuel Co. v. Central Lumber & Coal Co., 110 Minn. 128, 124 N. W. 981.

242. Burden of proof—(22) Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63 (fact of agency).

243. Law and fact—(23) Jones v. Burgess, 124 Minn. 265, 144 N. W. 954; Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109; Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63 (evidence held insufficient to justify a finding of agency); Farmer v. Studebaker Corp., 126 Minn. 346, 148 N. W. 285.

(24) Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112; Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109.

AGRICULTURE

245a. Agricultural societies—State aid—Under Laws 1911, c. 381, an incorporated county fair association meeting the requirements of the statute held entitled to state aid in preference to another association, subsequently organized, succeeding to a street fair association, which had conducted annual fairs for a number of years before the organization of the former county fair association. State v. Iverson, 120 Minn. 247, 139 N. W. 498.

245b. Farmers' Institute Annual—The duty and power to publish the Farmers' Institute Annual and to contract for the printing thereof rests with the board of administration of farmers' institutes, and not with the state printing commission. Syndicate Printing Co. v. Cashman, 115 Minn. 446, 132 N. W. 915.

246. Lien for threshing grain—One who retains possession of grain threshed by him as security for his charges is entitled to a lien thereon independent of statute and the lien is not lost by depositing the grain in an elevator. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

A reply, in an action to enforce a lien, held not a departure. Johnson v. Fehsefeldt, 113 Minn. 118, 129 N. W. 146.

(31) See Monthly Instalment Loan Co. v. Skellet Co., 124 Minn. 144, 144 N. W. 750.

ALIENS

NATURALIZATION

253. Necessity—(53) School District v. Bolstad, 121 Minn. 376, 141 N. W. 801.

256a. Presumptions—Proof that a foreign-born resident has voted, when voting without naturalization is a crime, raises a presumption of naturalization; and this presumption arises though the naturalization of the one voting comes through the naturalization of his father. Hitchcock v. Consolidated School District, 123 Minn. 119, 143 N. W. 120.

257. Judgment—A judgment of naturalization rendered by a domestic court having jurisdiction of the subject-matter and of the person of the applicant is not subject to collateral attack. State v. MacDonald, 24 Minn. 48. See Johannessen v. United States, 225 U. S. 227.

ALTERATION OF INSTRUMENTS

259. Effect—(63) It is doubtful if this rule has any justification other than historical. See comments of Justice Holmes in 10 Harv. L. Rev. 472.

See Note, 86 Am. St. Rep. 80.

261. Held material—An indorsement waiving demand, notice of demand and non-payment. Chippewa County State Bank v. Haubris, 123 Minn. 530, 143 N. W. 1123.

Change in name of payee. Note, L. R. A. 1915A, 166.

(86) Note, 32 L. R. A. (N. S.) 519.

262. Held not material—The undersigning of a note to give it additional credit, made before its delivery, without the knowledge or request of the maker. Kiefer v. Tolbert, 128 Minn. 519, 151 N. W. 529.

Words added to a county treasurer's bond not changing its effect. Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907.

263. Presumption of time—Burden of proof—(91) Note, 39 L. R. A. (N. S.) 100.

264. Filling blanks—Filling blanks obviously left to be filled does not constitute an alteration of the instrument. Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911.

(94) Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

269. Pleading—See Dunnell Minn. Pl. 2 ed. § 546.

270. Evidence—Admissibility—Error in the admission of evidence of collateral and immaterial matters held harmless. Bakke v. Melby, 119 Minn. 504, 138 N. W. 950.

271. Evidence—Sufficiency—(7) First Nat. Bank v. Rush City Starch Co., 119 Minn. 51, 137 N. W. 179; Bakke v. Melby, 119 Minn. 504, 138 N. W. 950.

ANIMALS

275. Injuries by vicious dogs and other animals—Evidence held sufficient to sustain a verdict for plaintiff in an action for being bitten by a dog. Rauch v. Ordemann, 125 Minn. 535, 147 N. W. 1135.

Recovery sustained for injuries inflicted by a vicious cow in the pasture of defendant, the pasture being traveled constantly by persons of the neighborhood with the knowledge and consent of the defendant, who had knowledge of the cow's vicious disposition and that she had previously attacked other persons. The plaintiff was not a trespasser and was not guilty of contributory negligence. Engebretson v. Bremer, 128 Minn. 232, 150 N. W. 897.

(16) 51 L. R. A. (N. S.) 45.

(23) 25 Law Quarterly Rev. 317; 3 Ency. L. & P. 969.

(25) 52 L. R. A. (N. S.) 377.

APPEAL AND ERROR

IN GENERAL

283. Appeal a statutory remedy—Legislative control—(47) J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 124 N. W. 828; Williams v. Minn. State Board of Medical Examiners, 120 Minn. 313, 139 N. W. 500; State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 806.

285. Construction of statutes—Appeals which do not go to the merits of a controversy, and which are unnecessary, should not be allowed unless expressly authorized, for they tend to delay justice and increase its cost. Ewert v. Minneapolis & St. L. R. Co., 128 Minn. 77, 150 N. W. 224.

The joinder of two non-appealable orders does not transform them into one that is appealable. Kommerstad v. Great Northern Ry. Co., 125 Minn. 297, 146 N. W. 975.

(54) Kommerstad v. Great Northern Ry. Co., 125 Minn. 297, 146 N. W. 975.

287. Waiver of right to appeal—Estoppel—One does not ordinarily waive the right to appeal from a judgment by paying it. See State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286.

The payment of a fine after a refusal of the trial court to grant a stay in order to perfect an appeal, held not a waiver of a right to appeal. State v. Chicago, G. W. R. Co., 125 Minn. 332, 147 N. W. 109.

Where plaintiff appealed from an order granting a new trial, without first exhausting his remedies below by moving to vacate the order, it was held that he waived his right to subsequently appeal from a subsequent refusal to vacate the order. Noonan v. Spear, 129 Minn. 528, 152 N. W. 270.

Where specific relief is by a judgment granted to both plaintiff and defendants, and under the issues in the action the relief so granted is not wholly independent, but so related that the relief granted to one of the parties is dependent upon the extent of the relief granted the other, the acceptance of such relief in so far as favorable precludes the right of appeal as to the party so accepting. In an action of ejectment judgment was awarded to plaintiff for the possession of the land, and for $600 for the value of the use thereof while detained by defendants, less the sum of $250 awarded to defendants for betterments. Plaintiff accepted the money award, and then appealed from the judgment, seeking thereby to contest the allowance of $250 to defendants. Held, that by such acceptance plaintiff waived the right of appeal. The fact that plaintiff had not formerly satisfied the judgment of record is not important. Mastin v. May, 130 Minn. 281, 153 N. W. 756.

The fact that the attorney for defendant in an action for divorce accepted the attorney's fee awarded and satisfied that part of the judgment did not require that defendant's appeal be dismissed. Gran v. Gran, 129 Minn. 531, 152 N. W. 269.

(69) Rase v. Minneapolis etc. Ry. Co., 116 Minn. 414, 133 N. W. 986.

288. Jurisdiction of lower court after appeal—An appeal from a non-appealable order and a supersedeas bond given thereon do not deprive the district court of jurisdiction to proceed further in the case. Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169.

290. Court equally divided—Where the supreme court is equally divided the judgment is as binding on the parties to the particular action as any other judgment, but it is not a precedent in any other case. Jordan v. N. W. Electric Equipment Co., 117 Minn. 209, 135 N. W. 529.

(84) Jordan v. N. W. Electric Equipment Co., 117 Minn. 522, 134 N. W. 1134; Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115.

291. Frivolous appeals—(86) See Phillipps v. Webb, 125 Minn. 300, 146 N. W. 1100; Connecticut Mutual Life Ins. Co. v. Schurmeier, 125 Minn. 368, 147 N. W. 246 (appeal held not frivolous); Digest, § 462.

293. Special proceedings—The general statute does not apply to ditch proceedings. Aspelin v. Murray County, 115 Minn. 440, 132 N. W. 749.

WHAT JUDGMENTS AND ORDERS APPEALABLE

295. Appeal from a judgment in an action commenced in the district court—No appeal lies from a judgment establishing a county ditch. Aspelin v. Murray County, 115 Minn. 440, 132 N. W. 749.

An appeal lies from a judgment modifying a former judgment in the same case, though the time for appealing from the original judgment has expired. Bilsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16, 299.

A party may cause judgment to be entered against himself under the rules of court and appeal therefrom. Rase v. Minneapolis etc. Ry. Co., 116 Minn. 414, 133 N. W. 986.

An appeal lies from a judgment involving only the costs and disbursements where these accrued before the cause of action was settled, were excluded from the settlement, and are not trifling in amount. Salo v. Duluth & Iron Range R. Co., 124 Minn. 361, 145 N. W. 114.

The appeal is from the judgment and is not rendered ineffective by the reference in the notice of appeal to non-appealable orders, or to the items claimed to have been erroneously omitted from the judgment. Salo v. Duluth & Iron Range R. Co., 124 Minn. 361, 145 N. W. 114.

(1) Salo v. Duluth & Iron Range R. Co., 124 Minn. 361, 145 N. W. 114.

(4) King v. Board of Education, 116 Minn. 433, 133 N. W. 1018.

(5) Holliston v. Ernston, 120 Minn. 507, 139 N. W. 805; Larson v. Curran, 120 Minn. 534, 139 N. W. 1134.

(6) Hodge v. Franklin Ins. Co., 111 Minn. 321, 126 N. W. 1098; Renville County v. Minneapolis, 112 Minn. 487, 128 N. W. 669 (order for judgment on the pleadings); J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966; Rase v. Minneapolis etc. Ry. Co., 116 Minn. 414, 133 N. W. 986; Holliston v. Ernston, 120 Minn. 507, 139 N. W. 805; State v. Bjornstad, 125 Minn. 526, 147 N. W. 104.

297. Appeal from orders relating to provisional and ancillary remedies—The statute refers to an order which in itself grants or refuses an injunction. It does not refer to an order for a judgment granting an injunction. Holliston v. Ernston, 120 Minn. 507, 139 N. W. 805.

298. Appeal from orders involving the merits—An order, made after judgment, allowing an amended or supplemental pleading, is not appealable. Stromme v. Rieck, 110 Minn. 472, 125 N. W. 1021.

An order denying a motion to dismiss certiorari proceedings instituted to review the action of the county board in apportioning school funds

is not appealable under this provision. State v. Lincoln County, 129 Minn. 300, 152 N. W. 541.

(49) Stromme v. Rieck, 110 Minn. 472, 125 N. W. 1021.

299. Appeal from orders on demurrer—R. L. 1905, § 4365, as amended by Laws 1913, c. 474 (G. S. 1913, § 8001), does not contemplate certification of questions to this court, but merely saves the right of appeal from an order overruling a demurrer upon the conditions prescribed thereby; the case being reviewable here the same as prior to the amendment. Benton v. Hennepin County, 125 Minn. 325, 146 N. W. 1110.

(79) See Digest, § 7560.

300. Appeal from orders granting or denying a new trial—The right to appeal from an order granting a new trial was greatly restricted by Laws 1913, c. 474. An order, based upon an alternative motion for judgment notwithstanding the verdict or a new trial, denying the motion for judgment, but granting a new trial, on the ground that the verdict was not sustained by the evidence, is not an appealable order. The former rule of the court, sustaining the right of appeal from such orders, was abrogated by chapter 474, Laws 1913 (G. S. 1913, § 8001), by which an appeal from orders granting new trials except in certain instances, was abolished and taken away. Kommerstad v. Great Northern Ry. Co., 125 Minn. 297, 146 N. W. 975.

Under G. S. 1913, § 8001, providing that an order granting a new trial is not appealable unless it or a memorandum of the trial court states that the order is based exclusively on errors occurring at the trial, an order wherein the court denied a motion for judgment notwithstanding the verdict, and on its own motion granted a new trial, was not appealable, in the absence of any statement that it was based on errors occurring at the trial. Montee v. Great Northern Ry. Co., 129 Minn. 526, 151 N. W. 1101.

Under G. S. 1913, § 8001, an order granting a new trial is not appealable unless it appears therefrom, or from the memorandum attached thereto, that it is granted exclusively on the ground of errors of law occurring at the trial; and, when it appears that misconduct was one of the grounds, the order is not appealable. Heide v. Lyons, 128 Minn. 488, 151 N. W. 139.

An appeal from an order denying an alternative motion to amend the findings and conclusions of law or for a new trial is, in effect, only one from an order denying a motion for a new trial. Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80.

An order granting a new trial in condemnation proceedings is appealable. King v. Board of Education, 116 Minn. 433, 133 N. W. 1018.

301. Appeal from orders determining an action and preventing a judgment—An order denying a motion to dismiss certiorari proceedings instituted to review the action of the county board in apportioning school funds is not appealable under this provision. State v. Lincoln County, 129 Minn. 300, 152 N. W. 541.

302. Appeal from final orders in special proceedings—An appeal from an order denying a new trial in proceedings for the consolidation of school districts under the provisions of chapter 207, Laws 1911, held to have been seasonably taken, since the order of the district court, directing a dismissal of the appeal from the order of consolidation, was not a final order. Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723.

An order modifying a judgment, based on a motion made subsequent to entry of the judgment and after satisfaction of the judgment of record, is appealable under this provision. Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 180.

308. General list of appealable orders—An order denying a motion in the alternative for judgment notwithstanding the verdict or for a new trial. Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911.

An order denying an application for a reduction of alimony previously awarded, on the ground of the changed financial condition of the parties. Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787.

An order modifying a judgment, based on a motion made subsequent to entry of the judgment, and after satisfaction of the judgment of record. Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 180.

An order substituting a party defendant upon the death of the original defendant. National Council v. Weisler, 131 Minn. —, 155 N. W. 396.

(10) Stromme v. Rieck, 110 Minn. 472, 125 N. W. 1021.

(80) King v. Board of Education, 116 Minn. 433, 133 N. W. 1018 (order granting a new trial in condemnation proceedings).

(81) Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383.

309. General list of non-appealable orders—An order before judgment granting or denying an amended or supplemental pleading. Stromme v. Rieck, 110 Minn. 472, 125 N. W. 1021; Itasca Cedar & Tie Co. v. McKinley, 129 Minn. 536, 152 N. W. 653; Blied v. Barnard, 130 Minn. 534, 153 N. W. 305.

An order granting a new trial, unless it appears from the order or memorandum that it was granted exclusively for errors of law occurring at

the trial. Heide v. Lyons, 128 Minn. 488, 151 N. W. 139; Montee v. Great Northern Ry. Co., 129 Minn. 526, 151 N. W. 1101.

An order based upon an alternative motion for judgment notwithstanding the verdict or a new trial, denying the motion for judgment but granting a new trial, on the ground that the verdict was not justified by the evidence. Kommerstad v. Great Northern Ry. Co., 125 Minn. 297, 146 N. W. 975.

An order transferring a cause to a federal court. Ewert v. Minneapolis & St. L. R. Co., 128 Minn. 77, 150 N. W. 224.

An order denying a motion to dismiss certiorari proceedings instituted to review the action of the county board in apportioning school funds. State v. Lincoln County, 129 Minn. 300, 152 N. W. 541.

An order denying a motion for an order directing the clerk to enter such judgment as either party might be entitled to under the facts shown in the moving papers. Rase v. Minneapolis etc. Ry. Co., 116 Minn. 414, 133 N. W. 986.

An order made by a court commissioner. Sacramento Suburban Fruit Lands Co. v. Niles, 131 Minn. ——, 154 N. W. 748. See § 2332.

(31) Stromme v. Rieck, 110 Minn. 472, 125 N. W. 1021.

(38) Rase v. Minneapolis St. Ry. Co., 116 Minn. 414, 133 N. W. 986; Desaman v. Butler Bros., 118 Minn. 198, 136 N. W. 747; Minnesota Land & Immigration Co. v. Munch, 118 Minn. 340, 136 N. W. 1026; First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

(44) Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

(67) Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383.

(84) See State v. Fjolander, 125 Minn. 529, 147 N. W. 273.

(94) See Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787 (holding order appealable).

PARTIES

310. Who may appeal—The attorney general may appeal in mandamus proceedings when the state is interested. State v. Osakis, 112 Minn. 365, 128 N. W. 295.

(8) Kellogg v. Chicago etc. Ry. Co., 126 Minn. 31, 147 N. W. 667.

313. Death of parties—The fact that one of several joint appellants is dead at the time of the appeal does not invalidate it. Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

TIME WITHIN WHICH TO APPEAL

316. Appeal from judgment—(29) Bilsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16, 299.

317. Appeal from order—Service of notice of the filing of a conditional order before compliance with the conditions does not limit the time within which an appeal may be taken. McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

(01) Lawver v. Great Northern Ry. Co., 110 Minn. 414, 125 N. W. 1017.

318. Courts cannot extend time—(36) Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

NOTICE OF APPEAL

319. Contents—A notice of appeal from a judgment is not rendered ineffective by a reference therein to non-appealable orders or to the items claimed to have been erroneously omitted from the judgment. Salvo v. Duluth & Iron Range R. Co., 124 Minn. 361, 145 N. W. 114.

The notice of plaintiffs' appeal from the order granting their motion for a new trial does not in terms embrace an appeal from the court's orders on the demurrers interposed, even if such orders were appealable. Bjorgo v. First Nat. Bank, 127 Minn. 105, 149 N. W. 3.

(38) J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 124 N. W. 828.

320. Upon whom served—In statutory proceedings for the abatement of premises and occupations menacing the public health a notice of appeal should be served on the president or secretary of the state board of health and on the attorney general. J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 124 N. W. 828.

BONDS

327. Sufficiency—Where an appeal bond is not in the express terms of the statute it may be valid as a common-law obligation. First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101; Id., 123 Minn. 218, 143 N. W. 355.

A party taking an appeal from an order may, by agreement of the parties, give a common-law bond to pay all judgments which may be rendered against the appellant in the action. Such a bond must be supported by a valid consideration. An agreement to stay proceedings and forbear entering judgment is a sufficient consideration. First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101; Id., 123 Minn. 218, 143 N. W. 355.

331. Liability on bonds—In an action on a bond, held that the evidence sustains the finding of the trial court as to the amount remaining due on the judgment which the bond was given to secure. The judgment debtor claimed that an additional payment had been made by it

to its former attorney of record in the case. There was no evidence that he was authorized to receive payment in behalf of the judgment creditor, and the question of payment to him was accordingly immaterial to the issues of this case. First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

Abandonment or dismissal of appeal as breach of bond. Note, L. R. A. 1915 A. 839.

Liability on bonds. Note, 38 Am. St. Rep. 702.

331a. Deposit in lieu of bond—The proper procedure to obtain money deposited with the court on an appeal in lieu of the statutory bond, under R. L. 1905, § 4366, is to apply to the court having jurisdiction of the fund for an order directing its application. Either party may make such application. The successful party on such an appeal is not required, as a matter of law, to resort to the fund; but, if his judgment be not paid, he may proceed by execution to enforce it. Spear v. Johnson, 111 Minn. 74, 126 N. W. 402.

STAY OF PROCEEDINGS

333. Extent and effect of stay—An appeal from a non-appealable order, with a supersedeas bond, does not deprive the trial court of jurisdiction, and judgment may be entered therein. Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169.

THE RETURN

337. What included—Statute—A stipulation of facts is not a part of the record unless made so by a settled case. Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075.

The original verdict filed with the clerk is part of the record proper, and is no proper part of a settled case. If the verdict as incorporated in the settled case conflicts with the original verdict as so filed, the latter will be regarded in this court as the true verdict. Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

(1) Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476 (verdict).

338. Memorandum of trial judge—The memorandum of the trial court cannot be impeached as to the course of the trial by affidavit of a party. A motion to strike a memorandum from the files or that it be corrected held properly denied. Johnson v. MacLeod, 111 Minn. 479, 127 N. W. 1120.

A positive and unambiguous order of the trial court cannot be modified or limited by inferences drawn from a memorandum of the judge not made a part thereof. Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728.

(13) Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728.

339. Certificate of judge or clerk on appeal from orders—A certificate held to show that the return contained all the papers upon which certain orders were made. Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998. See Digest, § 352.

Where no oral evidence was received on the trial a return certified by the clerk held to constitute a settled case in substance and sufficient to present the questions involved. First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

An order denying a motion made upon all the files and records in the action will be affirmed, unless the record contains a settled case or bill of exceptions, or a certificate of the trial judge that the record contains all that was presented or considered on the motion, or a certificate of the clerk of the court that the return contains all the files and records in the case. Radel v. Radel, 123 Minn. 299, 143 N. W. 741.

Where a new trial is granted or denied upon the minutes of the court and upon affidavits the return must contain a case or bill of exceptions. Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716.

(19) Fred v. Segal, 122 Minn. 43, 141 N. W. 806; Radel v. Radel, 123 Minn. 299, 143 N. W. 741.

(25) Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716.

SUFFICIENCY OF RECORD

342. General rule as to completeness of return—(30) McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164; Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716 (appeal from order denying new trial for misconduct of jury); Wilson & Thoreen v. Henningsen, 127 Minn. 520, 148 N. W. 1081.

343. To review questions of fact—It is an unvarying rule that a decision, resting on conclusions drawn from the evidence, will not be reversed where such evidence is omitted from the record. Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716.

(32) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819.

344. Necessity of a case or bill of exceptions on appeal from a judgment—(34) Gourd v. Morrison County, 118 Minn. 294, 136 N. W. 874; First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343; Charles Betcher Lumber Co. v. Erickson, 131 Minn. —, 154 N. W. 1072.

(35) Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

345. When record must contain all the evidence—On appeal from an order granting or denying a new trial for misconduct of the jury the

record must contain all the evidence introduced on the trial, if the motion is based on the minutes of the court and upon affidavits. Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716.

(38) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819.

(41) Wheelock v. Home Life Ins. Co., 115 Minn. 177, 181, 131 N. W. 1081.

(43) Gourd v. Morrison County, 118 Minn. 294, 136 N. W. 874.

346. To review rulings on evidence—It is not necessary that the record contain all the evidence when it is manifest, from the nature of the testimony erroneously admitted, that it would tend to prejudice the jury against one of the parties. Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305.

A ruling of the trial court excluding a document from evidence cannot be reviewed when the document is not in the record and there is no other testimony to show its materiality. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

(54) Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819 (document not returned—impossible to determine its competency as a memorandum to refresh the memory of witness).

(57) See Digest, § 9717.

349. To review orders—(63) See Digest, §§ 339, 350.

350. Miscellaneous cases—(65) Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057. See § 9800.

(70) Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716.

352. Certificate of judge as to completeness—(86) Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998 (certificate held sufficient). See Digest, § 339.

PAPER BOOKS AND BRIEFS

354. Failure to serve—Dismissal, affirmance or reversal—(90) Melin v. Stuart, 119 Minn. 539, 138 N. W. 281 (where notice of appeal was served August 10, and notice of trial in due time for the succeeding October term of court, a motion to dismiss the appeal for failure to serve paper book and points and authorities until October 15 was necessarily granted).

ASSIGNMENT OF ERRORS

358. Necessity—Effect of failure to make—No assignments of error are necessary in criminal cases. See § 2498.

No assignments of error are necessary on appeal in habeas corpus proceedings. State v. Riley, 116 Minn. 1, 133 N. W. 86.

It is not necessary to assign error on a ruling which appellant does not care to have reviewed. Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911.

The supreme court may continue a case and grant appellant leave to file assignments. Buckendorf v. Minneapolis etc. Assn., 112 Minn. 298, 127 N. W. 1053, 1133.

A contention not sustained by the findings, and not presented by any request for further findings in respect thereto, and not presented by the assignments of error, cannot be considered. Prosser v. Manley, 122 Minn. 448, 142 N. W. 876.

(95) Creteau v. Chicago & N. W. Ry. Co., 113 Minn. 418, 129 N. W. 855; O'Connor v. Great Northern Ry. Co., 118 Minn. 223, 136 N. W. 743; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606 (action by creditors of a corporation to recover of stockholders thereof unpaid stock subscriptions—held that the point that a judgment obtained by one of the plaintiffs against the corporation was rendered without jurisdiction of the defendant is not available to appellants, there being no assignment of error challenging the finding that such judgment was duly recovered); Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175.

(96) See Finley v. Erickson, 122 Minn. 235, 142 N. W. 198.

359. Function—Do not obviate objections below—(98) Argall v. Sutor, 114 Minn. 371, 131 N. W. 466; Nordheimer v. Kanter, 129 Minn. 529, 152 N. W. 270.

360. Who may make—Sufficiency—Cross-assignments—A general assignment that errors of law were committed by the trial court presents no particular ruling for review. Therkeldsen v. Dorfner, 115 Minn. 528, 131 N. W. 481.

A party whose motion for new trial has been granted is not aggrieved by the order, so that the rulings adverse to him on the trial may be reviewed on his cross-appeal. Bjorgo v. First Nat. Bank, 127 Minn. 105, 149 N. W. 3.

(1) Koury v. Chicago, G. W. R. Co., 125 Minn. 78, 145 N. W. 786; Gronlund v. Cudahy Packing Co., 127 Minn. 515, 150 N. W. 176.

361. As to findings and conclusions—It is questionable whether an assignment that the court erred in refusing an amendment of findings is sufficient to raise the point that they were not justified by the evidence. Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

An assignment that the court erred in ordering judgment for respondent, and in not ordering judgment for appellant, is insufficient to pre-

sent the question whether the evidence sustained the findings of fact. Grimes v. Gaughan, 129 Minn. 537, 152 N. W. 653.

(12) Biles v. Dakota County Co-operative Co., 114 Minn. 526, 131 N. W. 338.

(14) Prosser v. Manley, 122 Minn. 448, 142 N. W. 876.

(25) See Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925 (assignments held sufficient to challenge the conclusions of law and the judgment appealed from, though not the findings of fact).

362. As to rulings on evidence—(28) Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436; Obert v. Otter Tail County, 122 Minn. 20, 141 N. W. 810.

363. As to orders granting or denying new trials—(34) McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434; Prosser v. Manley, 122 Minn. 448, 142 N. W. 876; J. G. Cherry Co. v. Larson, 124 Minn. 251, 144 N. W. 949.

(35) Prosser v. Manley, 122 Minn. 448, 142 N. W. 876.

(36) Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436.

364. As to instructions—(39) Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436.

365. As to various orders—An assignment that the court erred in denying a motion to direct a verdict is sufficient. Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911.

(44, 45) Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436.

366. Waiver—(46) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022; Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524; Keenan v. Chicago etc. Ry. Co., 116 Minn. 107, 133 N. W. 789; Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980; Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775; Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721; Zimmerman v. Chicago & N. W. Ry. Co., 129 Minn. 4, 151 N. W. 412.

PRESUMPTIONS AND BURDEN OF PROOF

368. In general—Burden of showing error on appellant—(53) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410; McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

(54) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410; Paine v. Crane, 112 Minn. 439, 128 N. W. 574; Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775.

(56) Walsh v. Paine, 123 Minn. 185, 143 N. W. 718.

372. As to findings—(67) Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

(69) Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176; State v. District Court, 129 Minn. 156, 151 N. W. 910; Charles Betcher Lumber Co. v. Erickson, 131 Minn. ——, 154 N. W. 1072.

373. As to damages—Where the evidence shows that the verdict is for an amount not larger than plaintiff is fairly entitled to as compensatory damages, it will be presumed that the jury did not allow punitive damages, and an instruction that they might is error without prejudice. Lamson v. Great Northern Ry. Co., 114 Minn. 182, 130 N. W. 945.

378. As to rulings on evidence—(86) Paine v. Crane, 112 Minn. 439, 128 N. W. 574; Gutmann v. Klimek, 116 Minn. 110, 133 N. W. 475 (materiality of excluded evidence not made to appear).

380. As to jury following instructions—(98) Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389.

382. As to grounds on which new trial was granted—(1) Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

NECESSITY OF DETERMINATION BY TRIAL COURT

384. In general—A defective pleading, clearly amendable in the discretion of the trial court, cannot be objected to on appeal by a party who had an opportunity to raise the objection on the trial but did not do so. Getty v. Alpha, 115 Minn. 500, 133 N. W. 159. See Digest, § 7732; Dunnell, Minn. Pl. 2 ed. § 527.

On an appeal from an order opening a default, the validity and effect of the judgment will not be considered, the points not having been raised below. Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

That a judgment was in excess of the amount justified by the complaint cannot be objected to for the first time on appeal. Nicholls & Taylor v. Frederick Milling Co., 123 Minn. 531, 143 N. W. 1123.

The objection that the trial court did not have authority to amend a settled case because of an appeal cannot be raised on appeal without objection below. Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37.

Objection that a notice for an interlocutory motion was not sufficient in length cannot be raised for the first time on appeal. Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

Where a demurrer is overruled without leave to plead and judgment is entered as upon default without notice, and no application is made to the trial court either for leave to answer or to vacate the judgment, the question whether the defendant was entitled to answer or to have

the judgment vacated cannot be considered on an appeal from the judgment. State v. Jack, 126 Minn. 367, 148 N. W. 306.

It cannot be objected for the first time on appeal that an allowance for expert witness fees was made ex parte by a judge other than the one who tried the case. Daly v. Curry, 128 Minn. 449, 151 N. W. 274.

An objection that a question put to a witness assumes a fact not proved cannot be urged on appeal, unless made at the trial. Trustees v. Chicago etc. Ry. Co., 119 Minn. 181, 137 N. W. 970.

(32) State v. Jack, 126 Minn. 367, 148 N. W. 306.

SCOPE OF REVIEW ON APPEAL FROM JUDGMENTS

389. Review of intermediate orders—An order, made before judgment, allowing an amended or supplemental pleading, may be reviewed on an appeal from the judgment. Stromme v. Rieck, 110 Minn. 472, 125 N. W. 1021.

On an appeal from a judgment modifying a former judgment in the same case, an order for the second judgment directing that the conclusions of law be modified, may be reviewed. Bilsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16, 299.

A non-appealable order, made after trial and before the entry of judgment, can be reviewed only upon an appeal from the judgment, where no motion for a new trial has been made; hence, so long as the judgment may be questioned on appeal, the correctness of such order may also be attacked. Rase v. Minneapolis etc. Ry. Co., 118 Minn. 437, 137 N. W. 176.

(1) Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

(81) Bilsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16, 299.

393. Judgment notwithstanding the verdict—If, after verdict, the unsuccessful party moves for judgment notwithstanding the verdict, but does not move in the alternative for a new trial, he cannot on appeal be awarded a new trial. By resting solely upon his motion for judgment, he waives all errors which would be ground only for a new trial. Errors in the admission or exclusion of evidence or in the charge are not open to review. Northwestern Marble & Tile Co. v. Williams, 128 Minn. 514, 151 N. W. 419; Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

The only questions open for review, there being no motion for a new trial, are whether the court erred in denying the motion for a directed verdict and whether the evidence is sufficient to justify the verdict. Bennett v. Great Northern Ry. Co., 115 Minn. 128, 131 N. W. 1066; Veline v. Lauer Bros., 128 Minn. 10, 150 N. W. 169; Quinn v. St.

Paul Boiler & Mfg. Co., 128 Minn. 270, 150 N. W. 919; N. W. Marble & Tile Co. v. Williams, 128 Minn. 514, 151 N. W. 419; Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421; Daily v. St. Anthony Falls Water Power Co., 129 Minn. 432, 152 N. W. 840; Bosch v. Chicago etc. Ry. Co., 131 Minn. ——, 155 N. W. 202.

SCOPE OF REVIEW ON APPEAL FROM ORDERS

394. Order granting a new trial—Alleged errors in the admission of evidence or the sufficiency of the evidence to sustain the verdict cannot be considered on appeal by the party in whose favor the new trial is granted. Swadner v. Schefcik, 124 Minn. 269, 144 N. W. 958; Bjorgo v. First Nat. Bank, 127 Minn. 105, 149 N. W. 3.

A party whose motion for a new trial has been granted is not aggrieved by the order so that the rulings adverse to him on the trial may be reviewed on his cross-appeal. Bjorgo v. First Nat. Bank, 127 Minn. 105, 149 N. W. 3.

(12) Upton v. Merriman, 116 Minn. 358, 133 N. W. 977; Nichols v. Atwood, 127 Minn. 425, 149 N. W. 672.

395. Order denying a new trial—The sufficiency of the evidence to justify findings of fact is open to review. Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80; Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

On an appeal from an order denying a motion for a new trial of an appeal from the probate court to the district court in the matter of a petition to remove an administrator, an order refusing to make specific findings requested is reviewable, if accompanied by a sufficient record. First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

Objection that findings are too indefinite to support a judgment may be raised. Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

Objection that findings do not justify the conclusions of law or judgment may be raised. Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80; Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

Upon an appeal by the plaintiff from an order denying his motion for a new trial the defendant cannot have reviewed an appealable order adverse to it made upon its motion to set aside the service of the summons for want of personal jurisdiction. Lewis v. Denver & R. G. R. Co., 131 Minn. ——, 154 N. W. 945.

(18–22) See Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022 (query whether an order, not made on the trial, denying a motion to set aside a stipulation, can be reviewed).

(26) Rase v. Minneapolis etc. Ry. Co., 116 Minn. 414, 133 N. W.

986; Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80; Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

LAW OF CASE

398. Res judicata—Law of case—If the evidence is held sufficient to sustain a verdict on a first appeal it will be held sufficient on a second appeal, there being no substantial difference in the evidence. Gasser v. Wall, 115 Minn. 59, 131 N. W. 850; Street v. Chicago etc. Ry. Co., 130 Minn. 246, 153 N. W. 518.

A construction given to a contract on a first appeal will be followed on a second appeal, there being no substantial difference in the evidence. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

Where an appeal is taken from an order denying a new trial, and the order is affirmed, either on the merits, or on an equal division in opinion of the justices, or under the rules of court, no questions, which were or might have been determined on such appeal, can be raised on a subsequent appeal from the final judgment. Jordan v. N. W. Electric Equipment Co., 117 Minn. 209, 135 N. W. 529.

A reversal of an order denying a motion for a new trial and granting one for failure of respondent to serve a brief opens the whole case, which goes back for trial upon the same basis that it would have been tried if the district court had granted a new trial in the first instance. The questions involved are not res judicata. Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410.

Where defendant moved for judgment notwithstanding the verdict and plaintiff moved for a new trial, and the motions were considered upon the merits, and subsequently defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial, and defendant appealed from both orders, the correctness, on its merits of the first order appealed from, is the only question presented by the appeal. The subject-matter of the second appeal was disposed of in the trial court by the first order appealed from. Howard v. Illinois Central R. Co., 114 Minn. 189, 130 N. W. 946.

Where the plaintiff, in an action to recover damages for personal injuries, moves for and obtains a new trial on the ground that the damages awarded were inadequate, and the order granting it is reversed on appeal upon the ground and for the reason that plaintiff has no cause of action on the merits, the decision so rendered becomes the law of the case, and will be applied on a subsequent appeal by defendant from the judgment rendered upon the verdict, reinstated by the reversal of the order granting a new trial, as final and conclusive upon the rights of the parties. Maki v. St. Luke's Hospital Assn., 126 Minn. 13, 147 N. W. 668.

A decision on a first appeal that a party was not entitled to judgment notwithstanding the verdict held not to preclude the supreme court from ordering such a judgment for him on a second appeal. Marshall v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 208.

An appeal lies from a judgment modifying a prior judgment in the same case and the order for the second judgment is not res judicata. Bilsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16, 299.

(30) Webber v. Axtell, 110 Minn. 52, 124 N. W. 453; International Boom Co. v. Rainy Lake River Boom Corp., 112 Minn. 104, 127 N. W. 382; Snyder v. Waldorf Box Board Co., 112 Minn. 431, 128 N. W. 468; Johnson v. Modern Brotherhood, 114 Minn. 411, 131 N. W. 471; Gasser v. Wall, 115 Minn. 59, 131 N. W. 850; Howard v. Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557; Minnesota Land & Immigration Co. v. Munch, 118 Minn. 340, 136 N. W. 1026; State v. Great Northern Ry. Co., 119 Minn. 541, 138 N. W. 671; O'Connor v. Great Northern Ry. Co., 120 Minn. 359, 139 N. W. 618; Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518; Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066; Blakely v. J. Neils Lumber Co., 128 Minn. 465, 151 N. W. 182; Noonan v. Spear, 129 Minn. 528, 152 N. W. 270; Gotschall v. Minneapolis & St. L. R. Co., 130 Minn. 33, 153 N. W. 120; Street v. Chicago etc. Ry. Co., 130 Minn. 246, 153 N. W. 518.

(31) Redwood County v. Minneapolis, 131 Minn. —, 154 N. W. 660.

(32) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410; Jordan v. N. W. Electric Equipment Co., 117 Minn. 209, 135 N. W. 529.

(34) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410; Bilsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16, 299; Jordan v. N. W. Electric Equipment Co., 117 Minn. 209, 135 N. W. 529.

REVIEW OF DISCRETIONARY ORDERS

399. In general—In determining whether abuse of discretion is shown the supreme court construes the findings of the trial court in the light of the record. Clark v. Clark, 114 Minn. 22, 129 N. W. 1052.

(38) Brown v. Hagadorn, 119 Minn. 491, 138 N. W. 941.

THEORY OF CASE—SHIFTING POSITION ON APPEAL

401. In general—Taking inconsistent positions in litigation. See Digest, § 3218.

(43) Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; State v. Municipal Court, 123 Minn. 377, 143 N. W. 978; Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 722 (defendant, a railroad company, held precluded by

its concessions on the trial from contending the court erred in charging it with negligence, as a matter of law, if it left a switch open, whereby plaintiff, an employee of its co-defendant, was injured).

406. As to the pleadings and theory of case—Where on the trial the plaintiff insists that his action is for rescission, he cannot change his position on appeal and insist that it was for damages. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156. See Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282.

Defendant having based its refusal of assistance entirely on grounds not involving the merits of the claim against plaintiff, and the case having been tried and determined solely on such grounds, the question of burden of pleading and proof upon an issue as to whether the character of the claim was such as to entitle plaintiff to assistance from defendant was not properly open in this court. Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472.

(55) Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282; Phelan v. Edwards, 112 Minn. 345, 128 N. W. 23; Webster v. Chicago etc. Ry. Co., 119 Minn. 72, 137 N. W. 168; Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156; Bouch v. Shere, 125 Minn. 122, 145 N. W. 808.

407. As to the issues—Where no objection is made on the trial or on a motion for a new trial to the submission of the issues, the supreme court will consider whether the verdict is sustainable on any theory of the complaint. McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613.

(58) Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945; Smith v. Cloquet, 120 Minn. 50, 139 N. W. 141; Bouck v. Shere, 125 Minn. 122, 145 N. W. 808.

408. As to the facts—When a party concedes on the trial the existence of certain facts he cannot deny them on appeal. Farmer v. Studebaker Corp.; 126 Minn. 346, 148 N. W. 285.

WEIGHT GIVEN FINDINGS OF FACT BY TRIAL COURT

410. Findings on motions, etc.—The general rule is applicable to the determination of questions of fact in the taxation of costs. McKinley v. National Citizens Bank, 127 Minn. 212, 149 N. W. 295.

The trial court is much better able than the supreme court to determine the value of affidavits of attorneys. Southern Minnesota Invest. & Loan Co. v. Livingston, 117 Minn. 421, 136 N. W. 8.

(67) Wheeler v. Almond, 110 Minn. 503, 508, 124 N. W. 227, 126 N. W. 138; Viers v. Perry, 112 Minn. 348, 127 N. W. 1120 (motion to dis-

solve attachment); Foster v. Brick, 121 Minn. 173, 141 N. W. 101; Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322; Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728 (rule of relative injury and inconvenience stated and applied—enforcement of ordinance fixing rates for gas); Fitzgerald v. Maher, 129 Minn. 414, 152 N. W. 772; Hubbard Milling Co. v. Grover, 130 Minn. 103, 153 N. W. 266 (motion for change of venue).

(69) Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322.

411. **Findings on trial by court without a jury**—The findings are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are manifestly contrary to the evidence. This rule applies where the evidence is documentary, where the case is submitted on depositions or on the report of a referee, and where the findings are made by a judge other than the one who presided at the trial. The rule does not relieve the appellate court from the duty of giving the evidence in every case a careful examination and consideration, as a basis for its determination of the question whether the evidence brings the case fairly within the rule. Wunder v. Turner, 120 Minn. 13, 128 N. W. 770.

The rule guiding the supreme court in the consideration of the question whether the findings of the trial court are sustained by the evidence remains the same, whether the fact found be required to be established by a preponderance of the evidence, or by clear, convincing, or satisfactory evidence. The evidence must be clearly against the findings in either case to justify reversal. Oertel v. Pierce, 116 Minn. 266, 133 N. W. 797; Holien v. Slee, 120 Minn. 261, 139 N. W. 493; Foster v. Brick, 121 Minn. 173, 141 N. W. 101; Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170; Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827; Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387; Young v. Baker, 128 Minn. 398, 151 N. W. 132.

Findings will not be set aside by the supreme court merely because it would have found differently or would have been better satisfied with different findings. Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

The general rule applies to the findings of the trial court in proceedings for the appointment of guardians for insane or incompetent persons. Prokosch v. Brust, 128 Minn. 324, 151 N. W. 130.

The general rule applies to a finding of fact by the trial court on an appeal from an order of the Railroad and Warehouse Commission. State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247.

In order to determine the prejudicial effect of errors properly assigned, the whole record may be examined; and if, in the light thereof, the findings appear indefinite and uncertain on a vital issue, the judgment should

not be allowed to stand. First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

The supreme court will not consider and determine the case de novo. Bissonett v. Bissonett, 131 Minn. ——, 154 N. W. 943.

(70) Bridgeman v. Giese, 120 Minn. 254, 139 N. W. 489; Haarala v. Mickelson, 120 Minn. 276, 139 N. W. 504; Wann v. Northwestern Trust Co., 120 Minn. 493, 139 N. W. 1061; Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710; Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287; Barnum v. White, 128 Minn. 58, 150 N. W. 227; Butler v. Badger, 128 Minn. 99, 150 N. W. 233; Chamberlain v. Gordon, 129 Minn. 523, 151 N. W. 529; Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

(71) Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154 (determination of trial court based on admissions, documents and depositions); Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827.

(73) Miller v. Miller, 125 Minn. 49, 145 N. W. 615.

(74) Bartroot v. St. Paul City Ry. Co., 125 Minn. 308, 146 N. W. 1107.

(75) Hanson v. Kalstarud, 114 Minn. 489, 131 N. W. 477.

414. Discussion of evidence unnecessary—(84) Demaris v. Rodgers, 110 Minn. 49, 124 N. W. 457; Johnson-Van Sant Co. v. Martens, 113 Minn. 486, 129 N. W. 859; Haarala v. Mickelson, 120 Minn. 276, 139 N. W. 504; Wunder v. Turner, 120 Minn. 13, 138 N. W. 770; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566; Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

WEIGHT GIVEN VERDICT

415. In general—It is not the province of the supreme court to reconcile conflicting evidence nor to solve doubts arising therefrom. Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220; Berg v. B. B. Fuel Co., 122 Minn. 323, 142 N. W. 321.

415a. Discussion of evidence unnecessary—On an appeal involving the sufficiency of the evidence to justify a verdict it is not necessary for the supreme court to review and discuss the evidence to demonstrate the correctness of the verdict. Weiss v. Great Northern Ry. Co., 119 Minn. 355, 138 N. W. 423; Berg v. B. B. Fuel Co., 122 Minn. 323, 142 N. W. 321; Magnuson v. Burgess, 124 Minn. 374, 145 N. W. 32. See Digest, § 414.

HARMLESS ERROR

416. In general—The jury having found for defendant as to general damages, plaintiff cannot predicate error because of the refusal of the court to permit a recovery for special damages. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

A judgment will not be reversed, on the appeal of the prevailing party, on the ground that the court failed to make findings of fact necessary to sustain it. Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100.

(87) Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938.

417. De minimis non curat lex—(89) Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37; Foster v. Wagener, 129 Minn. 11, 151 N. W. 407. See Digest, § 7074.

417a. Right to only nominal damages—An order sustaining a general demurrer to a complaint will not be reversed merely because the plaintiff might be entitled to nominal damages. Foster v. Wagener, 129 Minn. 11, 151 N. W. 407.

418. Error favorable to appellant—A party cannot complain that a judgment entered by the clerk is more favorable to him than that ordered by the court, in the absence of a showing of prejudice. Hovelsrud v. Hovelsrud, 115 Minn. 421, 132 N. W. 910.

(93) State v. Snyder, 113 Minn. 244, 129 N. W. 375.

420. Estoppel—(4) Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137 (acquiescence in dismissal).

421. Wrong reasons for right decision—(5) Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053; National Council v. Ruder, 126 Minn. 154, 147 N. W. 959. See Digest, § 394e.

DISPOSITION OF CASE—POWERS OF SUPREME COURT

425. Disposition on merits when possible—The supreme court will not reverse a judgment simply for the purpose of having the same judgment entered again. Velin v. Lauer Bros., 128 Minn. 169, 150 N. W. 169.

(19) First Nat. Bank v. Towle, 118 Minn. 514, 525, 137 N. W. 291.

426a. Reversal of judgment in part—A judgment may be reversed in part and affirmed in part. Wortz v. Wortz, 128 Minn. 251, 150 N. W. 809.

427. Modification of judgment—(23) Macklanburg v. Griffith, 115 Minn. 131, 131 N. W. 1063; Edwards v. Hennepin County, 116 Minn. 101, 133 N. W. 469; Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396; State v. District Court, 128 Minn. 486, 151 N. W. 182; Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

430. Granting a new trial of part of the issues—(31) Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975. See Digest, § 7079.

432. Remitting parties to trial court for relief—The supreme court may affirm a judgment without prejudice to an application by the de-

feated party to the trial court for a modification thereof in certain particulars. Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

434. Supreme court cannot make or direct findings—The supreme court is without authority to make findings of fact in causes presented on appeal from the trial court, or to direct the trial court to find a particular fact, except perhaps where the evidence is conclusive upon the question. Lawton v. Fiske, 129 Minn. 380, 152 N. W. 774. See First Nat. Bank v. Towle, 118 Minn. 514, 525, 137 N. W. 291 (case reversed with directions to make certain findings).

The supreme court cannot, for the purpose of demonstrating error in the conclusion arrived at, assume that the trial court made a particular finding of fact. Jarecki Mfg. Co. v. Ryan, 114 Minn. 38, 41, 129 N. W. 1055, 130 N. W. 948.

(35) White v. Jefferson, 110 Minn. 276, 289, 124 N. W. 373, 641.

(36) C. H. Young Co. v. Springer, 113 Minn. 382, 388, 129 N. W. 773.

435. Remanding with directions to amend or make findings—Where the trial court has wrongly refused to make a finding on a material issue the supreme court may remand the case with directions to the trial court to make a finding thereon in accordance with the trial court's view of the evidence. A new trial of all the issues is not necessary. Foltmer v. First Methodist Episcopal Church, 127 Minn. 129, 148 N. W. 1077.

435a. Remanding with directions to amend conclusions of law and order judgment—A case may be remanded with directions to the trial court to amend its conclusions of law and to order judgment for one of the parties. Minnesota Land & Immigration Co. v. Munch, 118 Minn. 340, 136 N. W. 1026; Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899; Rodseth v. N. W. Marble Works, 129 Minn. 472, 152 N. W. 885; Poe v. Cameron, 130 Minn. 15, 153 N. W. 129.

438. Remanding to permit motion for a new trial—(40) See Archer v. Whitten, 117 Minn. 122, 134 N. W. 508.

EFFECT OF REVERSAL

441. Reversal of judgment without directions—Where, on appeal from a judgment, based upon findings of fact and conclusions of law, the judgment is reversed upon the ground that the findings of fact are not sustained by the evidence, and new or additional findings are necessary to support any judgment subsequently to be rendered, a new trial follows as of course, where the reversal is without specific directions as to further proceedings in the court below. A reversal of a judgment upon the ground that the findings of the trial court are not sustained by the evidence is not to be understood as a direction to the trial court to

change its findings without a further trial of the action. Lawton v. Fiske, 129 Minn. 380, 152 N. W. 774.

(43) See Hart v. Hart, 110 Minn. 478, 481, 126 N. W. 133 (reversal held to necessitate a new trial).

(46) Lawton v. Fiske, 129 Minn. 380, 152 N. W. 774.

444. Reversal of order denying new trial—A reversal of an order denying a new trial and granting one for failure of respondent to serve a brief opens the whole case, which goes back for trial upon the same basis that it would have been tried if the district court had granted a new trial in the first instance. Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410.

PROCEEDINGS IN LOWER COURT AFTER REMAND

454. Law of the case—(68) Minnesota Land & Immigration Co. v. Munch, 118 Minn. 340, 136 N. W. 1026.

455. Compliance with mandate—(69) Bilsborrow v. Pierce, 114 Minn. 185, 130 N. W. 852 (modification of judgment held to be in accord with mandate); Minnesota Land & Immigration Co. v. Munch, 118 Minn. 340, 136 N. W. 1026 (general rule as to duty of trial court to follow mandate stated).

456. Granting a new trial—See Digest, § 7090.

457. Matters undetermined by appeal—(74) See Minnesota Land & Immigration Co. v. Munch, 118 Minn. 340, 136 N. W. 1026.

457a. Amendment of findings—Where specified findings of fact, and the conclusions of law are assailed on appeal from a judgment, and the judgment is reversed, with directions to amend the conclusions of law in accordance with the opinion and order judgment accordingly, the findings of fact become res judicata, and the trial court has no right to amend them after remittitur, unless the mandate be first modified. Minnesota Land & Immigration Co. v. Munch, 118 Minn. 340, 136 N. W. 1026.

JURISDICTION OF SUPREME COURT AFTER REMAND

459. In general—(79) Hunt v. Meeker County Abstract & Loan Co., 130 Minn. 530, 152 N. W. 866.

DISMISSAL OF APPEAL

461. For defective return—(81) Wilson & Thoreen v. Henningsen, 127 Minn. 520, 148 N. W. 1081.

462a. For jurisdictional defects—A respondent is not entitled to have an appeal dismissed on the ground that the court was without jurisdic-

tion to render the decision appealed from. State v. George, 123 Minn. 59, 142 N. W. 945.

463. Moot and academic questions—Decisions should be limited to real controversies, in actions involving facts and rights asserted thereunder. Moot questions will not be determined on appeal. Anderson v. Louisberg, 121 Minn. 528, 141 N. W. 97; De Graff v. Moench, 121 Minn. 531, 141 N. W. 1134; National Council v. Ruder, 126 Minn. 154, 147 N. W. 959; Hansen v. N. W. Telephone Exchange Co., 127 Minn. 522, 149 N. W. 131.

Action upon a judgment rendered in another state. Defence that an appeal had been taken from the judgment, and dismissal of the Minnesota action by the trial court. Where, upon appeal in the foreign state a new trial of the action in which the judgment was rendered has been granted, before the hearing of an appeal in the Minnesota action, our supreme court will dismiss the appeal. De Graff v. Moench, 121 Minn. 531, 141 N. W. 1134.

Where, pending appeal in mandamus proceedings to compel a recorder to certify a petition for the recall of a mayor, an election is held at which the mayor sought to be recalled is defeated, and he goes out of office, the appeal will be dismissed as involving only a moot question. State v. City Recorder, 129 Minn. 535, 152 N. W. 654.

465. Appeal from non-appealable order or judgment—(86) Renville County v. Minneapolis, 112 Minn. 487, 128 N. W. 669.

466a. Effect of dismissal on case in supreme court—The dismissal of an appeal leaves no basis for a decision by the supreme court on the merits for the dismissal takes the case out of that court. Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410.

468. Practice—Affidavits—Notice—(89) Mastin v. May, 130 Minn. 281, 153 N. W. 756.

REHEARINGS

471. Rehearing allowed—Where the statement of facts in the original opinion was inaccurate and the case important. Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856.

(3) Dodge v. Chicago etc. Ry. Co., 111 Minn. 123, 126 N. W. 627.

472. Rehearing denied—Where a question was not raised or litigated in the trial court. First Nat. Bank v. Persall, 110 Minn. 333, 125 N. W. 506, 675.

474. Time of application—(22) Hunt v. Meeker County Abstract & Loan Co., 130 Minn. 530, 152 N. W. 866.

APPEARANCE

476. Effect of general appearance—A general appearance in the district court waives defects in perfecting an appeal from a justice court, if the district court has jurisdiction of the subject-matter. Spitzhak v. Regenik, 122 Minn. 352, 142 N. W. 709. See Digest, § 5334.

(27) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410. See Spitzhak v. Regenik, 122 Minn. 352, 142 N. W. 709.

(29) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410 (foreign corporation).

478. Validating a void judgment by appearance—An appearance to set aside a judgment void because of an unauthorized service of summons is not rendered general by also challenging the jurisdiction of the court over the subject-matter. Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815.

(33) Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815.

479. General appearance—What constitutes—Presence in court at a general term call of the calendar, when the case is set for trial, without either participation or objection, does not constitute a general appearance. Spitzhak v. Regenik, 122 Minn. 352, 142 N. W. 709.

(38) Quaker Creamery Co. v. Carlson, 124 Minn. 147, 144 N. W. 449.

481. Special appearance—What constitutes—An appearance of a contestee in an election contest to resist, on jurisdictional grounds, a motion for leave to reserve a notice of contest, held a special appearance. Whittier v. Farmington, 115 Minn. 182, 131 N. W. 1079.

An appearance of a county attorney to oppose a motion to vacate the forfeiture of a bail bond held not to give the court jurisdiction over the county. Edwards v. Hennepin County, 116 Minn. 101, 133 N. W. 469.

Defendant did not appear generally from the mere fact that, in subscribing the notice of motion to set aside the summons, its attorneys did not limit their authority to a special appearance, the notice itself showing their appearance for defendant to be for a special purpose; nor did the fact that the court in the order to show cause stayed proceedings convert defendant's special appearance to a general appearance. Schlesinger v. Modern Samaritans, 121 Minn. 145, 140 N. W. 1027.

An order, entered upon a special appearance, to show cause why the service of the summons and complaint should not be set aside as insufficient to confer jurisdiction, did not convert the special into a general appearance by reason of the fact that, in addition to reciting the special appearance, it enlarged the time for answering in the event that the service should be held sufficient. The special appearance was not made general by an adjournment, granted at the defendant's request, of the hear-

ing upon the order to show cause. Longcor v. Atlantic Terra Cotta Co., 122 Minn. 245, 142 N. W. 310.

(50) Big Vein Coal Co. v. Read, 229 U. S. 31.

(51) Whittier v. Farmington, 115 Minn. 182, 131 N. W. 1079; Davis v. Cleveland etc. Ry. Co., 217 U. S. 157.

(52) Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815 (an appearance by way of motion to set aside a judgment rendered upon an unauthorized and void service of the summons, being specifically limited to the purposes of the motion, held a special appearance, though the motion also challenged the jurisdiction of the court over the subject-matter of the action).

482. Proceeding to trial after special appearance—Waiver—(58) Getty v. Alpha, 115 Minn. 500, 133 N. W. 159.

ARBITRATION AND AWARD

IN GENERAL

492. Hearing—Notice—(81) See American Central Ins. Co. v. District Court, 125 Minn. 374, 147 N. W. 242.

498. Revocation of submission—(89) Note, 138 Am. St. Rep. 640.

AT COMMON LAW

499. In general—Validity and binding force of arbitration agreements. Note, 47 L. R. A. (N. S.) 337.

(97) Note, 47 L. R. A. (N. S.) 337.

ARREST

512. Without warrant—(32) Note, 84 Am. St. Rep. 679.

(38) Witte v. Haben, 131 Minn. ——, 154 N. W. 662 (arrest of insane person by officer).

516. Resisting arrest—(47) Note, 84 Am. St. Rep. 679.

ARSON

517b. What constitutes—Attempt—Evidence held to show attempt to commit arson in the third degree. State v. Dumas, 118 Minn. 177, 136 N. W. 311.

What constitutes arson and who may commit it. Note, 101 Am. St. Rep. 21.

518. Indictment—An indictment for arson in the third degree is not bad because it fails to state that the burning was "under circumstances not amounting to arson in the first or second degree," nor because the acts charged might also constitute a crime under R. L. 1905, § 5126. State v. Roth, 117 Minn. 404, 136 N. W. 12.

An indictment for attempted arson in the third degree sustained. State v. Dumas, 118 Minn. 77, 136 N. W. 311.

520. Evidence—Admissibility—(53) State v. Roth, 117 Minn. 404, 136 N. W. 12 (evidence relating to insurance held admissible); State v. O'Hagan, 124 Minn. 58, 144 N. W. 410 (knowledge possessed by defendant as to the wishes and intentions of his relatives concerning matters of interest to him held admissible as bearing on his motives); State v. Jacobson, 130 Minn. 347, 153 N. W. 845 (footprints may be convincing evidence, but to be such they must be shown to correspond with the foot or footwear of the accused).

520a. Evidence—Sufficiency—Corpus delicti—There must be proof not only of the fact that the building burned, but also that the fire originated through criminal agency. State v. McLarne, 128 Minn. 163, 150 N. W. 787; State v. Jacobson, 130 Minn. 347, 153 N. W. 845.

Evidence held sufficient to sustain a conviction. State v. Hendricksen, 116 Minn. 366, 133 N. W. 850; State v. Roth, 117 Minn. 404, 136 N. W. 12; State v. O'Hagan, 124 Minn. 58, 144 N. W. 410.

Evidence held insufficient to justify a conviction. State v. Jacobson, 130 Minn. 347, 153 N. W. 845.

ASSAULT AND BATTERY

CIVIL LIABILITY

521. Definition—(58) See Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645.

523a. Contributory negligence—Contributory negligence of plaintiff is no defence to a civil action for assault and battery. Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645.

524. What constitutes—Various forms considered—A recovery has been sustained where an officer in serving papers on a woman threatened to come and kick her out of the house if she did not settle a claim within three days, and reached for her through an open door to seize her. Austin v. Moffett, 113 Minn. 290, 129 N. W. 388.

Striking a horse driven by another, from malice, wantonness, or recklessness, so that the driver is injured, is an assault. One who whips up his own horses to great speed and passes the team of another, driving near and yelling loudly, if such acts are done recklessly and in such manner as to be likely to produce injury, and so that they do cause injury, commits an assault. Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645.

(67) Jansen v. Minneapolis & St. L. R. Co., 112 Minn. 496, 128 N. W. 826; Mark v. Fink, 125 Minn. 401, 147 N. W. 279; Duer v. Gagnon, 129 Minn. 517, 152 N. W. 880.

525. Indecent assault—(76) Bingham v. Bernard, 36 Minn. 114, 30 N. W. 404 (evidence—explanation of written admission—instructions as to evidence of reputation for chastity held not erroneous—cautionary instructions held not erroneous).

527. Pleading—Justification is generally new matter to be specially pleaded. Evertson v. McKay, 124 Minn. 260, 144 N. W. 950.

A general allegation of permanent injury resulting from an assault and battery alleged to have been committed upon plaintiff by defendant held sufficient to admit evidence of the nature and character of the injury so claimed to be permanent. The proper practice in such a case, where the general allegation is deemed insufficient, is to move the court for more specific allegations. Evertson v. McKay, 124 Minn. 260, 144 N. W. 950.

(78) Foran v. Levin, 76 Minn. 178, 78 N. W. 1047.

528a. Evidence—Admissibility—Where in a civil action for assault and battery, no question arises as to which party was the aggressor, and the issue is defence of self or property, plaintiff's reputation for turbulence or violence, uncommunicated to defendant, is inadmissible. The

trial court did not abuse its discretion in allowing plaintiff to be interrogated on cross-examination as to a prior independent assault committed by her upon a third person, such being within the permissible field of examination as to collateral matters to shake credibility; but it was improper to allow defendant subsequently to introduce testimony contradicting the answers so elicited. Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956.

Evidence of threats of violence made by defendant against plaintiff two years and four months before the assault held admissible. Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645.

529. Evidence—Sufficiency—(83) Evertson v. McKay, 124 Minn. 260, 144 N. W. 950; Mark v. Fink, 125 Minn. 401, 147 N. W. 279; Duer v. Gagnon, 129 Minn. 517, 152 N. W. 880; Likum v. Porter, 131 Minn. —, 154 N. W. 1070.

531. Damages—In general—(91) Austin v. Moffett, 113 Minn. 290, 129 N. W. 388 (miscarriage); Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126 (impairment of hearing); Likum v. Porter, 131 Minn. —, 154 N. W. 1070.

(94) Germann v. Great Northern Ry. Co., 114 Minn. 247, 130 N. W. 1021 (verdict for $2,000 held excessive and new trial granted); Evertson v. McKay, 124 Minn. 260, 144 N. W. 950 (verdict for $1,200—reduced to $850); Mark v. Fink, 125 Minn. 401, 147 N. W. 279 (assault caused a rupture of a permanent nature—plaintiff a grocer—rupture did not interfere with his earning capacity—verdict for $5,000 reduced on appeal to $3,000).

(95) Austin v. Moffett, 113 Minn. 290, 129 N. W. 388 (pregnant woman—miscarriage—permanent nervous condition—verdict for $1,000); Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126 (verdict for $500); Evenstad v. Stevens, 120 Minn. 532, 139 N. W. 1134 (verdict for $500); Nettle v. Flour City Ornamental Iron Works, 126 Minn. 530, 148 N. W. 42 (plaintiff struck in face—loss of several teeth—verdict for $750); Duer v. Gagnon, 129 Minn. 517, 152 N. W. 880 (laborer—right leg broken—confined to hospital fourteen weeks—verdict for $1,200).

532. Exemplary damages—(97) Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126.

533. Mitigation of damages—(1) See Quimby v. Minnesota Tribune Co., 38 Minn. 528, 38 N. W. 623 (provocation—cooling time).

CRIMINAL LIABILITY

534. What constitutes—In general—Unlawfully discharging a firearm to frighten a person, though not intending to hit him, is an assault and battery, if he is hit. State v. Lehman, 131 Minn. —, 155 N. W. 399.

537. Self-defence—In cases of homicide or assault, no burden rests upon defendant to prove that his act was justifiable, because in self-defence; but the jury, to convict, must be satisfied beyond a reasonable doubt that the act was not justifiable on such ground. State v. McGrath, 119 Minn. 321, 138 N. W. 310.

539. Indictment—The term "wilfully" imports designedly and intentionally; and an indictment for an assault which follows the language of the statute and charges that defendant wilfully assaulted another and wilfully inflicted grievous bodily harm upon him sufficiently charges an intent to inflict such harm. State v. Lehman, 131 Minn. ——, 155 N. W. 399.

541. Evidence—Admissibility—(20) State v. McCoy, 112 Minn. 424, 128 N. W. 465 (improper cross-examination of defendant).

547. Evidence—Sufficiency—(27) State v. Lee, 126 Minn. 402, 148 N. W. 280 (conviction for assault in the second degree held not contrary to the evidence nor contrary to law).

ASSIGNMENTS

IN GENERAL

554. What constitutes—In an action for injury and destruction of personalty by a fire alleged to have been set by defendant's locomotive, evidence held sufficient to show an assignment of the property owner's claim for such injury and destruction to the plaintiffs. Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275.

(38) See Vollmer v. Big Stone County Bank, 127 Minn. 340, 149 N. W. 545.

(40) See Hodgdon v. Peet, 122 Minn. 286, 293, 142 N. W. 808 (rule held inapplicable).

555. Equitable assignments—Courts of equity have departed from the rule of the common law by upholding assignments of mere expectancies and possibilities of the future acquisition of the thing assigned. Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments of rights and interests which are absolutely fixed and in esse. On the contrary, they support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true that the assignment can have no positive operation to transfer, in præsenti, property in things not in esse; but it operates by way of present contract, to take effect and attach to the things assigned when and as soon as they

come into esse. Except in cases prohibited by statute, whenever the parties by their contract in clear terms express an intention to create a positive lien upon personal property, not then owned, but to be subsequently acquired, by the mortgagor, whether then in esse or not, the mortgage attaches as a lien on the property as soon as the mortgagor acquires it, as against the mortgagor and all claiming under him either by voluntary transfer or with notice, precisely as if the property had been in being and belonged to the mortgagor when the mortgage was executed. Of course, it is necessary, as in the case of any mortgage, that the property should be definitely pointed out, so that it may be distinguished or identified. The rule applies to assignments as well as to chattel mortgages or other contracts. The distinction between the equity rule and the common law is that under the latter the assignment passes a present title, while under the former, or rule in equity, the title passes at the time the thing assigned comes into being. The assignment must appear to have been made in good faith and for a valuable consideration, and the rights of subsequent claimants are governed by the principles of law pertinent to that subject. Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265.

558. Mode of assigning things in action—A time check issued by a contractor, or his foreman, to a laborer, containing a memorandum of the time of labor and the amount he is entitled to receive therefor, is the evidence and symbol of his claim for such labor. The indorsement in blank of such a check and a delivery thereof is an assignment in writing of the claim for labor, as required by the statute. Small v. Smith, 120 Minn. 118, 139 N. W. 133.

The words "sell, assign and transfer" are usual. See Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

(47) See Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051 (assignment of mortgage—sufficiency of delivery).

(48) Telford v. Henrickson, 120 Minn. 427, 139 N. W. 941 (statute provides a mere rule of evidence—does not require a recording or registering within the meaning of the bankruptcy act); Leonard v. Farrington, 124 Minn. 160, 144 N. W. 763.

558a. Filing—Failure to file the assignment of a debt as provided by section 7017, G. S. 1913, 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.

560. Partial assignments—Conceding that when a debtor refuses to recognize an assignment, an independent action by the assignee against the debtor will not lie when only a part of the debt is assigned, the rule has no application where the debtor has notice of the assignment and

makes no objection thereto. Cross v. Page & Hill Co., 116 Minn. 123, 133 N. W. 178.

(53) See Merchants Nat. Bank v. Sexton, 228 U. S. 634 (effect of partial assignment of claim secured by a common fund).

561. Notice—A service of a statutory notice to terminate a land contract may be made on the person named in the contract as vendee, in the absence of a notice of assignment. Hage v. Benner, 111 Minn. 365, 127 N. W. 3.

(55, 56) Cross v. Page & Hill Co., 116 Minn. 123, 133 N. W. 178.

WHAT ASSIGNABLE

563. Common-law rule—Under the early common law a chose in action not within the law merchant could not be assigned, and the rule had particular application to rights and things in expectancy, and not in existence at the time of the assignment. But by statute and judicial decisions the old rule has been modified, so that in most of the states of this country it is now held that all choses in action which survive the death of the holder and pass to his personal representative may be assigned precisely as under the rule of the law merchant. The extension of the rule was found necessary to keep the law in touch with advanced conditions in commercial activities, and to sustain and uphold transactions of everyday occurrence outside of and beyond the law merchant rule. Though under the strict letter of the old rule neither property nor property rights having no present existence can be mortgaged or transferred by assignment, yet to uphold and sustain many such transactions the rule of potential existence was invented, under which a mortgage of crops to be grown in the future, the assignment of wages to be earned under an existing contract of employment, and other rights having a substantial foundation in anticipation, have been held valid. And such is the rule now applied generally in this country as well as in England. Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265.

(65) See Ames, Lectures on Legal History, 210.

564. Test of assignability—(68) Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275; Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265.

565. Rights of action ex delicto—(69) 24 Harv. L. Rev. 670.

(71) Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275.

566. Claims for services—Wages—One who has contracted to perform certain specified work may assign his claim for the compensation to be received therefor before the work has been completed. Leonard v. Farrington, 124 Minn. 160, 144 N. W. 763.

The statute requiring notice to the employer of an assignment of wages is constitutional. Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

(72) See Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265; Mutual Loan Co. v. Martell, 222 U. S. 225; 5 Mich. L. Rev. 115.

569. Held assignable—A claim for damages for the destruction of personal property by fire. Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275.

An agreement to repurchase corporate stock. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

Rights to land under the Chippewa treaty of February 22, 1855. Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

A contract for the purchase of land. Cornell v. Upper Michigan Land Co., 131 Minn. ——, 155 N. W. 99.

A claim for refundment, under G. S. 1913, § 3150, of money paid for a liquor license. Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265.

(94) Small v. Smith, 120 Minn. 118, 139 N. W. 133.

EFFECT

571. In general—An assignee is not necessarily limited to the remedies of his assignor. Anderson v. Amidon, 114 Minn. 202, 130 N. W. 1002.

The assignment of an executory contract by one party to it does not relieve the assignor of his personal liability to the other contracting party, nor does it create a personal liability on the part of the assignee, without provision to that effect. But the assignee may not enforce the contract against the other contracting party until the obligations which the contract imposes have been performed by some one. He takes his assignment incumbered by all the burdens to which it was subject in the hands of the assignor. As between him and his assignor, the assignment likewise passes the benefits subject to the burdens, and unless he has so stipulated he cannot require the assignor to continue to bear the burdens of the contract while he enjoys the benefits. Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

An assignment of a claim for damages to personal property by fire to the plaintiffs, who, as insurers of the property, paid the loss to the owners, held not based upon the policy pursuant to which such payment was made and hence not affected by any illegality which may have existed in the policy. Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275.

An assignment of a contract held not to assign another contract between plaintiff and defendant and not to pass title to certain material in

process of manufacture by defendants. Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

(5) Leonard v. Farrington, 124 Minn. 160, 144 N. W. 763.

572. Assignee takes subject to equities—(8) See, as to rule in New York, Selwyn & Co. v. Waller, 212 N. Y. 507, 106 N. E. 321.

575. Assignment carries securities and remedies—(16) Cornell v. Upper Michigan Land Co., 131 Minn. ——, 155 N. W. 99 (land contract—right to sue for rescission).

ACTIONS

577. Pleading—(21) Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359 (general allegation of assignment of wages—issue as to noncompliance with G. S. 1913, § 3858, requiring notice of assignments of wages to employer, held raised by a general denial). See Dunnell, Minn. Pl. 2 ed. § 169.

ASSIGNMENTS FOR BENEFIT OF CREDITORS

IN GENERAL

578. Right to make—(23) Moore v. Bettingen, 116 Minn. 142, 133 N. W. 561.

580. What constitutes—An assignment held not valid either as a common-law assignment for the benefit of creditors, or as a trust under R. L. 1905, § 3249(6). Moore v. Bettingen, 116 Minn. 142, 133 N. W. 561.

581. Nature of statute and proceedings—(30) Mitchell v. Green, 125 Minn. 24, 145 N. W. 404.

DEED OF ASSIGNMENT

596a. Gives creditors a vested interest—Where a debtor, by trust deed assented to by all his creditors, conveyed his property to trustees to be converted into money, and the proceeds thereof to be distributed to his creditors, the creditors took a vested and not a contingent interest in the trust estate. National Surety Co. v. Hurley, 130 Minn. 392, 153 N. W. 740.

ASSIGNEES

601a. Sale by assignee—Approval—Discharge of assignee—Acquiescence of parties in interest—Where the assignee, under an assignment for the benefit of creditors, made a sale of real estate in which all parties in interest acquiesced, the discharge of the assignee by the court, on the ground that he had fully performed his trust, will be deemed an ap-

proval of such sale as against an objection raised more than ten years later by a stranger to both the assignment proceedings and the title. An assignment for the benefit of creditors is the exercise of a common-law right, and the assignee derives his title and power of sale from the deed of assignment and not from the statute. The statute merely regulates the manner of creating and executing the trust. If the assignee made the conveyance in question without the court having approved the sale, such conveyance was not void, but only voidable; and, all parties in interest having acquiesced therein, the title vested in the grantee. Mitchell v. Green, 125 Minn. 24, 145 N. W. 404.

ADMINISTRATION

614. Releases—A common-law assignment for the benefit of creditors, which requires a release of the debtor in consideration of the right to participate in the proceeds of the trust, is invalid as to creditors not assenting to the same. A creditor who does not assent to such an assignment may attack it in any appropriate proceeding, and is not required to resort to bankruptcy or insolvency proceedings. Moore v. Bettingen, 116 Minn. 142, 133 N. W. 561.

(41) Note, 50 L. R. A. (N. S.) 714.

ASSOCIATIONS

618a. Defence of actions against members—Notice of action—The by-laws of a society of physicians for mutual protection against claims for malpractice held applicable to claims arising prior to their adoption. Where plaintiff had made due application to the secretary of the society for assistance, as provided by the by-laws, held that he was not required to apply to its council, or to give notice of a second action on the same claim after defendant's refusal to consider his demand with reference to the first, which was dismissed. The burden of proving that a demand for aid under the by-laws of the society involved a claim upon which a member was not entitled to aid was on the society. Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472.

618b. Expulsion of members—Members of an association may be expelled in accordance with the by-laws, though the acts on which the expulsion is based are of a criminal nature for which the member has been prosecuted in court and acquitted. Miller v. Hennepin County Medical Society, 124 Minn. 314, 144 N. W. 1091.

ASSUMPSIT

620. History—(51) See Dunnell, Minn. Pl. 2 ed. §§ 528–534.

621. Pleading—(52) See Dunnell, Minn. Pl. 2 ed. §§ 528–534.

ATTACHMENT

IN GENERAL

622. Nature—Our remedy by attachment and garnishment had its origin in the ancient custom of foreign attachment in London, under which a debt was regarded as having a situs wherever the debtor might be found. Starkey v. Cleveland etc. Ry. Co., 114 Minn. 27, 130 N. W. 540.

625. Jurisdiction—How acquired—(63) Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915. See Digest, § 7836.

GROUNDS

629. Fraudulent disposition of property—If a conveyance of real estate made by a non-resident debtor is fraudulent as to creditors, the land remains the property of the debtor as against such creditors, and may be seized by them under a writ of attachment as the basis of an action against such nonresident. Where such attachment has been made, the creditor has the right to proceed to judgment and to sell the real estate thereunder without first contesting the validity of the conveyance. The service of the summons upon the debtor in such an action cannot be set aside upon affidavits that he has no interest in the property. The validity of the conveyance cannot be determined upon affidavits, nor in an action to which the claimant thereunder is not a party. Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915.

A preferential transfer or payment, without actual fraud, does not constitute a disposition of property with intent to delay and defraud creditors, so as to authorize the issuance of a writ of attachment, under R. L. 1905, § 4216 (G. S. 1913, § 7846). Crookston State Bank v. Lee, 124 Minn. 112, 144 N. W. 433.

Mere constructive fraud, implied by law from the giving of a chattel mortgage with an agreement giving the mortgagor the right to retain possession of the property and dispose of it as his own, is not sufficient to authorize an attachment. There must be an actual, personal intent to defraud, on the part of the defendant. Harris v. Spencer, 130 Minn. 141, 153 N. W. 125.

632. Non-residents—(74) See Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307; Note, L. R. A. 1915 A. 400.

PROCEDURE

634. Time of issuance—The writ may be issued before the formal commencement of the action, and is valid if the action is begun within sixty days thereafter. Hudson v. Patterson, 123 Minn. 330, 143 N. W. 792.

637. Return of sheriff—A return of a sheriff that he levied upon and attached "all the right, title and interest" of a party has been sustained, though not commended. Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

A return of a levy on logs held to describe them sufficiently. Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

The service by a sheriff of a writ of attachment is presumed to have been made within the county of which he is sheriff. Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

639. Form of writ—(4) Note, 107 Am. St. Rep. 894.

643. Discharge on bond—(11) Right of obligor on bond to attack attachment. Note, 32 L. R. A. (N. S.) 401.

LIEN

650. On realty—(20) Kelly v. Byers, 115 Minn. 489, 132 N. W. 919. See Digest, § 8307.

VACATION

662. Question on appeal—(47) Viers v. Perry, 112 Minn. 348, 127 N. W. 1120; Ekberg v. Swedish-American Pub. Co., 114 Minn. 519, 130 N. W. 1032.

ATTORNEY AND CLIENT

IN GENERAL

666. Summary jurisdiction over attorneys—Courts have common-law and statutory power to compel attorneys, in a summary proceeding, to pay to their clients money which they have received for them. Clients are not required to resort to an ordinary action. This power should be exercised cautiously, yet resolutely, and so as to secure justice to both parties. The proceeding may be based on affidavits, or oral evidence may be taken and a finding made by the court, or a reference may be directed, or an issue sent to a jury. But whatever procedure is adopted

it should be characterized by reasonable speed. Landro v. Great Northern Ry. Co., 112 Minn. 87, 141 N. W. 1103.

(56) Salo v. Duluth & Iron Range R. Co., 124 Minn. 526, 114 N. W. 1134.

668. Contracts of employment—A contract of employment between an attorney and his client, whereby the client is prohibited from settling his cause of action unless the attorney consents thereto, is contrary to public policy and void. A clause in such contract wherein the client agrees not to employ any other attorney to present, prosecute, or collect the claim, and not to settle the claim except through the attorney named in the contract, is held to be an attempt to prohibit the client from settling without the consent of the attorney, and to vitiate the entire contract. Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386.

(59) Smith v. Funk, 114 Minn. 367, 131 N. W. 377 (finding that defendant was not acting as attorney for plaintiff in a certain transaction sustained); Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975 (employment held a question for the jury); Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914 (evidence of employment conclusive).

670. Notice to attorney notice to client—(62) Note, 57 Am. St. Rep. 914.

672. Contracts—Good faith—Burden of proof—(67, 68) Garceau v. McNamara, 125 Minn. 130, 145 N. W. 809 (purchase by attorney of subject-matter of litigation—burden of proof—good faith—acquiescence of client).

674. Liability of attorney to client—(71) Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975 (action for neglecting to foreclose a mechanic's lien—question of defendant's employment as attorney held one of fact for the jury—new trial granted for errors in the charge).

675a. Offences—Advertising for divorce business—Attorneys at law are forbidden by statute from advertising for divorce business. The statute has been held constitutional against the objection that it impaired vested rights. State v. Giantvalley, 123 Minn. 227, 143 N. W. 780 (conviction under statute sustained).

REMOVAL AND SUSPENSION OF ATTORNEYS

678. Causes—An attorney may be suspended for advertising for divorce business contrary to the statute. State Board v. Giantvalley, 123 Minn. 529, 143 N. W. 1135.

An attorney may be disbarred for acts constituting a criminal offence for which he has been tried in court and acquitted. Miller v. Hennepin County Medical Society, 124 Minn. 314, 144 N. W. 1091.

(75) State Board v. Reineke, 124 Minn. 528, 144 N. W. 1134; State Board v. Thoen, 124 Minn. 529, 144 N. W. 1135.

(76) State Board v. Cary, 112 Minn. 101, 127 N. W. 466 (misappropriation of funds—unprofessional conduct); State Board v. Bensel, 119 Minn. 532, 137 N. W. 1115 (inserting grossly libelous charges in complaint which were wholly irrelevant to any issue in the case); State Board v. Downey, 121 Minn. 529, 141 N. W. 1134 (misappropriation of funds of client—effect of attorney leaving state—final judgment of disbarment suspended); State Board v. Novotny, 122 Minn. 490, 142 N. W. 733 (misappropriation of funds of client—betrayal of trust and confidence of client); State Board v. De La Motte, 123 Minn. 54, 142 N. W. 929 (withdrawing a motion for a new trial without the knowledge or authority of his client—drawing contracts so as to cover up champerty); State Board v. Prigge, 129 Minn. 540, 152 N. W. 1103 (wilful misconduct in profession—wilful disobedience of an order of court). See Note, 45 Am. St. Rep. 71.

682a. Practice—The petition should present the evidence in an orderly and concise form and the testimony should be upon oath. State Board v. De La Motte, 123 Minn. 54, 142 N. W. 929.

AUTHORITY OF ATTORNEYS

684b. Law of agency applicable—Notice of authority—The rules of law applicable to principal and agent control the relation of attorney and client and persons dealing with an attorney are bound to take notice of his authority. Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

685. Authority to appear—Proof—Stay—(89–95) Note, 126 Am. St. Rep. 33.

687. To employ associate counsel—(98) Brewer v. Hartman, 116 Minn. 512, 134 N. W. 113.

688. Conduct of litigation—An attorney has no exclusive control over litigation committed to his charge. Absolute control thereof rests with his client. Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731. See Note, 132 Am. St. Rep. 148.

A contract between attorney and client is void, if the client is thereby excluded from control of the cause of action. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281.

The court is generally justified in acting upon statements and concessions in relation to the case, deliberately made by counsel, in open court, during the progress of the trial. Independent School District v. School District, 130 Minn. 19, 153 N. W. 113.

690. Compromise of claims—Under a general retainer an attorney has no implied authority to compromise his client's cause of action, except

when confronted with an emergency, and prompt action is necessary to protect the interests of his client, and there is no opportunity to consult with him. Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

697. Held to have authority—(13) Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

(22) See Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

COMPENSATION

699. Allowance by court—Discretion—Proof—(33) State v. District Court, 113 Minn. 304, 129 N. W. 583.

701. Contracts—Value of services—Evidence—Particular contracts fixing the amount of compensation construed. Johnson v. Great Northern Ry. Co., 128 Minn. 365, 151 N. W. 125; Gray v. Bemis, 128 Minn. 392, 151 N. W. 135.

Where an attorney is involved with others as a party to a lawsuit, and his interest in the litigation is large and in a measure antagonistic to theirs, an agreement on their part to pay him for his services will not readily be implied. Fryberger v. Anderson, 125 Minn. 322, 147 N. W. 107.

(35) Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173; McCaughey v. Wilson, 130 Minn. 196, 153 N. W. 310.

702. Actions—Pleading—Burden of proof—Sufficiency of evidence—Findings—(43) Gedney v. Ayers, 111 Minn. 66, 126 N. W. 398 (action against attorney for money had and received—counterclaim for services as attorney—compensation to be one-third of an estate—meaning of "estate"—findings justified by the evidence); Brewer v. Hartman, 116 Minn. 512, 134 N. W. 113 (finding that defendant never authorized employment of plaintiff as associate counsel sustained—burden of proof); Scannell v. Hendrickson, 119 Minn. 529, 137 N. W. 1 (finding of implied contract to pay reasonable compensation and the amount sustained —claim presented to probate court); Moriarty v. Maloney, 121 Minn. 285, 141 N. W. 186 (the evidence in this case is sufficient to sustain the findings of the trial court—defendants, having tendered payment of the full amount called for in a written contract, and, after its refusal, having paid the full amount into court, cannot attack the judgment rendered therefor on the ground that the full amount was not then due—the court, having determined the total amount due plaintiff for services, was not required to make a specific finding upon each item claimed by plaintiff—there was no error in amending the findings of fact, as the evidence was sufficient to sustain the amendment); Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104 (complaint alleged both an express and implied contract—plaintiff elected on the trial to proceed on the implied contract—verdict for defendant held justified by the evidence); Comstock v. Bald-

win, 125 Minn. 357, 147 N. W. 278 (a complaint, alleging that the plaintiff, an Illinois attorney, having a contract with the heirs at law of a deceased, who had come to his death in Minnesota by the negligent act of another, to bring an action therefor, and to take such steps as were proper, entered into a contract with the defendant attorneys in Minnesota to prosecute such action with him, the fees received to be divided equally between the plaintiff and defendants, that a recovery was had and the fees paid to the defendants, and that the defendants refused to pay the plaintiff the one-half agreed, states a cause of action); Crosby v. Larson, 127 Minn. 315, 149 N. W. 466 (plaintiff sued to recover for services rendered and disbursements made as attorney for a receiver—upon conflicting evidence, the court found as a fact that plaintiff rendered no services and made no disbursements in the capacity of attorney for the receiver—the evidence is sufficient to sustain the finding); Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914 (evidence held to show employment of plaintiff by corporation and to justify amount of recovery); McCaughey v. Wilson, 130 Minn. 196, 153 N. W. 310 (evidence of employment held sufficient—verdict for $5,000 held not excessive).

LIEN OF ATTORNEYS

704. Statutory—Construction of statute—(47) Desaman v. Butler Bros., 118 Minn. 198, 136 N. W. 747.

706. On cause of action—Under R. L. 1905, § 2288, subd. 3, an attorney has a lien upon the cause of action of his client from the time of the service of the summons. This lien continues to exist until it is satisfied or released. No notice to the opposite party or his attorney is necessary to the creation of the lien. The settlement of a cause of action upon which an attorney has a lien, made without his consent, is void as to the attorney to the extent of his lien, and the settlement may be set aside and the action reinstated, to enable the attorney to satisfy such lien. Desaman v. Butler Bros., 114 Minn. 362, 131 N. W. 463. See Desaman v. Butler Bros., 118 Minn. 198, 136 N. W. 747.

By section 4955, G. S. 1913, an attorney is given a lien for his compensation upon the cause of action from the time of the service of the summons in the action. Where the action is settled by the parties before trial without notice to or consent of the attorney, the attorney may elect to proceed for the enforcement of his lien rights by an independent action against the defendant, or by intervention proceedings in the original action. Such a settlement, when made in good faith and without purpose to defraud the attorney, is final and conclusive of the amount of recovery in the action, and is the basis from which the attorney's compensation, fixed by a percentage agreement with the plaintiff, must be

determined. The pendency of a former action for the same cause, brought by other attorneys, and which was not pleaded in defense to the second action, and of which the attorneys in the second action had no notice, held not a bar to the lien rights of the attorneys in the second action. The lien given by the statute covers legitimate expenditures by the attorneys in the prosecution of the action, when included within the contract of employment, and it is not limited to such items of costs or disbursements as might be taxed as such against the defendant. Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128.

The plaintiff's intestate was killed in Minnesota, while in the employ of the defendant, under circumstances giving a cause of action for his death. He was domiciled in Missouri and a general administrator was appointed for him there. Afterwards the plaintiff was appointed special administrator in Minnesota, and the intervener, as his attorney, commenced suit under the Minnesota death by wrongful act statute. Afterwards the general administrator appointed by the Missouri court settled with the defendant. Later the plaintiff was appointed general administrator by an order of the probate court in Minnesota. Upon appeal the order of the probate court was reversed. It is held that the intervener, upon the commencement of the cause of action, had a lien for his compensation, as provided by G. S. 1913, § 4955. Castigliano v. Great Northern Ry. Co., 129 Minn. 279, 152 N. W. 413.

Plaintiff agreed with his attorney that the latter should receive as his compensation 40 per cent. of any judgment or verdict against defendant. A verdict was had for $2,000. After judgment was entered, defendant settled with plaintiff personally for $1,500, paying him $1,050, and retaining $450 to protect itself against any attorney's claims for services. Plaintiff's attorneys moved for judgment, which was thereafter entered against defendant in favor of the attorneys for $885. Held that, it being conceded that plaintiff's attorney of record had a lien on the cause of action, defendant was not justified in accepting plaintiff's statement that some one else was his attorney, nor in accepting plaintiff's version of the contract between himself and his attorney, in the absence of any attempt by defendant to consult either the attorney of record or the attorney named by plaintiff. There is no error in entering judgment in favor of the attorney of record and counsel who assisted him at the trial, when plaintiff's attorney of record joins his assistant with him in the motion papers. Georgian v. Minneapolis & St. L. R. Co., 131 Minn. ——, 154 N. W. 962.

710. Settlement and dismissal—Under the present statute the lien of an attorney on the cause of action cannot be defeated by a secret settlement. Desaman v. Butler Bros., 114 Minn. 362, 131 N. W. 463; Id., 118 Minn. 198, 136 N. W. 747; Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128.

712. Enforcement—An attorney may enforce his lien on the cause of action either in the original action or by an independent action. Davis v. Great Northern Ry. Co., 128 Minn. 354, 151 N. W. 128.

The form of procedure for the enforcement of the lien is not important. Georgian v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 962.

AUCTIONS AND AUCTIONEERS

714. Nature of an auction—(75) Note, 131 Am. St. Rep. 479.

715. Offer of property—Bid—Withdrawal of bid—(76) Note, 131 Am. St. Rep. 479.

715a. Powers and liabilities of auctioneers—The auctioneer does not sell his own goods; he acts, in making a sale at auction, primarily as the agent of the seller; when the property is struck off he becomes also the agent of the purchaser, at least to the extent of binding him by his memorandum of sale. He is liable to the seller for a loss due to his negligence, or to his deviating from instructions, as well as for money paid him by purchasers. He is liable to a purchaser under certain circumstances. Wright v. May, 127 Minn. 150, 149 N. W. 9.

716. Regulation—License—An ordinance providing a license fee of twenty-five dollars per day has been sustained. Minneota v. Martin, 124 Minn. 498, 145 N. W. 383.

The general statutes of this state providing for the licensing of auctioneers has been sustained against various constitutional objections. Wright v. May, 127 Minn. 150, 149 N. W. 9.

AUTOMOBILES—See Carriers, 1291a, 1296b; Damages, 2577b; Evidence, 3322; Highways, 4167–4167*l*; Street Railways, 9023a, 9026.

AUTOPSY—See Dead Bodies, 2599; Insurance, 4872.

BAIL

723. Sufficiency—Necessity and sufficiency of description of offence. Note, 38 L. R. A. (N. S.) 309.

726. Forfeiture—(3) Edwards v. Hennepin County, 116 Minn. 101, 133 N. W. 469 (relief from forfeiture—jurisdiction—notice of proceedings—effect of appearance by county attorney).

BAILMENT

728. **Definition—What constitutes**—(5) Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426 (an agreement between the defendant and the predecessor in title of the plaintiff, held one of bailment and not for the rental of storage space); Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971 (contract held a bailment with a power of sale and not a conditional sale—a bailment contemplates that the title shall not pass to the bailee, but remain in the bailor, and that the property shall return to the bailor, or be disposed of as he may direct).

731. **Contracts of hiring—Negligence—Measure of damages**—A written contract, by which plaintiff leased or hired to defendant certain horses for a specified term, construed, and held to have imposed upon defendant an absolute obligation to return the horses to plaintiff in as good condition as when received, and not as creating an ordinary bailment, imposing upon defendant the exercise of reasonable care. The measure of damages for the breach of such a contract by a return of the horses in an injured and damaged condition, whether the injury be permanent or temporary, is the difference between the value of the horses when delivered and their value when returned, the diminution in value, if any, being ing caused by the injury, and not the natural decline in the market value. Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301.

Liability of letter for negligence. 25 Harv. L. 660.

732. **Liability of bailee for negligence**—Proof of injury or loss makes out a prima facie case for the 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. Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

Where the proprietor of an automobile repair shop had notice that his foreman was possessed of proclivities rendering it likely that he would injure cars left at the shop for repairs, by taking them out at improper times and making unauthorized use of them, it was such proprietor's duty to exercise ordinary care to protect such cars from the danger of injury to which they were thus subjected. Action of the court, in an action for injury to an automobile in a collision which occurred while the foreman of the defendant's repair shop was using it for his own private purposes, in submitting to the jury the question as to whether the defendant was guilty of negligence in retaining such foreman in his employment, sustained. Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703.

(12) Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703 (admission of receipt and inability to return the property throws the burden on defendant of proving that he exercised due care). See Note, 43 L. R. A. (N. S.) 1168.

733. Liability of bailee for conversion—Neglect of a bailee to notify the bailor of a sale of the premises, where a gratuitous bailment is kept, is not a conversion, where no loss or misappropriation follows; nor is the advertising of goods for sale through mistake a conversion so long as there is no sale or loss or misappropriation; nor is the sale of a few articles which have in some manner become commingled with the bailor's goods a conversion of the whole stock, in the absence of evidence as to how the commingling took place. Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

(14) See Varney v. Curtis, 100 N. E. 650 (Mass.); 13 Col. L. Rev. 438.

See Digest, § 1935.

734. Excuses for non-delivery—(16, 17) Note, 33 L. R. A. (N. S.) 681.

734a. Effect of chattel mortgage—After the bailment of property, the bailor gave a note to the bailee in renewal of an old note, and secured it by a mortgage on the property bailed. The mortgage contained the usual printed clause to the effect that so long as the mortgagor performed the conditions of the mortgage he should remain in possession, and that in consideration thereof he agreed to keep the property in as good condition as it then was at his own cost and expense. Held, that such a provision in no way affects the liability of the mortgagee as bailee. Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

735a. Actions by bailor against third parties—A bailor may pursue his property and reclaim it, even in the hands of a good-faith purchaser from or under the bailee, unless estopped by his own conduct from causing loss to such purchaser. And this is equally true where property is consigned to a factor to sell, who wrongfully disposes of it to satisfy his own debt. Where the owner ships property to a factor and the factor wrongfully executes a bill of sale therefor to one having notice of his wrongdoing, and thereafter such vendee sells to another to whom he exhibits his bill of sale, and who without the production of the bill of lading and without knowing or inquiring the source of the factor's title, and without knowing or inquiring by whom or on what conditions the property had been shipped, takes it while still in the car in which it had been shipped to the factor, the owner is not estopped from reclaiming his property. Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971.

736. Actions by bailee—A bailee, though not liable to the bailor, may recover for the wrongful act of a third party resulting in the loss of, or injury to, the subject of bailment. If the bailee recovers he holds the proceeds as trustee for the bailor. A recovery by either a bailor or bailee bars an action by the other. Rogers v. Atlantic, G. & P. Co., 213 N. Y. 246, 107 N. E. 661.

(19) Grinnell-Collins Co. v. Illinois Central R. Co., 109 Minn. 513, 516, 124 N. W. 377. See 25 Harv. L. Rev. 655.

736a. Pleading—A complaint alleging that plaintiff intrusted money to defendant upon his promise to keep it safely and return it to plaintiff on demand, and that defendant converted the money to his own use and refused to repay the same to plaintiff on demand, held to state a cause of action ex contractu for a breach of the contract of bailment. Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090.

A complaint against a bailee for the destruction of the property bailed, where the bailment is reciprocally beneficial to the parties, must show negligence on the part of the bailee. St. Paul & Sioux City Ry. Co. v. Minneapolis etc. Ry., Co., 26 Minn. 243, 2 N. W. 700.

A complaint by an insurance company, standing in the shoes of a bailor under the doctrine of subrogation, against a bailee of an automobile for its destruction, held sufficient against objection first raised on appeal. Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703.

BANKRUPTCY

ACT OF 1898

737. Effect on state statute—(22) Moore v. Bettingen, 116 Minn. 142, 133 N. W. 561.

741a. Parties—Minors—A minor cannot be adjudged a bankrupt. Foot, Schulze & Co. v. Porter, 131 Minn. ——, 154 N. W. 1078.

742. By firm—It has been held that, when one of two members composing a partnership and the partnership have been adjudged bankrupt, the court may draw to itself and administer the property of the other member of the firm to the extent necessary to pay the partnership debts. But the converse does not hold true, namely, that where a member of a partnership has been adjudicated a bankrupt and a trustee is appointed, such trustee thereby acquires, or may acquire, the right to the partnership assets. He cannot recover an unlawful preference made by the firm. Foot, Schulze & Co. v. Porter, 131 Minn. ——, 154 N. W. 1078.

743. Preferences—Under section 60, subds. "a" and "b" of the Bankruptcy Act as amended (Act June 25, 1910, c. 412, § 11, subds. "a," "b," 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]), where an insolvent

debtor procures or suffers a judgment to be entered against himself within four months before the filing of the petition in bankruptcy, and the judgment then operates as a preference, the preference is not voidable by the trustee, unless it appears that the creditor, at the time the judgment was entered, had reasonable cause to believe that the enforcement of the judgment would effect a preference. Where, under the same sections, an insolvent debtor makes a transfer of any of his property, and the effect is a preference of any creditor, such preference is voidable by the trustee, and the amount thereof may be recovered, if it appears that the creditor receiving the preference had, at the time of the transfer, reasonable cause to believe that such transfer would effect a preference. Where a creditor procures a judgment against an insolvent debtor, and thereafter procures execution thereon to be issued and levied on personal property of the debtor, and at the execution sale such property is sold and the proceeds of the sale paid to the creditor in satisfaction of the debt, it is held that such execution sale and payment of the proceeds thereof constitutes a transfer of his property by the debtor, within the meaning of those words as used in the act. In determining whether the creditor had reasonable cause to believe a transfer by the debtor would effect a preference, facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor's solvency charge such person with all the knowledge he could have acquired by the exercise of reasonable diligence. Galbraith v. Whitaker, 119 Minn. 447, 138 N. W. 772.

R. L. 1905, § 3502, providing that "every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration," does not "require" a "recording or registering" within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 60, cls. "a," "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506); and hence, where a written assignment of a claim was actually made more than four months prior to the filing of a petition in bankruptcy by the assignor, it could not be avoided by the trustee in bankruptcy as being a preference under section 60, cls. "a," "b," though it was never filed. Telford v. Henrickson, 120 Minn. 427, 139 N. W. 941.

A creditor, by the garnishment of a debt, gets nothing more than an inchoate lien, and this inchoate lien can be perfected only by proceeding to judgment against the garnishee in the manner provided by statute. An inchoate lien by garnishment cannot be tacked to the lien of an execution on the judgment against the defendant, and levied upon the in-

debtedness owing by the garnishee, so as to make up the period of four months specified by sections 60a, 60b, 67c, and 67f of the Bankrupt Act of July 1, 1898 (30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]). The defendant brought suit against one Grossman on April 27, 1912, and garnisheed one Galbraith. Nothing further was done with the garnishment. On June 15, 1912, it took judgment against Grossman, and levied upon the debt due him by the garnishee. Grossman filed his petition in bankruptcy on September 14, 1912. Held, that the four months specified by the bankrupt act commenced to run in June, not in April, and that the trustee in bankruptcy could recover as a preference the money collected by the defendant on its execution. Marsh v. Wilson Bros., 124 Minn. 254, 144 N. W. 959.

(36) Citizens State Bank v. Brown, 110 Minn. 176, 124 N. W. 990 (chattel mortgage); National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879 (mortgage of firm property).

See Digest, §§ 755, 3852, 4591–4609.

744. Schedules—A private banker being on trial for receiving money on deposit when he was insolvent, the schedules of creditors, assets, and liabilities filed by him in involuntary bankruptcy proceedings are not admissible in evidence to prove insolvency, when objected to upon the ground that the effect would be to compel him to be a witness against himself. State v. Drew, 110 Minn. 247, 124 N. W. 1091.

In an action for fraud in the sale of stock in a corporation, the schedules of assets and liabilities made by the corporation more than four months after the alleged fraud, held inadmissible. Walsh v. Paine, 123 Minn. 185, 143 N. W. 718.

745. Title—Effect of bankruptcy—The title to the property involved in bankruptcy proceedings remains in the bankrupt until the appointment and qualification of the trustee; the title of the trustee, when appointed, relating back as of the date of the adjudication in bankruptcy. During the interval between the adjudication in bankruptcy and the appointment of the trustee, the vendor in an executory contract for the sale of land to the bankrupt may serve notice upon the bankrupt for the termination and cancellation of the contract for default in payment of the purchase price, as provided for by chapter 355, Laws 1909, and the notice so served and given is valid and effectual unless the result of fraud or collusion with the bankrupt and for the purpose of defeating the rights of creditors. Christopherson v. Harrington, 118 Minn. 42, 136 N. W. 289.

The bankrupt is not divested of his property by filing a petition in bankruptcy. He is still the owner, holding in trust, pending the appointment and qualification of the trustee, whose title then relates back to

the date of application. Until the election of the trustee, the bankrupt may sue on any cause of action possessed by him. Johnson v. Collier, 222 U. S. 538, overruling Rand v. Sage, 94 Minn. 344, 102 N. W. 864.

(42) See Johnson v. Collier, 222 U. S. 538; 25 Harv. L. Rev. 79.

746. Title of trustee—What passes—Funds of estate—The right to membership in a board of trade or stock exchange is property and passes to the trustee. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

The title of the trustee relates back to the date of the adjudication of bankruptcy. Christopherson v. Harrington, 118 Minn. 42, 136 N. W. 289. See 24 Harv. L. Rev. 396; 25 Id. 79; 9 Col. L. Rev. 88.

A trustee of one of the members of a firm, the firm not being adjudged a bankrupt, held not entitled to a certain fund arising from the sale of the business of the firm. Foot, Schulze & Co. v. Porter, 131 Minn. —, 154 N. W. 1078.

(43) See National Surety Co. v. Hurley, 130 Minn. 392, 153 N. W. 740.

747. Powers of trustee—Avoidance of fraudulent transfers—Under section 67e of the bankruptcy act of July 1, 1898, a trustee in bankruptcy cannot avoid a conveyance executed and delivered by the bankrupt more than four months prior to the filing of the petition, though such conveyance is filed for record within the four months period. Under section 70e of the bankruptcy law the trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided under the common law or the statutes of the state, whether such transfer is made within four months prior to the filing of the petition or not. Under the laws of this state, a creditor may avoid a transfer made with intent to hinder, delay, or defraud creditors. Such intent of the debtor is essential to the fraudulent character of the transfer. A voluntary conveyance is presumptively fraudulent as to existing creditors, but not conclusively so. Where the debtor is solvent, and retains sufficient property to amply satisfy the claims of existing creditors, in the absence of an actual intent to hinder, delay, or defraud creditors, such a transfer is valid. The definition of what constitutes "insolvency," contained in section 1, subd. 15, of the bankruptcy act does not control in determining whether a debtor was insolvent, so as to make a voluntary conveyance fraudulent under the laws of this state. Hence the exempt property of the debtor is not to be considered in determining the value of the assets retained. Nor is a debt that is amply secured by mortgage on the property conveyed to be included in determining whether the debtor has retained assets amply sufficient to satisfy existing claims. Underleak v. Scott, 117 Minn. 136, 134 N. W. 731.

The judgment of the federal court that a bankrupt is not entitled to a discharge, upon the ground that he has an interest in property standing in the name of his wife, is not res judicata in an action brought by the

trustee in bankruptcy against the wife to set aside the conveyance as a fraud upon creditors. Bradford v. Borg, 114 Minn. 387, 131 N. W. 373.

(44) Hempstead v. Leland, 111 Minn. 224, 126 N. W. 736; Way v. Ruff, 112 Minn. 57, 127 N. W. 564, 609; Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25; Telford v. Hendrickson, 120 Minn. 427, 139 N. W. 941.

748. Revival of discharged debt—(48) Note 135 Am. St. Rep. 377.

748a. Setoff and counterclaim—A setoff or counterclaim cannot be allowed in favor of any debtor of the bankrupt which is not provable against the estate. Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

A trustee suing a bailor on a debt owing the bankrupt may be met with a claim of damages for the breach of the contract of bailment, whether against the bankrupt bailee or against himself as trustee. Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

749. Discharge of bankrupt—Effect of judgment—Exceptions—The entry and docketing of a judgment against a bankrupt pending the bankruptcy proceedings and before the discharge of the bankrupt, becomes a valid lien upon real property of the bankrupt, which by reason of the homestead exemption at the time of the adjudication in bankruptcy did not pass to the bankrupt estate, but which was liable to the payment of the debt represented by the judgment, because not a part of the homestead when the debt was created; the homestead exemption having been enlarged by statute subsequent to the creation of the debt. The subsequent discharge of the bankrupt does not in such a case annul or extinguish the judgment, except so far as it imposes a personal liability upon the bankrupt. Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75.

It is the general rule that liens are not affected by the bankruptcy act and remain untouched by the bankrupt's discharge. This applies to a judgment lien. A judgment evidencing a lien is unaffected by a discharge except in so far as it imposes a personal liability on the bankrupt, the discharge being personal to the debtor. Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097. See Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

A mortgagor's discharge held not to bind his mortgagee in an action to restrain the foreclosure of a mortgage. Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

The discharge of a corporation does not discharge or extinguish the constitutional liability of its stockholders for the payment of its debts. Way v. Barney, 116 Minn. 285, 133 N. W. 801.

The judgment of the federal court that a bankrupt is not entitled to a discharge, upon the ground that he has an interest in property standing in the name of his wife, is not res judicata in an action brought by the trustee in bankruptcy against the wife to set aside the conveyance as a fraud upon creditors. Bradford v. Borg, 114 Minn. 387, 131 N. W. 373.

A judgment recovered against a bankrupt after the commencement of proceedings in bankruptcy and before his discharge is annulled thereby, and he has the absolute right, if not guilty of laches, to have further proceedings thereon perpetually enjoined, for he had no opportunity to plead in bar a discharge which had not then been granted. On the other hand, where the judgment is recovered after the discharge has been granted, no matter when the action was begun, it is valid and enforceable, for the bankrupt has had his opportunity to plead in bar his discharge. Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737.

(50) Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75; Way v. Barney, 116 Minn. 285, 133 N. W. 801; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

(51) Ziegler v. Suggit, 118 Minn. 74, 136 N. W. 411; Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737.

(54) Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508.

750. Exceptions from discharge—Fraud—The bankruptcy act makes an exception from discharge where property is obtained by false pretences or false representations. To bring a case within this provision it must appear that property of some kind, tangible or intangible, was obtained by the bankrupt. The mere fact that a liability arose in consequence of his fraud is not enough; the fraud must result in a loss of property to the creditor. Rudstrom v. Sheridan, 122 Minn. 262, 142 N. W. 313.

In determining whether a judgment represents a liability for obtaining money by false pretences or false representations, within the meaning of the provision of the bankruptcy act, excepting such a liability from release by a discharge of the debtor in bankruptcy, resort will be made to the pleadings and decision or verdict in the case. The complaint in this case stated a cause of action for breach of contract, and also alleged fraudulent representations. The jury returned a general verdict for plaintiff, and a special finding that defendant had not made fraudulent representations. Held, that this conclusively shows that the judgment entered on such verdict was not a liability for obtaining money by false pretences or false representations. Ziegler v. Suggit, 118 Minn. 74, 136 N. W. 411. See Ziegler v. Suggit, 129 Minn. 309, 152 N. W. 754.

A fact determined by a judgment cannot be controverted by the judgment creditor, to show that the judgment is not affected by the discharge in bankruptcy of the judgment debtor. Karger v. Orth, 116 Minn. 124, 133 N. W. 471.

(55) Karger v. Orth, 116 Minn. 124, 133 N. W. 471.

BANKS AND BANKING

IN GENERAL

764. Payment at banking house—(77) See Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010 (situs of debt for purposes of administration).

765a. Capital—Impairment—Assessment of stockholders—The directors of a state bank have no inherent authority to make an assessment upon the capital stock to make up a deficiency arising from the impairment of the capital; and such an assessment can be made only under a direction of the bank examiner, as authorized by R. L. 1905, § 3000 (G. S. 1913, § 6365). Upon the evidence it is held that the action of the bank examiner amounted, at the time this action to enjoin the enforcement of an assessment was commenced, to an informal, but sufficient, direction that the amount of a prior irregular assessment be collected and applied to restore the depleted capital. Slette v. Larson, 125 Minn. 263, 146 N. W. 1093.

POWERS AND LIABILITIES

773. Loan—Fraud—A complaint for fraud in procuring a loan from a bank to an insolvent person for the benefit of defendant held sufficient. Merchants & Miners State Bank v. Chisholm, 119 Minn. 459, 138 N. W. 682.

773a. Limit of loans to one person—The statute prescribes a limit to the amount which a bank may loan to a single individual. G. S. 1913, § 6358; Merchants & Miners State Bank v. Chisholm, 119 Minn. 459, 138 N. W. 682.

OFFICERS

776. Dealing with bank—Where a bank holds a note upon which its president and another are sureties and takes a renewal note executed by the principal only, it is not bound by an undisclosed agreement between the president and his cosurety that the renewal note should discharge and extinguish the original, and the trial court properly excluded evidence of such an agreement. State Bank v. Mutual Telephone Co., 123 Minn. 314, 143 N. W. 912.

777. Notice to officers notice to bank—(97) First Nat. Bank v. Persall, 110 Minn. 333, 125 N. W. 506, 675; First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980.

778. Authority of cashier—When a national bank passes into the hands of a receiver the authority of its cashier ceases. Kimball v. Marine Nat. Bank, 112 Minn. 450, 128 N. W. 678.

(1) Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 134 N. W. 510.

779. Fraud—Liability of bank—When a stock certificate is pledged with a bank, the act of an officer thereof in wrongfully appropriating the same to his own use is not the misappropriation of the bank to whose custody it was intrusted, even though the bank may be liable to the pledgor. Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 134 N. W. 510.

779a. False reports to superintendent of banks—The statute makes it a felony for an officer of a bank to withhold any information called for by the superintendent of banks for the purpose of examination and ascertaining the true condition of the bank. If the president of a bank makes a false report in response to a call made by the superintendent of banks for information upon specific facts, the offense is committed. It is his business to know whether the reports he makes are true or false. He cannot be heard to say that he possessed no knowledge of the truth or falsity of the reports. State v. Sharp, 121 Minn. 381, 141 N. W. 526.

DEPOSITS

780. Relation of bank and depositor—Debtor and creditor—(6) Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 224.

781. Passbook—Effect of entry—Balancing—Duty of depositor to inspect—(7, 8) Note, 134 Am. St. Rep. 1019; L. R. A. 1915D, 741.

782. Title to checks and drafts deposited—The controversy being whether certain money paid by the drawee to the collecting bank on a draft payable to the order of the forwarding bank belonged to the creditor who made the draft or to the payee bank, held, the evidence was sufficient to sustain the trial court in finding that the money belonged to the creditor and that the bank had no interest in it. Gray v. Allen, 115 Minn. 113, 131 N. W. 1012.

Where checks are forwarded by a depositor to a bank, in lieu of previously dishonored checks, and to cover an overdraft created thereby, and they are so indorsed as to confer upon the bank the legal title, though they are entered by the bank for collection only, there is created an agency coupled with an interest, which confers upon the bank the right to hold the checks and their proceeds until its debt is paid. This interest of the agent cannot be divested or prejudiced by any act of the principal. If there is nothing but a delivery of checks for collection,

without indorsement, and if they arise out of a transaction entirely independent of the overdraft, the bank has a banker's lien thereon to the extent of the overdraft, with a right to hold the paper until its debt is paid. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

Where the indorsement is unrestricted, but there is an agreement that the indorsee is in fact merely an agent for collection, that fact may be shown, and if the agency is a naked agency to collect, the indorser may revoke the agency and make a settlement with the drawer of the checks. Where the agency is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, the agency is irrevocable. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

(9) Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178. See Note, 47 L. R. A. (N. S.) 552; 47 Am. St. Rep. 389; 86 Id. 775.

784. Deposit as collateral security—(12) See 25 Harv. L. Rev. 558.

785. Deposit of note—Discount or purchase by bank—Bona fide purchaser—One H sold certain notes to defendant bank. The bank placed the purchase price to the credit of the deposit account of H. After honoring checks for a part of the amount the bank refused to make further payments. An assignee of H held entitled to recover the balance of the deposit with interest. A claim of a surrender of the right to draw further on the deposit held not sustained by the evidence. Judgment was obtained against the makers of the notes, and then compromised; both H and the bank consenting. Defendant's claim that, as part of this compromise, H surrendered his right to receive the purchase price of the notes, is not sustained by the evidence. H was originally a guarantor of the notes sold. His assent to the compromise could not diminish his right to recover the amount of the original consideration for their sale, in the absence of assertion by the bank of some rights under the guaranty. Zwiener v. First State Bank, 131 Minn. ——, 154 N. W. 615.

(13) First Nat. Bank v. Persall, 110 Minn. 333, 125 N. W. 506, 675.

787. Application of deposit by bank—Setoff—The general rule is that a bank holding an unmatured note of a depositor may, upon his insolvency, offset the deposit against the note, but this rule does not apply against third parties in whose favor a deposit is impressed with a trust, at least if the bank had notice of the trust or all the equities are in favor of the third parties. Platts v. Metropolitan Nat. Bank, 130 Minn. 219, 153 N. W. 514. See, as to lien of bank, Note, 111 Am. St. Rep. 419.

(18) See Digest, § 3984.

787a. Special deposit—Payment—Notice to bank—The fact that a bank draft issued by a small village bank was made payable to the order of the defendant bank is held sufficient to put the defendant bank on inquiry as to the ownership of the proceeds before paying the same to the person presenting the draft. Bjorgo v. First Nat. Bank, 127 Minn. 105, 149 N. W. 3.

RECEIVING DEPOSITS WHEN INSOLVENT

790. Criminal liability—(21) State v. Drew, 110 Minn. 247, 124 N. W. 1091 (charge as to knowledge of insolvency held erroneous—schedules in bankruptcy held inadmissible to prove insolvency).

COLLECTIONS

791. Liability for default of subagent—(22) See 5 Mich. L. Rev. 109; Note, 52 L. R. A. (N. S.) 608.

792. Negligence in selecting subagent—(23) Note, 52 L. R. A. (N. S.) 608.

794. Accounting for collections—The evidence sustains the findings of the trial court that certain cattle shipped from Montana to Chicago belonged to the plaintiff, and that he was entitled to recover the proceeds thereof, received by the defendant bank, though the bank had made a colorable, but not actual, transfer thereof to a receiver, an officer of the bank, claiming to be entitled thereto. Larson v. First Nat. Bank, 125 Minn. 275, 146 N. W. 1097.

STOCKHOLDER'S LIABILITY

795. Nature and extent—The stockholder's liability created by section 3, art. 10, of the state constitution constitutes a reserve or trust fund for the benefit of creditors, and is enforceable only in sequestration or insolvency proceedings, in which all creditors are afforded an opportunity to be heard. The liability is not discharged by the payment of an assessment upon the stock levied pursuant to orders given by the public examiner, acting under the provisions of section 3000, R. L. 1905; the assessment having been ordered on account of an impairment of the bank's funds, and to enable it to reopen its doors and continue its banking business. Nor will the voluntary payment by a stockholder of the full quota of his liability to a particular creditor of the corporation relieve him from the payment of an assessment duly made in liquidation proceedings. Northwestern Trust Co. v. Bradbury, 117 Minn. 83, 134 N. W. 513.

796. Constitutional provisions—(30) Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

798. Single liability—(36, 37) Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

802. How enforced—The constitutional liability is enforceable only in sequestration or insolvency proceedings, in which all creditors are afforded an opportunity to be heard. Northwestern Trust Co. v. Bradbury, 117 Minn. 83, 134 N. W. 513.

803. Liability of transferrer of stock—Statute—If a corporation becomes insolvent and proceedings are instituted for the sequestration of its property within a year after entry of a stock transfer, a cause of action accrues in favor of creditors against the transferrer for the debts existing at the time of such transfer, which may be enforced at any time within six years after it so accrues. Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

(58) Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

NATIONAL BANKS

823. Insolvency—Receiver—When a bank passes into the hands of a receiver the authority of its cashier ceases. Kimball v. Marine Nat. Bank, 112 Minn. 450, 128 N. W. 678.

TRUST COMPANIES

824. Statutory restrictions—Loans to officers—(86) Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

BASTARDY

IN GENERAL

826. Legitimation—G. S. 1913, § 7240, providing that an illegitimate child shall inherit from the person who, in writing, before a competent attesting witness, shall have declared himself to be his father, impliedly requires that the person making the declaration shall be the real father. Williams v. Reid, 130 Minn. 256, 153 N. W. 593.

A "competent attesting witness," under the provisions of section 7240, G. S. 1913, is a competent witness, who, at the request of the person making the writing containing the declaration of legitimacy, subscribes the same as such witness. Williams v. Reid, 130 Minn. 256, 153 N. W. 324.

PROCEEDINGS TO CHARGE FATHER

840. Evidence—Sufficiency—(18) State v. Snow, 130 Minn. 206, 153 N. W. 526.

BIGAMY

853. What constitutes—A voidable marriage is sufficient upon which to base a prosecution for bigamy, and the fact that the contract is voidable is no defence. On the other hand a void marriage is a good defence. State v. Yoder, 113 Minn. 503, 130 N. W. 10.

(49) See State v. Gieseke, 125 Minn. 497, 147 N. W. 663; Note, 126 Am. St. Rep. 201.

856. Proof of marriage—(52) Note, 47 Am. St. Rep. 228.

BILLS AND NOTES

NATURE AND REQUISITES

862. Must be unconditional—(59) Conditions destroying negotiability. Note, 125 Am. St. Rep. 192.

865. Certainty as to amount—(67–69) See G. S. 1913, § 5814. L. R. A. 1915B, 928.

867. Payable out of particular fund—(76) See G. S. 1913, § 5815; 7 Col. L. Rev. 216.

868. Seal—(77) See G. S. 1913, § 5818.

869. Consideration—Presumption—(79) Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637; Dowagiac Mfg. Co. v. Van Valkenburg, 111 Minn. 1, 126 N. W. 119; West Coast Co. v. Bradley, 111 Minn. 343, 127 N. W. 6; Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142; Latzke v. Albrecht, 113 Minn. 322, 129 N. W. 508; Montgomery v. Grenier, 117 Minn. 416, 136 N. W. 9; Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870.

(80) Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 224.

(82) Smith & Dixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637.

See Digest, §§ 1750–1773.

871. Effect of mortgage—(89) See Guilford v. Minneapolis etc. Ry. Co., 48 Minn. 560, 51 N. W. 658; Note, 32 L. R. A. (N. S.) 858.

879. Conditional delivery—(8) Note 128 Am. St. Rep. 609.

882. Construction—Uniformity to be sought—(14) Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783.

See G. S. 1913, § 5829.

886a. Orders for payment of money—Action to recover on a written order given plaintiffs by a debtor to pay the amount thereof out of the proceeds of an auction sale of the debtor's property, which sale was to

be held in the future and to be conducted by defendant bank. Held, the evidence shows an agreement by defendant, made when the order was presented, to pay the same out of the proceeds of the sale after the claims which the debtor, prior to the presentation of plaintiff's order, had ordered defendant to pay. The evidence was sufficient to support a finding by the jury that plaintiff's order was presented before certain other claims were ordered by the debtor to be paid. Defendant, as a stakeholder, was not responsible for the validity of the claims it was ordered to pay. The evidence was insufficient to show that defendant knew that certain claims were fictitious, and fraudulently conspired with their owners to dissipate the proceeds of the sale so as to prevent the payment of plaintiff's order. It was error to submit this question to the jury. It was error to instruct the jury that if such claims were fictitious "in whole or in part," to the knowledge of defendant, plaintiffs could recover the full amount of their claim. The owners of the claims, the priority and validity of which are in controversy, should be made parties to this litigation. Plaintiffs are the real parties in interest. Vollmer v. Big Stone County Bank, 127 Minn. 340, 149 N. W. 545.

ACCEPTANCE OF BILL OF EXCHANGE

893. Effect as assignment of fund—(33) See G. S. 1913, § 5939; Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 224.

894. Who may sue on acceptance—(34) See Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

895. Promise to accept—(35) See Oil Well Supply Co. v. Mac Murphey, 119 Minn. 500, 138 N. W. 784.

895a. Contract to honor draft—One Hukill, residing in Pittsburgh, Pa., sent a telegram to the defendant, a resident of this state, reading: "Will you wire me that you will honor draft for $300?" Defendant telegraphed back, "I will." Thereupon Hukill presented draft for $300, drawn on defendant to Hukill's order, and the two telegrams, to plaintiff, which purchased the draft on the strength of the telegrams. Held, that the telegrams created an agreement on the part of defendant to honor the draft. As against plaintiff, the purchaser of the draft, defendant could not show that Hukill had failed to comply with the condition upon which defendant had consented to telegraph his agreement to honor Hukill's draft; there being no proof, or offer to prove, that plaintiff knew of the arrangement between Hukill and defendant. Oil Well Supply Co. v. Mac Murphey, 119 Minn. 500, 138 N. W. 784.

PRESENTMENT FOR PAYMENT

897a. Instrument must be exhibited—Demand over telephone insufficient—Presentment of a note and demand of payment must be made by actual exhibition of the instrument itself, or at least, the demand should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case. While it may not be necessary to actually produce the note if the maker refuses to pay it, it must be at the place for presentment, otherwise the presentment is insufficient. Hence a demand over the telephone on the maker, at the place specified in the note, is not sufficient. Gilpin v. Savage, 201 N. Y. 167. See G. S. 1913, § 5886.

PAYMENT

903. To whom—A payee who gives his agent credit with the payor, by employing him to obtain the obligation and allowing him to retain possession of it, clothes him with apparent authority to receive the payments of interest and principal according to the tenor of the instrument. McMahon v. German-Am. Nat. Bank, 111 Minn. 313, 127 N. W. 7.

See Digest, § 6262.

908. Forged bill—(65) See Digest, § 999; Note, 10 L. R. A. (N. S.) 49.

912. Payment—What constitutes—(82) National Bank of Commerce v. Jessup, 121 Minn. 458, 141 N. W. 525 (finding of payment sustained—defendant having testified to the payment of the note to the president of the plaintiff bank it was not error to instruct the jury that if they found defendant did not make the payment to the president, but in fact paid the note to the bank, defendant was entitled to a verdict).

TRANSFERS WITHOUT INDORSEMENT

929. By delivery—In an action on certain notes, held, that upon payment the collecting agent of the payee was authorized to deliver the notes to the plaintiff; that such delivery, though without indorsement, transferred the legal title; and that the plaintiff was entitled to recover of the defendant the amount which he paid, subject to such defences as the defendant had against the payee. Kiefer v. Tolbert, 128 Minn. 519, 151 N. W. 529.

(22) Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037.

931. Liability of transferrer—(28) See G. S. 1913, § 5861; Note, 10 L. R. A. (N. S.) 510.

INDORSEMENT

932. Definition—The term "indorse" has a well defined technical meaning and imports everything necessary to pass the legal title from the indorser to the indorsee. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

933. What constitutes—Validity—Misnomer—A note was executed and delivered to the Northland Motor Car Company, but the word "Car" was omitted from the name of the payee. In discounting the note, the true name of the payee was indorsed. Held, that the variance or omission was not fatal to a valid indorsement under the law merchant. First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139.

936. For collection—An unrestricted indorsement of a check confers on the indorsee the legal title and the right to sue thereon, though the check is taken for collection. If the indorsement is restricted by the words, "for collection," no right to sue is conferred. Where the indorsement is unrestricted, but there is an agreement that the indorsee is in fact merely an agent for collection, that fact may be shown, and if the agency is a naked agency to collect, the indorser may revoke the agency and make a settlement with the drawer of the checks. Where the agency is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, the agency is irrevocable. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

(35) Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

937. Without recourse—(36) See G. S. 1913, § 5850; Note, 134 Am. St. Rep. 993.

943. Indorser surety to preceding parties—Release—(51) Note, 18 L. R. A. (N. S.) 530.

948. By payee—(64) Burwell v. Gaylord, 119 Minn. 426, 138 N. W. 685.

BONA FIDE PURCHASERS

951. What is due course—To render one a bona fide purchaser he must have acquired the note in the due course of business. This includes a valid indorsement to the holder before maturity, where the note is payable to order. Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037; First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139.

(70) Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037.

(73) Cole v. Johnson, 127 Minn. 291, 149 N. W. 466.

952. Who is a purchaser for value—Banks—Deposit accounts—While a mere credit entry upon the books of a bank does not of itself amount to the payment of a valuable consideration, the withdrawal by check of a substantial part of the amount so credited is such payment. First Nat. Bank v. Persall, 110 Minn. 333, 125 N. W. 506, 675.

A bank, which, upon discounting its customer's negotiable paper, places the amount to the credit of the customer's deposit or checking account, does not become a purchaser for value until the credit so given is exhausted by payment of checks drawn against such account. In determining whether such credit has been exhausted, the rule is to be applied that, as checks are paid, the amount is to be charged against the oldest item of deposit or credit of the customer. First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139.

(76) Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080; German-American State Bank v. Lyons, 127 Minn. 390, 149 N. W. 658.

953. Good faith—Negligence—(80) Pennington County Bank v. First State Bank, 110 Minn. 263, 125 N. W. 119; Park v. Winsor, 115 Minn. 256, 132 N. W. 264. See G. S. 1913, § 5868.

(82) Note, 44 L. R. A. (N. S.) 395.

956. Payment of valuable consideration evidence of good faith—Want of notice may be inferred from the payment of a valuable consideration, where the transaction occurs in the ordinary course of business and is free from suspicious circumstances. Cole v. Johnson, 127 Minn. 291, 149 N. W. 466.

957. Rights of bona fide purchaser—It is only where a defence arises before indorsement that the question whether the plaintiff is an indorsee for value within the law merchant becomes material. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

961. Purchaser with notice from innocent holder—(97) Note, 50 L. R. A. (N. S.) 74, 83.

962. Law and fact—(98) Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037: Cole v. Johnson, 127 Minn. 291, 149 N. W. 466.

963. Held bona fide purchasers—(1) Pennington County Bank v. First State Bank, 110 Minn. 263, 125 N. W. 119; First Nat. Bank v. Persall, 110 Minn. 333, 125 N. W. 506, 675; First Nat. Bank v. Segerstrom, 116 Minn. 226, 133 N. W. 564; First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139; German-American State Bank v. Lyons, 127 Minn. 390, 149 N. W. 658; First Nat. Bank v. Webster, 130 Minn. 277, 153 N. W. 736.

964. Held not bona fide purchasers—(2) Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637; Park v. Winsor, 115 Minn. 256, 132 N. W. 264; City Nat. Bank v. Winsor, 116 Minn. 422, 133 N. W.

961; Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037; Schlemmer v. Nelson, 123 Minn. 66, 142 N. W. 1041; First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980.

OVERDUE PAPER

965. When paper is overdue—(5) See Israel v. N. W. Nat. Life Ins. Co., 111 Minn. 404, 127 N. W. 187 (instalment note for insurance premium—effect of default in part of instalments in dishonoring remainder).

967. Subject to what defences and setoffs—(7) American Seeding Co. v. Holzbauer, 117 Minn. 278, 135 N. W. 807.

ACCOMMODATION PAPER

969. What constitutes—Want of consideration is an element of accommodation paper. Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111.

(11) First Nat. Bank v. Flour City Trunk Co., 118 Minn. 151, 136 N. W. 563 (notes of corporation executed by officer without authority held not strictly accommodation paper).

970. Corporation paper—(12) First Nat. Bank v. Flour City Trunk Co., 118 Minn. 151, 136 N. W. 563. See Digest, § 2010; Note, 9 L. R. A. (N. S.) 193.

975. Not binding till negotiated—Revocation—(18) Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111.

977. Parol evidence—(20) Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785.

979. Rights of bona fide holders—(22) National Citizens Bank v. Thro, 110 Minn. 169, 124 N. W. 965.

(23) Noyes v. Ostrom, 113 Minn. 111, 115, 129 N. W. 142.

980. Pleading—(26) Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111 (answer held to state a valid defence of want of consideration and that the note involved was an accommodation note).

CHECKS

981. Nature—(30) Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792.

982. Effect as assignment of fund—Liability of bank to holder—A check on a bank in which the drawer has funds subject to check is an assignment of such funds of the drawer to the amount of the check, which assignment is complete as between the drawer and payee when the check is given, and complete as between the payee or holder and the bank when the check is presented for payment. Upon such presentation, the bank,

unless its right to pay has been taken away by some occurrence before presentation, is legally bound to pay the check. Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 224; Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783. The rule is now otherwise by statute. G. S. 1913, § 6001. See Glennan v. Rochester Trust & Safe Deposit Co., 209 N. Y. 12, 102 N. E. 537; 25 Harv. L. Rev. 660.

But see 5 ALR 1667 no 1667

984a. Indorsement—Authority to sue—Revocation—An unrestricted indorsement of a check confers on the indorsee the legal title and the right to sue thereon, though the check is taken for collection. If the indorsement is restricted by the words, "for collection," no right to sue is conferred. Where the indorsement is unrestricted, but there is an agreement that the indorsee is in fact merely an agent for collection, that fact may be shown, and if the agency is a naked agency to collect, the indorser may revoke the agency and make settlement with the drawer of the checks. Where the agency is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, the agency is irrevocable. A finding that checks were indorsed and delivered to the plaintiff imports everything necessary to pass the legal title from the indorser to the indorsee. A finding of "ownership" in express terms is in such case not necessary to support a judgment. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

986. Necessity of presentment and notice of dishonor—(39) G. S. 1913, §§ 5901, 5998; Note, 17 Am. St. Rep. 807.

987. Time of presentment—(40) See G. S. 1913, § 5998.

993. Death of drawer—Payment by bank before notice—A bank which, in due course of business and without notice, pays a check of a depositor after his death, is not liable to his personal representative for the amount so paid. Glennan v. Rochester Trust & Safe Deposit Co., 209 N. Y. 12, 102 N. E. 537. See Note, 43 L. R. A. (N. S.) 109.

995a. Stopping payment—The drawer of a check may stop payment thereof by due notice to the drawee bank before it is presented for payment. Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783.

997. Wrong payment by bank—Negligence—Unauthorized indorsements—A bank, paying a check upon the unauthorized indorsement of the payee and charging the amount thereof to the drawer's account becomes liable to the payee for the amount of such check, unless the conduct of the payee excuses such payment, or prevents him from asserting such liability. McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542. See McMahon v. German-American Nat. Bank, 111 Minn. 313, 127 N. W. 7 (payment of certificate of deposit to wrong person—payment to guardian).

998a. Certified checks—See G. S. 1913, §§ 5998, 5999; Note, 128 Am. St. Rep. 691.

999. Forged checks—The liability of a bank to a depositor in case of the payment of a forged or raised check is now regulated by statute. G. S. 1913, §§ 6378, 6379.

(56) Pennington County Bank v. First State Bank, 110 Minn. 263, 125 N. W. 119. See Woodward, Quasi Contracts, §§ 80–92; Note, 94 Am. St. Rep. 641; 10 L. R. A. (N. S.) 49.

1000. Pleading—An allegation that the plaintiff is the owner will admit proof of any legal title. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

An answer alleging that payment of the check sued upon had been stopped, held not demurrable. Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783.

(58) By virtue of statute it may now be necessary to allege notice of dishonor. See G. S. 1913, § 5997.

CERTIFICATES OF DEPOSIT

1001. Nature—(62, 63) Note, 75 Am. St. Rep. 43.

PAROL EVIDENCE

1011. To vary terms of contract—Parol evidence held inadmissible to vary a clause in a note giving the "privilege of increasing or decreasing insurance on first payment." Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870.

(76) National Citizens Bank v. Thro, 110 Minn. 169, 124 N. W. 965.

(83) Security Nat. Bank v. Pulver, 131 Minn. ——, 155 N. W. 641.

1012. To vary indorsement—(89) Burwell v. Gaylord, 119 Minn. 426, 138 N. W. 685.

1013. Held admissible—(3) Farmers Supply Co. v. Weis, 115 Minn. 428, 132 N. W. 917; Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111.

(95) Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785. See Digest, § 977.

DEFENCES

1014. Alteration—Cancelation—That one of the makers of a note drew ink lines through the signatures of three other makers without the consent of the payee held not a cancelation of the note as to them. Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501.

(4) See Bakke v. Melby, 119 Minn. 504, 138 N. W. 950; Chippewa County State Bank v. Haubris, 123 Minn. 530, 143 N. W. 1123. The subject is now regulated by statute. G. S. 1913, §§ 5936, 5937.

1015. Extension of payment—The burden of proof as to a renewal of notes and extension of time of payment held on the defendant. Marquette Nat. Bank v. Stearns, 111 Minn. 218, 126 N. W. 726.

1016. Failure of consideration—(6) Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792 (burden of proof); Schlemmer v. Nelson, 123 Minn. 66, 142 N. W. 1041 (failure to convey a marketable title to realty).

(9) Galbraith v. McDonald, 123 Minn. 208, 143 N. W. 353 (note for stock subscription—subsequent bankruptcy of corporation not a failure of consideration).

1017a. Renewal note—Burden of proof as to renewal of notes and extension of time of payment held on defendant. Marquette Nat. Bank v. Stearns, 111 Minn. 218, 126 N. W. 726.

1018. Fraud—The common-law rule that the fraud of the payee of negotiable instruments in securing its execution and the knowledge thereof by the purchaser before maturity is a good defence to an action against the maker was not modified nor repealed by section 2747, R. L. 1905. That section created a new and different defence in cases where the signature to the negotiable instrument was fraudulently obtained by trick or artifice as to the nature and terms of the contract, and where the maker did not believe the paper signed to be a negotiable instrument and was not negligent in signing it without knowledge of its terms. Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940.

In an action on a promissory note by an innocent purchaser for value, where the maker signed the note knowing that it was a contract of some kind, and that it contained blank spaces to be filled in, though not knowing that the instrument was a promissory note, and the blanks are thereafter filled in by the payee with the amount of the note, negligence on the part of the maker prevents a defence based upon the unauthorized or fraudulent filling in of the blanks. Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911.

The defences of fraud and breach of warranty are not inconsistent. Minneapolis Threshing Machine Co. v. Peters, 112 Minn. 429, 128 N. W. 578.

(13) First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980; Iowa Mausoleum Co. v. Johnson, 123 Minn. 526, 143 N. W. 1135.

(14) Hinkley v. Freick, 112 Minn. 239, 242, 127 N. W. 940; Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080; German-American State Bank v. Lyons, 127 Minn. 390, 149 N. W. 658.

1019. Fraud in procuring signature—Statute—The statute creates a new defence. It does not affect the common-law rules as to the effect of fraud. Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940.

(16) Minneapolis Brewing Co. v. Grathen, 111 Minn. 265, 126 N. W. 827; Farris v. Koplau, 113 Minn. 397, 129 N. W. 770; Freick v. Hinkley,

122 Minn. 24, 141 N. W. 1096; Johnson County Sav. Bank v. Weiby, 126 Minn. 42, 147 N. W. 823. See Schmidt v. Bank of Commerce, 234 U. S. 64.

(17) Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911; Johnson County Sav. Bank v. Weiby, 126 Minn. 42, 147 N. W. 823.

(18) Johnson County Sav. Bank v. Weiby, 126 Minn. 42, 147 N. W. 823.

(19) Minneapolis Brewing Co. v. Grathen, 111 Minn. 265, 126 N. W. 827; Farris v. Koplau, 113 Minn. 397, 129 N. W. 770; Johnson County Sav. Bank v. Weiby, 126 Minn. 42, 147 N. W. 823.

(20) Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911; Johnson County Sav. Bank v. Weiby, 126 Minn. 42, 147 N. W. 823.

1019a. Intoxication—Where defendant executed a promissory note for a valid pre-existing debt, and, for at least five years after full knowledge of the transaction, recognized the note as valid and repeatedly promised to pay it, he cannot thereafter interpose as a defence thereto that he was intoxicated when he signed it, and testimony to prove such intoxication may properly be stricken from the record. Matz v. Martinson, 127 Minn. 262, 149 N. W. 370.

1022. Estoppel—(34) Dowagiac Mfg. Co. v. Van Valkenburg, 111 Minn. 1, 126 N. W. 119 (evidence held to show no elements of estoppel).

1028. Breach of warranty—The defences of fraud and breach of warranty are not inconsistent. Minneapolis Threshing Machine Co. v. Peters, 112 Minn. 429, 128 N. W. 578.

ACTIONS

1034. Parties plaintiff—An unrestricted indorsement of a check confers on the indorsee the legal title and the right to sue thereon, though the check is taken for collection. If the indorsement is restricted by the words, "for collection," no right to sue is conferred. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

See Digest, § 7315.

1036. Complaint—An allegation that the plaintiff is owner is sustainel by proof of any legal title. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

In an action on a duebill given for the price of certain lumber, the duebill to be payable within 15 days after patent issued from the United States, a complaint not alleging the issuance of the patent, but alleging that the duebill "is now due and payable," was an insufficient allegation of performance of conditions precedent. Vachon v. Nichols-Chisholm Lumber Co., 111 Minn. 45, 126 N. W. 278.

(89) Burwell v. Gaylord, 119 Minn. 426, 138 N. W. 685.

(92) Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

See Dunnell, Minn. Pl. 2 ed. §§ 557–564.

1037. Answer—Action on two notes the payment of which defendant guaranteed. Answer held to state a counterclaim for breach of warranty. Reeves & Co. v. Boyd, 114 Minn. 378, 131 N. W. 336.

An answer held to state a valid defence of want of consideration and that the note involved was an accommodation note as between the parties. Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111.

(5) Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785.

See Dunnell, Minn. Pl. 2 ed. §§ 565–568.

1038. Issues—Evidence admissible under pleadings—(17) Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940 (held error to exclude evidence of knowledge by the purchaser concerning fraudulent means employed in obtaining the signature).

1039. General denial—Evidence admissible under—(18) Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637.

1040. Burden of proof—Burden of proof as to renewal of notes and extension of time of payment held on the defendant. Marquette Nat. Bank v. Stearns, 111 Minn. 218, 126 N. W. 726.

Burden of proof as to the insolvency of the makers of certain instalment premium notes held on the defendant, though some of the instalments were due and unpaid. Israel v. N. W. Nat. Life Ins. Co., 111 Minn. 404, 127 N. W. 187.

A check imports a consideration and the burden of proving the want of it is on the defendant. Wasgatt v. First Nat. Bank, 117 Minn. 9, 134 N. W. 224.

(19) Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637; First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139 (note discounted by plaintiff bank before maturity and placed to the deposit account of the payee, a customer of the bank—evidence disclosed no defence to the note except such as arose from an alleged breach of warranty in the sale of an automobile for which the note was given in part payment—general rule applied and held that the burden was on defendant to prove that plaintiff was not a bona fide holder); Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080 (general rule applies to holder for security); Presidio County v. Noel Young B. & S. Co., 212 U. S. 58.

(20) Park v. Winsor, 115 Minn. 256, 132 N. W. 264; Marotta v. Duluth News Tribune Co., 116 Minn. 51, 133 N. W. 89; City Nat. Bank v. Winsor, 116 Minn. 422, 133 N. W. 961; Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037; First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980; Ludowese v. Amidon, 124 Minn. 288, 293, 144 N. W. 965;

Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080; Cole v. Johnson, 127 Minn. 291, 149 N. W. 466.

(22) Cole v. Johnson, 127 Minn. 291, 149 N. W. 466.

(23) Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792.

(25) Cole v. Johnson, 127 Minn. 291, 149 N. W. 466.

1041a. Findings—Sufficiency—A finding that checks were indorsed and delivered to the plaintiff imports everything necessary to pass the legal title from the indorser to the indorsee. A finding of "ownership" in express terms is in such case not necessary to support a judgment. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

1042. Amount of recovery—In an action involving an account between a wholesale merchant and a retail firm, there being an issue as to whom certain goods for which the note was given were sold, the amount of recovery held proper. M. E. Smith & Co. v. Meeker, 123 Minn. 441, 143 N. W. 1132.

(35) See Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080.

BONDS

1047. Requisite number of sureties—R. L. 1905, §§ 4523, 4524, prescribing the requirements of official bonds as to the number of sureties and their justification, have no application to bonds other than statutory official bonds. Blied v. Barnard, 120 Minn. 399, 139 N. W. 714.

1049. Justification of sureties—R. L. 1905, §§ 4523, 4524, prescribing the requirements of official bonds as to the number and justification of sureties, have no application to bonds other than statutory official bonds. Blied v. Barnard, 120 Minn. 399, 139 N. W. 714.

1052. Approval—Bond satisfactory to a party—Where a bond is to be "satisfactory" to a party he cannot reject it arbitrarily. But though it is sufficient in form and substance the conditions may be such under the agreement that he may reject it, and his right to do so may be a question for the jury. Blied v. Barnard, 116 Minn. 307, 133 N. W. 795; Id., 120 Minn. 399, 139 N. W. 714; Id., 126 Minn. 159, 147 N. W. 1095.

Under an agreement to furnish a bond that would be satisfactory to a party and subject to his approval, held, that a tendered bond was a good and sufficient bond, but that it was a question for the jury whether the party was justified in refusing to accept it. Blied v. Barnard, 120 Minn. 399, 139 N. W. 714.

1054. Extent of liability—(54) See United States v. United States Fidelity & Guaranty Co., 236 U. S. 512 (liability of surety for interest).

1056. Statutory bonds—Validity—Construction—A statutory bond, containing the statutory condition and also other conditions, will be so construed as to give effect to the statutory condition, unless the language of the bond precludes such construction. Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

Statutory bonds must be construed in the light of the statute creating the obligations intended to be secured, and either extended or restricted in scope, as the case may be, to cases contemplated by the statute, unless violence thus be done to the language of the bond. Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255. See Lynch v. Brennan, 131 Minn. —, 154 N. W. 795.

(59) Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

(60) Waterous Engine Works Co. v. Clinton, 110 Minn. 267, 125 N. W. 269; First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

(64) Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

(65) Waterous Engine Works Co. v. Clinton, 110 Minn. 267, 125 N. W. 269.

1057a. Pleading—An admission in an answer that the defendant executed a bond sued on, in the form and manner set out in the complaint, carries with it an admission of all that is essential to a valid execution of the bond, with the terms contained therein, including the full authority of the agents by whom it was executed. First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

See Dunnell, Minn. Pl. 2 ed. § 570.

BOUNDARIES

1059. Reference to plats—Where a definite tract of land is platted and subdivided into lots of regular and specified dimensions, leaving at the end a remnant or irregular tract not sufficient from which to form a lot of the character of those laid out, and the plat indicates the size of all lots, including the irregular tract, and it subsequently appears that there is a deficiency of land to accord to each of the regular lots the dimension indicated by the plat if the irregular tract retains the area given to it, thus disclosing a clear mistake on the part of the person platting the land, the deficiency must fall upon the irregular tract, and not upon the regular and uniform lots. The same rule would apply in the case of an excess of land. Barrett v. Perkins, 113 Minn. 480, 130 N. W. 67.

Where land is described as a numbered lot of a plat the description by lot will prevail over bounds. Moore v. Minneapolis & St. P. S. R. Co., 129 Minn. 237, 152 N. W. 405.

Plats of unofficial surveys held admissible in action to restrain trespasses. Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094.

(72) Moore v. Minneapolis & St. P. S. R. Co., 129 Minn. 237, 152 N. W. 405.

(74) Arms v. Owatonna, 117 Minn. 20, 134 N. W. 298.

1060. Courses and distances—(83) Note, 129 Am. St. Rep. 990.

1061. Monuments and natural boundaries—The rule that monuments control courses and distances is merely a rule of construction to ascertain the intention, and, where the intention is otherwise plainly manifested, such rule may be disregarded. Green v. Horn, 207 N. Y. 489, 101 N. E. 430.

(87) Obert v. Otter Tail County, 122 Minn. 20, 141 N. W. 810; Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089 (county road). See White v. Jefferson, 110 Minn. 276, 124 N. W. 373 (street); Arms v. Owatonna, 117 Minn. 20, 134 N. W. 298; Wilson v. Palmgren, 125 Minn. 519, 145 N. W. 1077; Note, 129 Am. St. Rep. 990.

1065. Highways—Under a deed conveying lots upon a street that has been vacated the grantee does not take any of the land within the former street unless such intent is clearly disclosed in the deed. White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 641, 125 N. W. 262; White v. Coburn, 114 Minn. 213, 130 N. W. 1028; Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110; White v. Hewitt, 119 Minn. 340, 138 N. W. 421. See, for a criticism of this rule, 23 Harv. L. Rev. 480.

Where a deed expressly makes the nearer external line of a highway the boundary line no title to the highway passes, in the absence of express provision to the contrary. Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096; Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38.

A road order of a town board in laying out a cartway is no evidence of the boundary line between parties beyond its limits. Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788.

(95) Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089.

(97) Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096; Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38. See Note, 32 L. R. A. (N. S.) 778.

(98) See Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110.

1066. Calls for quantity—Calls for quantity must yield to the more certain and locative lines of the adjoining owners. Such lines are certain, or they can be made certain, and may be platted so as to show the exact course and distance. They are treated as a sort of natural mon-

ument, and must prevail over the more general and less distinct designation by quantity. Veve v. Sanchez, 226 U. S. 234.

(99) See Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089.

1067. Rivers and lakes—The question of boundaries on navigable waters is governed by the law of this state. Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925.

R. S. (U. S.) § 2396 held inapplicable to a controversy relating to the riparian rights of owners of fractional lots in a fractional township abutting on a lake in this state. Held, upon the facts of the particular case, that the boundaries might be equitably fixed by extending the lines of the lots of all the parties to the action in a direct course westerly from the established corners. Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925.

(5) Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925; Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 147 N. W. 431; State v. Korrer, 127 Minn. 60, 148 N. W. 617 (title of abutting owner extends to low-water mark); Hall v. Hobart, 174 Fed. 433; Id., 186 Fed. 426. See Digest, §§ 6949–6963.

(8, 9) See Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60.

1068. Meander lines about lakes—A meander line is not a line of boundary, but is designed primarily to point out the variations of the bank or shore. An owner of land abutting upon a non-navigable lake owns to the middle of the lake. This title to the bed of the lake passes by a deed of the shore land, unless a contrary intention appeals. A meander line will not ordinarily be considered the boundary of land bordering on such a lake; but the grantee of the shore land will take to the middle of the lake, even though the grant is described by metes and bounds with the meander line as one of the calls. The evidence in this case sustains the findings of the trial court that West Lake, on which respondent's land abuts, was still a lake when defendant received his deed. The fact that the owners of land abutting on an irregular lake exchange deeds, fixing their respective rights in the lake bed, is not conclusive of an intention to separate the lake bed from the shore land. The use of part of the bed of the lake by a grantor after conveyance of the shore land is not conclusive of an intent that he should reserve the lake bed. The evidence sustains the trial court in refusal to find that defendant was estopped by representations as to his line to claim the portion of the lake bed adjacent to his land. Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60. See Producers Oil Co. v. Hanzen, 238 U. S. 325.

(10) See Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60.

(11) See Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925; Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60.

1069. Meander lines along rivers—(12) Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925. See Producers Oil Co. v. Hanzen, 238 U. S. 325.

1070. Non-navigable lakes—Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be the most suitable for adjusting riparian rights in the lake bottom along its sides and the use of converging lines would only be required at its two ends. Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

(13) State v. Korrer, 127 Minn. 60, 71, 148 N. W. 617; Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858. See Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60.

(14) Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858. See Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925; 10 Col. L. Rev. 82; Note, 122 Am. St. Rep. 982.

1075. Parol evidence—(33) See Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60 (evidence held not to show an estoppel); Digest, § 3201.

1076. Reputation—(34) Moser v. Doffner, 111 Minn. 464, 470, 125 N. W. 275, 127 N. W. 494.

1077. Official plats and field notes—(37) Sommer v. Meyer, 125 Minn. 258, 146 N. W. 1106.

1078. Fractions of lots—The words "the north half," used in the conveyance of a part of a platted block of land, mean the half of the block in area lying north of an east and west line drawn through the block, unless the context and surrounding facts require that these words be given a different meaning. Lavis v. Wilcox, 116 Minn. 187, 133 N. W. 563.

1079. Government corners, surveys, etc.—The federal statute provides that the boundary lines, actually run and marked in the surveys shall be established as the proper boundary lines of the sections or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof, and the boundary lines which shall not have been actually run and marked as aforesaid shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township. This statute has been held inapplicable to a controversy relating to the riparian rights of owners of fractional lots in a fractional township abutting upon a lake in this state. Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925.

Monuments placed by a county surveyor pursuant to G. S. 1913, § 773, show prima facie the section corners and quarter posts of the government survey. Roy v. Dannehr, 124 Minn. 233, 144 N. W. 758 (evidence held insufficient to overcome presumption).

(39) Goroski v. Tawney, 121 Minn. 189, 141 N. W. 102; Sommer v. Meyer, 125 Minn. 258, 146 N. W. 1106. See Note, 110 Am. St. Rep. 677.

(43) Moser v. Doffner, 111 Minn. 464, 125 N. W. 275, 127 N. W. 494.

1081. Lost corners—A lost corner is one whose location, as established by the government surveyors, cannot be found. If its location, though evidence of it on the ground is gone, can be determined satisfactorily by competent evidence, it is not a lost corner. The fact that evidence of the physical location of a corner cannot now be seen, or that no one who saw the marked corner is produced, does not necessarily make the corner a lost one. If the evidence is such that the place where the corner was can be determined, it is enough. Where quarter corners are lost, and the field notes are inconsistent, the boundary of the quarter sections is found by a proportional measurement between the known section corners to which the quarter corners belong. Goroski v. Tawney, 121 Minn. 189, 141 N. W. 102 (finding that two quarter corners were lost held justified by the evidence); Wetle v. Flegel, 112 Minn. 445, 128 N. W. 577.

A section corner is where the government surveyors placed it. Where a section corner post has disappeared, the evidence of witness bearing trees and the surveyor's field notes will usually prevail. If the calls of the field notes are erroneous, their use or rejection becomes a practical question. There is no universal rule applicable to such a case. The court must make its decision, as in any other case, by considering all the evidence that will aid it in arriving at the facts, such as the testimony of eyewitnesses as to the location of lost monuments, the testimony of surveyors based on surveys from other established locations, as well as the calls of witness trees and field notes. The direction of lines may be reversed, if by so doing all the known calls of the survey are harmonized; otherwise, the calls are to be taken as they are. Sommer v. Meyer, 125 Minn. 258, 146 N. W. 1106.

(46, 47) Moser v. Doffner, 111 Minn. 464, 125 N. W. 275, 127 N. W. 494; Sommer v. Meyer, 125 Minn. 258, 146 N. W. 1106.

1083. Practical location—Where there is no agreement or estoppel acquiescence must continue for the full statutory period of fifteen years. Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788.

(51) Moser v. Doffner, 111 Minn. 464, 125 N. W. 275, 127 N. W. 494; Marek v. Holey, 119 Minn. 216, 137 N. W. 969; Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788; Roy v. Dannehr, 124 Minn. 233, 144 N. W. 758 (effect of placing fence on supposed boundary line); Nadeau v.

Johnson, 125 Minn. 365, 147 N. W. 241; Houston County v. Burns, 126 Minn. 206, 148 N. W. 115 (land surveyed and division fence constructed by agreement of adjoining owners—division line maintained by both owners about ten years); Einung v. Schlopkohl, 129 Minn. 9, 151 N. W. 273. See Note, 110 Am. St. Rep. 677.

(52) Moser v. Doffner, 111 Minn. 464, 125 N. W. 275, 127 N. W. 494 (evidence held sufficient); Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788 (fencing by one party on a varying line—cultivation of a part unfenced to the line claimed—small amount of ditching—evidence held insufficient); Roy v. Dannehr, 124 Minn. 233, 144 N. W. 758 (placing fence on supposed division line—evidence not conclusive); Draheim v. Fell, 130 Minn. 535, 153 N. W. 513 (evidence held insufficient—the digging of a drainage ditch to the east of a line fence by the owner of the lands west of the fence held not persuasive evidence either way).

1084. Statutory action to determine—(54) See Burton v. Isaacson, 122 Minn. 483, 142 N. W. 925 (issues triable); Note, 119 Am. St. Rep. 66.

(57) Nelson v. Lemon, 126 Minn. 527, 147 N. W. 1134 (the court found that a line run by a certain survey was the true line—held that the finding supported the conclusion of law and the judgment, and it was unnecessary expressly to find that the parties agreed to abide by the survey).

(58) Wetle v. Flegel, 112 Minn. 445, 128 N. W. 577; Cerveny v. Uherka, 112 Minn. 417, 128 N. W. 457; Sommer v. Meyer, 125 Minn. 258, 146 N. W. 1106.

BREACH OF PROMISE OF MARRIAGE

1087. The contract—Express and implied representations. Note, 44 Am. St. Rep. 381.

1088a. Rescission of contract by mutual agreement—The parties may, by mutual agreement, express or implied, rescind the contract. Brown v. Gunderson, 123 Minn. 303, 143 N. W. 795 (evidence held to justify a finding of rescission).

1092. Want of chastity as a defence—(67) Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Hively v. Golnick, 123 Minn. 498, 144 N. W. 213. See Davis v. Condit, 124 Minn. 365, 144 N. W. 1089.

See Note, 40 Am. St. Rep. 172 (various defences).

1092a. Epilepsy as a defence—It is a good defence that the plaintiff is an epileptic person. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

1094. Damages—In general—Compensatory damages cannot be awarded for pleading or attempting to prove unchastity by way of de-

fence or in mitigation of damages. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

(70) Hively v. Golnick, 123 Minn. 498, 144 N. W. 213 (loss of opportunity to contract a marriage with another—injury to health).

(71) Hively v. Golnick, 123 Minn. 498, 144 N. W. 213. See Note, 41 L. R. A. (N. S.) 840.

1095. Exemplary damages—To justify the recovery of exemplary damages the complaint must contain appropriate allegations, as, for example, that the defendant acted maliciously, wantonly or to oppress or injure the plaintiff. Exemplary damages are recoverable if the defendant pleads or attempts to prove unchastity of plaintiff in justification of the breach, or in mitigation of damages, and does so maliciously and without reason for believing the defence true. Otherwise if the defence is made in good faith. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

(73) Hively v. Golnick, 123 Minn. 498, 144 N. W. 213. See Note, 41 L. R. A. (N. S.) 840.

1097. Mitigation of damages—(80) Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

1098. Excessive damages—(81) Halness v. Anderson, 110 Minn. 204, 124 N. W. 830 (held error for trial court to grant a new trial unless plaintiff would reduce her verdict for $1,500 to $500); Hively v. Golnick, 123 Minn. 498, 144 N. W. 213 (verdict for $800 sustained); Cox v. Edwards, 126 Minn. 350, 148 N. W. 500 (verdict for $17,425 sustained). See Note, 41 L. R. A. (N. S.) 840.

1098a. Pleading—Want of chastity as a defence is new matter to be specially pleaded by the defendant. Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070.

To justify the recovery of punitive damages the complaint must contain appropriate allegations of the intent or purpose of defendant in doing the alleged wrongful act, as that he acted maliciously, wantonly, to oppress or injure plaintiff. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

Under a general allegation of damages injury to health is recoverable. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

If it is desired to prove seduction in aggravation of damages it may be necessary to allege it. See Schmidt v. Durnham, 46 Minn. 227, 49 N. W. 126; Note, 33 L. R. A. (N. S.) 702.

1100. Evidence—Sufficiency—(83) Hively v. Golnick, 123 Minn. 498, 144 N. W. 213; Cox v. Edwards, 126 Minn. 350, 148 N. W. 500.

1100a. Law and fact—Whether a promise of marriage was made, and whether a release pleaded as a defence was obtained by fraud or duress, held questions for the jury. Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070.

BREACH OF THE PEACE

1101. Use of abusive language—Complaint must state name of the person in reference to and in whose presence the language was used. State v. Riley, 116 Minn. 1, 133 N. W. 86.

BRIBERY

1103. What constitutes—In connection with elections. See Sweaas v. Evenson, 110 Minn. 304, 125 N. W. 272.

See Note, 116 Am. St. Rep. 38.

BRIDGES

1111. Legislative control—(1) See Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738.

1112. Width—The statute provides for a 16-foot driveway. Biegert v. Maynard, 122 Minn. 126, 142 N. W. 20.

1113. Contracts for construction—Validity—The city of Minneapolis has no power to enter into a contract with a company operating a commercial railway, by which the city agrees to bear part of the expense of strengthening a city bridge which the railway company desires to cross with its cars, where the bridge is already of sufficient strength and construction to accommodate general travel, and the sole purpose of the improvement is to permit the operation of such railway cars thereover. Plaintiff desired to cross this bridge in order to meet the line of the Minneapolis Street Railway Company. The city, in lieu of permitting the plaintiff to cross the bridge, directed the City Railway Company to extend its line across the bridge to plaintiff's terminus. The public also has used the bridge for general travel. These facts impose no liability upon the city, since the contract was beyond the corporate power of the city and was not susceptible of ratification, but was wholly void. Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609.

(3) Biegert v. Maynard, 122 Minn. 126, 142 N. W. 20 (piers constructed too close together necessitating blowing out one of them so that a dredging machine might pass—cost of rebuilding held to fall on contractor—verdict for defendant sustained).

1116. Authority of county board to construct—By chapter 164, Laws of 1905, and the acts amendatory thereof (G. S. 1913, §§ 2584–2586), the legislature gave counties having more than 150,000 population authority to construct bridges and approaches thereto within villages without the

consent or concurrence of the village. Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738.

1116a. County road and bridge fund—Bridge in cities—Appropriation—Section 2, c. 378, Laws 1911, authorizes the city council of cities of the fourth class to require the county board to appropriate money from the county road and bridge fund for the building or improving of bridges on such city streets only as the county board may have designated as state roads or highways. State v. Freeborn County, 117 Minn. 361, 135 N. W. 975.

1120. Defective bridges—Negligence—Liability of municipalities— Bridge over Mississippi river at Winona. Wire on bridge carrying a very heavy voltage of electricity. Workman employed in painting bridge killed by a "brush" or "disruptive discharge." Bridge constructed by city. Wire strung by power company under license from city. Manner of stringing wire regulated by city. City held liable. Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577.

Where a child playing under a bridge at a point not open to travel was injured by the fall of a timber from the bridge, it was held that the injury was a pure accident for which the municipality could not be held liable. Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

A municipality is bound to provide guard rails for bridges which it maintains sufficiently high to protect travelers. It may be liable for an unnecessary defect in the plan of construction. Where a team crossing a bridge was frightened by an automobile, and one of the horses was crowded over the edge of the bridge and killed by falling therefrom, whether an insufficient guard rail of the bridge was the proximate cause of the injury was held a question for the jury. Klaseus v. Kasota, 128 Minn. 47, 150 N. W. 221.

See Digest, § 6995a.

BROKERS

IN GENERAL

1125. Brokers for miscellaneous purposes—Brokerage for sale of cement. Action for commission. Verdict for plaintiff properly directed. Daniel v. Sandusky Portland Cement Co., 116 Minn. 82, 133 N. W. 162.

STOCK BROKERS

1127. Authority to advance margins—Purchase on margin. Note, 74 Am. St. Rep. 470.

REAL ESTATE BROKERS

1136. Necessity of employment—(36) See Kennison v. Haw, 124 Minn. 140, 144 N. W. 452; Boyd v. Quarberg, 125 Minn. 521, 145 N. W. 746.

1137. Contract of employment—(39) C. H. Graves & Co. v. Cook, 115 Minn. 34, 131 N. W. 854.

1139. Application of general principles of agency—(42) See Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469.

(43) Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549.

1141. Exclusive agency—(47) Smith v. Preiss, 117 Minn. 392, 136 N. W. 7.

1142. Powers—It is well settled that a real estate agent, or broker, can make no contract for the sale of the land of his principal except upon the terms prescribed by such principal; that without express authority to give credit, or to receive something other than cash, he can sell only for cash; and that any contract made by him which contains terms or provisions other than those prescribed by his principal is not binding upon such principal and cannot be enforced by the purchaser. Baker v. Brundage, 131 Minn. ——, 154 N. W. 1086.

(49) Stein v. Waite, 126 Minn. 157, 148 N. W. 49 (contract construed as authorizing broker to find a purchaser and not to bind principal by a contract to sell or convey). See Baker v. Brundage, 131 Minn. ——, 154 N. W. 1086.

1143. Duty to disclose facts to principal—(55) Hegenmyer v. Marks, 37 Minn. 6, 32 N. W. 785. See Christianson v. Mille Lacs Land & Loan Co., 113 Minn. 120, 129 N. W. 150.

1144. Purchase by broker—Where an agent for the sale of real property, charged as a matter of law with the usual obligations incident to that relation, informs his principal that he has secured a purchaser of

the property, and procures from the principal an executory contract for the sale thereof, in which the name of the purchaser is not given, and he subsequently inserts in the contract his own name as purchaser, the relation of principal and agent, if the principal ratifies the contract, ceases, and that of vendor and purchaser takes its place. By so becoming the purchaser the agent forfeits his right to a commission for effecting a sale, and he is not, in the absence of a special agreement after the change of the relation, entitled to compensation. Christianson v. Mille Lacs Land & Loan Co., 113 Minn. 120, 129 N. W. 150.

(56) See Sherwood v. Lovett, 113 Minn. 83, 129 N. W. 141 (division of commission between two brokers—one broker interested in purchase by undisclosed principal); Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

1145. Fraud of broker—Liability of principal and broker—If the broker fraudulently misrepresents the financial ability of the purchaser, and the purchaser is unable to carry out the contract of purchase, and the principal relies upon such representation to his prejudice, he may rescind by a voluntary agreement with the purchaser, and, if a rescission is thus made, the broker will not be entitled to compensation. The evidence justifies a finding that the broker fraudulently misrepresented the financial condition and ability of the purchaser giving the principal, as against the broker, a right of rescission by agreement with the purchaser. If the principal and the purchaser by mutual agreement rescind, and as a condition of the rescission, and as a part of the agreement therefor, the purchaser accepts a portion of the lands included within the contract, the transaction amounting in effect to a partial rescission by agreement and a partial purchase in accordance with the contract, the principal is liable to the broker in some amount. Meyer v. Keating Land & Mtg. Co., 126 Minn. 409, 148 N. W. 452.

(58) Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469 (evidence held not to show a conspiracy among defendants to defraud purchaser, or fraud on the part of any of the defendants against the purchaser—brokers to have commission paid by vendors).

1146. Acting for both parties—The general rule that a broker to sell cannot accept compensation from the purchaser applies where the price and terms of sale are fixed by the vendor. Steinmueller v. Williams, 113 Minn. 91, 129 N. W. 145.

Where all the parties understood that brokers were to have a commission from the vendor, it was held that the purchaser could not recover from the vendor or the brokers any part of the commission, or have the contract reformed so as to have the purchase price reduced to the net price exclusive of the commission. Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469.

One is a middleman where, not having undertaken to act as agent for either party or to exercise for either his skill, knowledge or influence, merely brings them together to deal for themselves, he standing indifferent between them. Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549.

Division of commission between two brokers. One broker interested in purchase by undisclosed principal. Sherwood v. Lovett, 113 Minn. 83, 129 N. W. 141.

(59) Steinmueller v. Williams, 113 Minn. 95, 129 N. W. 145; American Security & Investment Co. v. Penney, 129 Minn. 369, 152 N. W. 771. See Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469.

(60) American Security & Investment Co. v. Penney, 129 Minn. 369, 152 N. W. 771.

(61) See Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469.

1147. When commission earned—Though by the terms of the contract the agreed commission is payable out of the purchase price, the defendant having arbitrarily refused to make a sale to the customer furnished by the plaintiff, the plaintiff is entitled to payment of such commission. C. H. Graves & Co. v. Cook, 115 Minn. 34, 131 N. W. 854.

(63) Zuel v. McCollum, 111 Minn. 485, 127 N. W. 178; Jacobson v. Rotzien, 111 Minn. 527, 127 N. W. 419, 856; C. H. Graves & Co. v. Cook, 115 Minn. 34, 131 N. W. 854; Bruner v. Jacobson, 115 Minn. 425, 132 N. W. 995; Smith v. Mellen, 116 Minn. 198, 133 N. W. 566; Gransbury v. Saterbak, 116 Minn. 339, 133 N. W. 851; Bruner v. Jacobson, 122 Minn. 66, 141 N. W. 1097; Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983; Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347; Glaum v. Skaug, 129 Minn. 377, 152 N. W. 760; Converse v. Vaughn, 130 Minn. 52, 153 N. W. 133; Nelson v. Carlson, 130 Minn. 131, 153 N. W. 253.

(64, 66) Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

(67) Smith v. Mellen, 116 Minn. 198, 133 N. W. 566; Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

(68) Gransbury v. Saterbak, 116 Minn. 339, 133 N. W. 851; Meyer v. Keating Land & Mtg. Co., 126 Minn. 409, 148 N. W. 452.

(69) Zuel v. McCollum, 111 Minn. 485, 127 N. W. 178; See Jacobson v. Rotzien, 111 Minn. 527, 127 N. W. 419, 856; Gransbury v. Saterbak, 116 Minn. 339, 133 N. W. 851.

1148. Necessity of complete performance—Where the plaintiff agreed to find a purchaser for a certain tract of land and was to receive as commission all of the purchase price above $10 an acre, and he introduced to the defendant a proposed purchaser to whom the defendant sold a part of the tract at $13 an acre, the purchaser not being willing to buy the whole tract, it was held that the contract was entire and that

the plaintiff could recover nothing. Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

(73) See Meyer v. Keating Land & Mtg. Co., 126 Minn. 409, 148 N. W. 452.

1149. Broker must be procuring cause of sale—(74) Differt v. Adams, 112 Minn. 443, 128 N. W. 467.

1150. Sale on unauthorized terms—(75) See § 1142.

1151. Variation of terms—When a real estate broker is employed by an owner to sell real estate at a stipulated net price and upon certain terms, with the understanding that the broker shall have all in excess of the net price for his compensation, should the property sell for more, the broker is at liberty to enter into a contract to sell the premises, with other property, to a proposed purchaser for a gross consideration in excess of the owner's net price, provided such proposed purchaser is ready, willing, and able to purchase at the price and upon the stipulated terms. Smith v. Mellen, 116 Minn. 198, 133 N. W. 566.

(76) See Paysenso v. Swensen, 178 Fed. 999.

(78) Differt v. Adams, 112 Minn. 443, 128 N. W. 467.

(79) Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

1152. Sale by owner—(81) Smith v. Preiss, 117 Minn. 392, 136 N. W. 7; Wright v. Waite, 126 Minn. 115, 148 N. W. 50 (held that owner did not sell).

(84) See Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

1153. Sale defeated by owner—Defective title—An easement acquired by the city for a street over a city lot, in condemnation proceedings, the street not having been opened, is an "incumbrance" upon the land, within the terms of a representation by the owner to his real estate broker that he is possessed of a good marketable title, free from all incumbrances and adverse liens and interest. Smith v. Mellen, 116 Minn. 198, 133 N. W. 566.

(87) See Sperry Realty Co. v. Merriam Realty Co., 128 Minn. 217, 150 N. W. 785 (purchaser refused to carry out purchase because of an easement on the land—all the parties knew of the easement).

1155. Amount of compensation—(92) Sperry Realty Co. v. Merriam Realty Co., 128 Minn. 217, 150 N. W. 785 (contract gave broker privilege of selling to a specified person, at a specified price, within a specified time—refusal of purchaser to carry out contract because of an easement on the land); Glaum v. Skaug, 129 Minn. 377, 152 N. W. 760; Nelson v. Carlson, 130 Minn. 131, 153 N. W. 253.

1156. Breach of contract by principal—Damages—The measure of damages for a breach of contract by a principal, held, under the issues, to be the loss incurred by the agent on all sales actually made, not ex-

ceeding, however, the commissions stipulated in the contract. Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

1159. Sale by several brokers—Division of commission—(99) Sherwood v. Lovett, 113 Minn. 83, 129 N. W. 141; Clark v. McMullen, 129 Minn. 533, 152 N. W. 1101.

1160. Revocation and termination of authority—The termination of a revocable agency by sale by the principal before performance by the agent, is an affirmative defence, which need not be negatived by plaintiff in order to make out a prima facie case. Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

(2) Wright v. Waite, 126 Minn. 115, 148 N. W. 50 (finding of jury that there was no revocation sustained). See Note, 49 L. R. A. (N. S.) 985.

1161. Action for commission—Pleading and evidence—(5) Schick v. Suttle, 94 Minn. 135, 102 N. W. 217 (a claim on the part of the principal against his broker for a profit alleged to have been made by him in the course of his employment, founded on the rule of law that all such profits, whether resulting from the performance or violation of the broker's duty, belong to the principal, may be interposed as a counterclaim in an action by the broker against the principal to recover for services rendered in a transaction other than that in which the profit was made); Hill v. Glasspoole, 117 Minn. 537, 136 N. W. 261 (complaint against corporation sustained); Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983 (termination of agency by sale made by principal an affirmative defence—a defence cannot be made out merely upon allegations of the complaint when the same have been put in issue by denials); Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124 (where a complaint, in an action for compensation for services rendered, alleges the reasonable value thereof, and also that defendant agreed to pay a certain sum therefor, and there is no election at the trial upon which theory, quantum meruit or express contract, plaintiff will proceed with the trial, and both issues are retained in the case, plaintiff is at liberty to prove either the agreed or reasonable value, and recover a verdict accordingly); Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347 (issue as to whether contract was entire or severable held properly raised by the answer—complaint on express contract—no recovery allowable on quantum meruit); Wright v. Waite, 126 Minn. 115, 148 N. W. 50 (whether plaintiff procured a purchaser under a contract not pleaded voluntarily litigated); Sperry Realty Co. v. Merriam Realty Co., 128 Minn. 217, 150 N. W. 785 (plaintiff held not entitled to recover in the absence of pleading and proof as to the value of his services).

(6) Baker v. Barker, 118 Minn. 419, 137 N. W. 7 (evidence of a custom among brokers of charging for their services, where an exchange of

properties is effected, a specified commission upon the value of the property, held competent on the question of the reasonable value of such services); Drew v. Carroll, 120 Minn. 478, 139 N. W. 953 (refusal of trial court, in action for commission on sale of land, to strike out plaintiff's testimony as to the contents of a letter alleged to have been written by him to defendant, held, under the circumstances, not error—assignment of error to action of trial court, in allowing defendant to be cross-examined as to how much he received by way of commission or profit on a sale of land which he himself had previously made, overruled—action of trial court in admitting parol proof of the contents of a minor document collaterally involved in the action sustained); Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983 (defendant's statements in repudiating contract, to the effect that the land had been sold, held not substantive evidence of that fact); Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173 (in an action by an agent to recover the reasonable value of services in effecting an exchange of property, evidence of the value of the property received by the principal is admissible —evidence of customary charges of brokers in similar cases is admissible —any evidence which tends to throw light on the value of the services, such as the time spent, the money expended, the amount involved, the results achieved, is admissible); Wright v. Waite, 126 Minn. 115, 148 N. W. 50 (in an action to recover an agreed commission, it is in general error to receive evidence of efforts made to sell; but where there is a controversy as to the existence of a listing agreement at the time, and the fact that such efforts were being made was communicated to the owner, such evidence is competent; and, when it conclusively appears that the broker found a purchaser, the error is in general without prejudice).

(7) Zuel v. McCollum, 111 Minn. 485, 127 N. W. 178; Jacobson v. Rotzien, 111 Minn. 527, 127 N. W. 419, 856; Nichols v. Rodgers, 112 Minn. 250, 127 N. W. 923; Differt v. Adams, 112 Minn. 443, 128 N. W. 467; Whitney v. O. W. Kerr Co., 113 Minn. 525, 129 N. W. 1056; Daly v. Corliss, 114 Minn. 42, 129 N. W. 1048; Baker v. Barker, 118 Minn. 419, 137 N. W. 7; Kennison v. Haw, 124 Minn. 140, 144 N. W. 452; Glaum v. Skaug, 129 Minn. 377, 152 N. W. 760; American Security & Investment Co. v. Penney, 129 Minn. 369, 152 N. W. 771; Nelson v. Carlson, 130 Minn. 131, 153 N. W. 253.

1161a. Same—Burden of proof—The termination of a revocable agency by sale by the principal before performance by the agent, is an affirmative defence, which need not be negatived by plaintiff in order to make out a prima facie case. Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

BURGLARY

1177a. What constitutes—Evidence—The defendant was convicted of the crime of burglary in the third degree, in that he broke into and entered a room in the Dyckman Hotel, in Minneapolis, with intent to commit the crime of larceny therein. Held, the felonious intent with which entrance into the room was effected may be inferred from the fact that he attempted to commit larceny therein. The time and circumstances of his entrance, and acts done therein, are sufficient to sustain a finding that his entrance was not by the consent of the owner, but felonious. The proof that the building and room were in the possession and control of the person named in the indictment was sufficient evidence of ownership to support the indictment. State v. Ward, 116 Minn. 516, 134 N. W. 115.

Opening a door already ajar. 27 Harv. L. Rev. 382.

Possession of recently stolen property as evidence of burglary. Note, 12 L. R. A. (N. S.) 199.

See Note, 2 Am. St. Rep. 383.

1179. Intent—(49) State v. Ward, 116 Minn. 516, 134 N. W. 115.

1180. Evidence—Sufficiency—(50) State v. Ward, 116 Minn. 516, 134 N. W. 115.

CANCELATION OF INSTRUMENTS

1181. Discretion of court—(54) McKenzie v. Dunsmore, 114 Minn. 477, 131 N. W. 632.

1182. Adequate remedy at law—Objection that the plaintiff has an adequate remedy at law will not be sustained unless it is clearly well taken. Slingerland v. Slingerland, 109 Minn. 407, 124 N. W. 19.

(55) Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

1185. Restoration of status quo—Restoration of property is not a condition precedent to the granting of relief if it is rendered impossible by the fraud of the defendant. Holmes v. Wilkes, 130 Minn. 145, 153 N. W. 308.

(59) National Council v. Garber, 131 Minn. ——, 154 N. W. 512. See Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

See Digest, §§ 1810, 1815, 10092, 10097.

1186. For breach of contract—In an action involving breach of contract the plaintiff may be required to elect to proceed either for rescis-

sion or for damages for the breach. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. 176, 148 N. W. 43.

(60) See Digest, § 2677.

1188. For fraud—The action will lie without proof of damage. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965. See § 3828.

All contracts are subject to rescission or cancelation for fraud. See Digest, §§ 1810, 1815, 2677, 3834, 10092, 10097.

A contract to convey realty may be canceled for fraud. See Digest, §§ 10092, 10097.

An agreement for the exchange of land for corporate stock may be canceled. Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308.

Where, after plaintiff discovered that he had been induced to exchange property by defendant's false representations, it was agreed to rescind, but defendant thereafter refused to perform the contract of reexchange, so far as it required him to reconvey certain real property received by him in the original exchange, a suit by plaintiff for cancelation of the deed to such property executed by him to defendant was held to lie. Green v. Hayes, 120 Minn. 201, 139 N. W. 139.

An action brought after a loss under an insurance policy to cancel the policy for fraud, or to restrain an action at law thereon, cannot be maintained, in the absence of some special circumstances of a nature to cause irreparable loss to plaintiff if he is relegated to his remedy at law by way of defense to an action on the policy. Where the remedy at law is adequate, equity will not grant relief. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

(64) Green v. Hayes, 120 Minn. 201, 139 N. W. 139; Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308. See Digest, § 2677.

(65) Ferber v. State Bank, 116 Minn. 261, 133 N. W. 611; Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308.

(67) Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914. See Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

(68) Slingerland v. Slingerland, 115 Minn. 270, 132 N. W. 326.

1189. For innocent misrepresentation—(70) Martin v. Hill, 41 Minn. 337, 43 N. W. 337; Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914. See 15 Col. L. Rev. 187; 24 Harv. L. Rev. 415.

1191. For undue influence—(73) McEleney v. Donovan, 119 Minn. 294, 137 N. W. 306; Wortz v. Wortz, 128 Minn. 251, 150 N. W. 809.

1192. For mistake—A contract may be canceled at the instance of one of the parties for his own mistake of fact, when such mistake was caused by the inequitable conduct of, or when known to and wrongfully acted upon or taken advantage of by, the other party. C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773. See § 6124.

(75) Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156; Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

(76) C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773.

See Note 117 Am. St. Rep. 227; 28 L. R. A. (N. S.) 785.

1193. Instrument liable to improper use—Impossibility of performance—Where a contract to convey realty, made by the holder of the fee and the holder of a life estate, could not be performed because of the refusal of the probate court to confirm the sale, the holder of the life estate being an incompetent person, it was held proper to set aside the contract as to both parties. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

(81) See Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827.

1195. Intervening rights of third parties—Bona fide purchasers—Burden of proof—Fraudulent misrepresentations being proved in an action to rescind, the defendant, who claims title from the one guilty of the fraud, has the burden of showing himself a bona fide purchaser without notice. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

1196. Laches—Limitation of actions—Where there is a mutual mistake as to land conveyed, the vendee is not guilty of laches until he discovers the mistake, or is chargeable with knowledge of facts from which, in the exercise of reasonable diligence, he ought to have discovered it. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

(86) Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 87 (action not barred by laches).

1199. Rescission and tender before suit—(90) See Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 267, 132 N. W. 333; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

1200. Pleading—A complaint held sufficient to justify a cancelation though it only demanded damages. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

A complaint which shows on its face that the plaintiff has a plain, speedy and adequate remedy at law is demurrable. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

A complaint sustained on demurrer though the plaintiff might not be entitled to all the relief demanded. Mogren v. Finley, 112 Minn. 453, 128 N. W. 828.

(91) See Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 267, 132 N. W. 333; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

1201a. Burden of proof—One who seeks to set aside a deed or other instrument for fraud, undue influence, or other cause, ordinarily has the burden of proving the fraud or other cause, and he carries this burden

throughout the trial. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

1202. Evidence—Sufficiency—(95) Ferber v. State Bank, 116 Minn. 261, 133 N. W. 611 (evidence of fraud held sufficient); McMullen v. Heaney, 113 Minn. 348, 129 N. W. 764 (evidence held not to show fraud in sale); McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306 (evidence held not to show undue influence); Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430 (evidence of fraud held sufficient); Campbell v. Northwest Eckington Improvement Co., 229 U. S. 561. See First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

1203. Judgment—Relief allowable—Where the pleading asks for no relief except the cancelation of the deed, and alleges no facts showing that the pleader is entitled to any other relief, the court will not give the heirs of the grantor a lien on the real estate for sums paid by the grantor for his support, though the grantee was bound to pay such sums under the contract. McKenzie v. Dunsmore, 114 Minn. 477, 131 N. W. 632.

In an action to cancel a deed for mutual mistake as to the land conveyed it is unnecessary to find the value of the land. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

Though the court found that the deed was not delivered, the plaintiff having alleged facts tending to entitle him to equitable relief if the deed had been delivered, and having offered proofs in support thereof, and the defendant having alleged facts showing him entitled to equities, though the deed was not delivered, such equities appearing from the record, the court having possessed itself of the controversy as a court of equity should have determined the whole controversy between the parties and entered a decree determining the rights of all. O'Rourke v. O'Rourke, 130 Minn. 292, 153 N. W. 607.

(96) See 8 Col. L. Rev. 123.

CARRIERS

IN GENERAL

1204. Who are common carriers—A defendant operating a meagerly equipped railroad held under the pleadings to be a common carrier and liable as such. White v. Minneapolis & Rainy River Ry. Co., 111 Minn. 167, 126 N. W. 533.

A railroad company operating a railroad over stub lines, the road bed and ties thereof being furnished and owned by a lumber company, held a common carrier. McCallum v. Minneapolis & Rainy River Ry. Co., 129 Minn. 121, 151 N. W. 974.

A receiver operating a railroad is a common carrier. United States v. Nixon, 235 U. S. 231.

(4) Note, 61 Am. St. Rep. 360.

1205a. Reasonableness of rates—Judicial control—The courts cannot fix rates. That is a legislative or administrative function. But the courts may determine whether rates fixed by the legislature or an administrative board are unreasonable and confiscatory. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320. See Digest, § 8077.

1205b. Two-cent passenger rate—Construction of statute—Under G. S. 1913, §§ 4286, 4287, a railroad may charge three cents a mile for the first five miles of a passenger's trip, and two cents a mile for any additional distance. G. S. 1913, § 4285, prohibits unequal or unreasonable rates. State v. Chicago etc. Ry. Co., 128 Minn. 25, 150 N. W. 172

1205c. Distance tariff—Cashman Act—Chapter 90 of the Laws of 1913 (G. S. 1913, §§ 4348–4357), requiring railroad tariffs for transportation to be based upon distance, applies to movement of cars or commodities between stations and not to switching or like movements within a shipping point, such as a village or city. Washed Sand & Gravel Co. v. Great Northern Ry. Co., 130 Minn. 272, 153 N. W. 610.

1205d. Discrimination in rates—Damages—The jurisdiction of the state courts of an action by a shipper against a common carrier for damages resulting from unlawful discrimination against him in rates is not affected by the provisions of the federal Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), where the shipments involved are within points within the state and the transportation is wholly therein; and where such appears from the complaint a demurrer for lack of jurisdiction by reason of such act should be overruled, especially where there is no suggestion in the complaint that the defendant was ever engaged in interstate commerce, or that its road is so situated as to enable it to engage therein. The modern common law imposes upon common carriers the duty of equal-

ity in freight rates to all shippers similarly circumstanced, for the transportation of the same class of goods the same distance; and our statutes prohibiting such discrimination are declaratory of the common-law rule. The shipper's common-law right of action for damages for discrimination in rates is not taken away by our rate-regulating statutes, which furnish no civil remedy to the shipper therefor. The shipper would have such a right of action, even though the statutory prohibition of discrimination in rates were deemed to create a new obligation on the part of the carrier; no civil remedy being provided thereby. In such an action, whether based upon the common-law or the statutory duty not to discriminate in rates, the shipper may recover the difference between the charges exacted of him and those accepted from the most favored shipper; and though the rates charged the plaintiff were those established by law, such a recovery neither compels the defendant to commit a second wrong nor in any way affects the legally established rates. Sullivan v. Minneapolis & Rainy River Ry. Co., 121 Minn. 488, 142 N. W. 3; Seaman v. Minneapolis & Rainy River Ry. Co., 127 Minn. 180, 149 N. W. 134.

Contracts made prior to statutory rate regulation held no justification for downward departure from freight tariffs thereafter established, whereby plaintiffs, shippers who were charged with the legal rates for the same services, were discriminated against. The favored shipper's alleged payment to defendant of the difference between the discriminatory rate and the regular tariff, after the discriminations complained of had occurred, held no defence against the disfavored shipper's right to recover. Business competition is essential to a recovery of rate differentials by a shipper who is discriminated against, where no proof is made of damage other than the difference in the rates charged. Evidence held to show business competition, between plaintiff, Seaman, and a favored shipper, within the rule requiring such competition, where rate differentials are sought to be recovered, but the contrary was established in the Sullivan Case. Rate differentials allowed as damages for discriminations in freight charges must be computed upon the basis of equal tonnage, but such discriminations should be considered with reference to a reasonable time before and after the disfavored shipment, and hence may arise from shipments on different dates. Under the facts disclosed, plaintiff Seaman's shipments were, to a considerable extent not precisely ascertainable, interstate commerce, to which the federal rule of damages applied. Seaman v. Minneapolis & Rainy River Ry. Co., 127 Minn. 180, 149 N. W. 134.

1205e. Trackage charges—Validity—The defendant, a railroad company, owns and operates a main line of railroad extending from Deer River to the north in Itasca county. It operates a number of connecting

stub lines, the roadbed and ties of which are owned by a lumber company. It owns the rails and fasteners, it laid the rails, and it maintains the tracks and roadbed in condition. It is in exclusive control of the stub lines as a common carrier. It maintains a distance mileage tariff for freight originating on the stub lines and consigned to Deer River the same as from points on its main line to Deer River. It exacts a charge of $1 per car, called a trackage charge, in addition to its published tariff rates, for cars originating on the stub lines, except those of the lumber company, and pays it to the lumber company. It renders no service for such charge. Held, that such charge is invalid, and that the plaintiffs, paying involuntarily, are entitled to recover it. McCallum v. Minneapolis & Rainy River Ry. Co., 129 Minn. 121, 151 N. W. 974.

1205f. Interstate commerce—Federal law exclusive—Hepburn Act—Schedules—The schedules of fares and charges and the regulations filed with the Interstate Commerce Commission by the carrier pursuant to the provisions of the Hepburn Act (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1911, p. 1288]), are controlling between the carrier and the shipper. The schedule of fares and charges and baggage regulations filed by the carrier with the Interstate Commerce Commission fixing the limit of liability for loss of baggage bind the carrier and passenger in interstate transportation. Ford v. Chicago etc. Ry. Co., 123 Minn. 87, 143 N. W. 249.

1205g. Injunction against enforcement of rates—Jurisdiction of federal courts—The federal court of the district of Minnesota had jurisdiction of an action brought by the stockholders of the various railroads of the state to test the validity of chapter 97 of the Laws of 1907 (G. S. 1913, §§ 4288, 4289), known as the two-cent fare law, and authority and jurisdiction by injunction to restrain such companies, their agents and officers, from putting in force, during the pendency of the action, the rate prescribed by that statute. The effect of an injunction issued by a court of competent jurisdiction restraining the enforcement of such statutory rates pending the action is to suspend the operation thereof until the final determination of their validity. The trial court erred in excluding the writ of injunction from evidence on the trial of the indictment against defendant for alleged violation of the statute. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

CARRIERS OF PASSENGERS

IN GENERAL

1206. Who are passengers—Trespassers—Where a servant of a railroad company was injured while being transported by it to his work in accordance with his contract with the company, it was held imma-

terial, in an action to recover for the injury, whether he was strictly a passenger or not. Headline v. Great Northern Ry. Co., 113 Minn. 74, 128 N. W. 1115.

One entering a railroad train to confer with a passenger held not a passenger. Fox v. Minneapolis & St. L. R. Co., 114 Minn. 336, 131 N. W. 374.

Plaintiff desired to travel over defendant's road from Union, Iowa, to Kilkenny, Minn., on a designated train. The train did not stop at Union, and, at the suggestion of the agent there, he bought a ticket to Mason City, arriving there in the evening, and later took an early morning train to Kilkenny. He was not a "through passenger." Plaintiff bought his ticket at 3 a. m. for a 3:55 a. m. train. He was not a "passenger" before such purchase. Purchase of a ticket is not decisive of the relation. One becomes a passenger when he puts himself into the care of the carrier to be transported, and is received and accepted as a passenger. He is entitled to the privileges of a passenger for a reasonable time before train time, but not during the whole night before an early morning train. The facts of this case disclose no reasonable occasion for plaintiff's presence at the station before the time he purchased his ticket. Purchase of a ticket, though not conclusive, often fixes the time when the relation of carrier and passenger commences. Under the circumstances of the case, plaintiff must be regarded as a passenger from the time he bought his ticket. Barnett v. Minneapolis & St. L. R. Co., 123 Minn. 153, 143 N. W. 263.

The relation of passenger and carrier is created by contract, express or implied. Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322.

A person held not to have lost his status as a passenger by riding in the cupola of a caboose, contrary to a rule of the company. Schultz v. Minneapolis & St. L. R. Co., 123 Minn. 405, 143 N. W. 1131.

One entering a railroad train for the purpose of assisting an outgoing passenger, but not himself intending to take passage, is not a passenger. Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746. See 52 L. R. A. (N. S.) 179.

(12, 14) Person wrongfully on train by collusion with trainman. Note, 37 L. R. A. (N. S.) 418.

(20) Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322 (caretaker of live-poultry shipment failing to remain in caboose as required by contract of carriage).

1207. When relation of passenger terminates—(21–23) Note 2 L. R. A. (N. S.) 873.

1208. Regulations—A passenger may recover for an injury received while he was violating a rule of the company if the rule is habitually

disregarded. Schultz v. Minneapolis & St. L. R. Co., 123 Minn. 405, 143 N. W. 1131.

1209a. Who may be refused as passengers—See Note, 107 Am. St. Rep. 298; 26 L. R. A. (N. S.) 171; L. R. A. 1915E, 788.

1210. Passenger elevators—A recovery sustained where a passenger was injured while alighting from an elevator. His foot was caught in a projection of the sill or threshold of the floor. Charge as to opening of elevator doors sustained. Clark v. Scandinavian-American Bank, 113 Minn. 93, 128 N. W. 1114.

See Digest, §§ 5896, 6021, 6994; Note, 2 L. R. A. (N. S.) 744; L. R. A. 1915E, 722.

VARIOUS DUTIES

1211a. Duty to transport promptly—Damages—It is the duty of carriers to transport passengers within a reasonable time. In an action for damages for delay in transporting a crew of laborers it was held proper to admit evidence of the aggregate wages paid the men and the amount paid for their board and lodging during the delay. White v. Minneapolis etc. Ry. Co., 111 Minn. 167, 126 N. W. 533.

1214. Duty to furnish safe ingress and egress—Passenger trains on railroads are required by statute to stop a sufficient time, not less than one minute, to safely discharge and receive passengers. One entering a train to assist an outgoing passenger, but himself not intending to take passage, is entitled to the protection of the statute. G. S. 1913, § 4399; Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746. See Anderson v. Canadian Northern Ry. Co., 130 Minn. 373, 153 N. W. 863.

A railway company is under no duty to hold a train at a way station to give a person who has gone on a train for a conference with a passenger time to alight therefrom, or to aid such person in getting off the train safely by giving signals or lighting the station platform; the trainmen having no notice that such person was about to leave the train, and having in no way assented to his going on the train for said purpose. A person who goes upon a train to confer with a passenger thereon, without giving the trainmen notice of his so doing, or obtaining their assent thereto, assumes the risk of the train starting without signals while he is getting off, and of the unlighted condition of the platform. Fox v. Minneapolis & St. L. R. Co., 114 Minn. 336, 131 N. W. 374.

(37) Lamson v. Great Northern Ry. Co., 114 Minn. 182, 130 N. W. 945; Anderson v. Canadian Northern Ry. Co., 130 Minn. 373, 153 N. W. 863. See Fox v. Minneapolis & St. L. R. Co., 114 Minn. 336, 131 N. W. 374; Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746.

1215. Duty to furnish seats—If a carrier overcrowds its cars beyond their seating capacity it must exercise care proportioned to the increased danger caused by such overcrowding. Shields v. Minneapolis etc. R. Co., 124 Minn. 327, 144 N. W. 1092.

(38) Note, 136 Am. St. Rep. 311; L. R. A. 1915B, 915.

1216. Duty to warn passengers of dangers—Held a question for the jury whether a carrier owed a duty to warn passengers riding in a baggage car with their feet hanging out of the door of danger from a platform near its tracks. Shields v. Minneapolis etc. Co., 124 Minn. 327, 144 N. W. 1092.

1217. Duty to heat stations and passenger coaches—A carrier is bound to heat reasonably its passenger stations for its passengers properly therein. Barnett v. Minneapolis & St. L. R. Co., 123 Minn. 153, 143 N. W. 263; Id., 130 Minn. 300, 153 N. W. 600. See 6 Mich. L. Rev. 150.

The evidence on the issue as to whether or not plaintiff's illness was the result of defendant's negligence in failing to keep its depot waiting room warm after plaintiff became a passenger was sufficient to send the case to the jury. Barnett v. Minneapolis & St. L. R. Co., 130 Minn. 300, 153 N. W. 600.

1218. Duty to sick and infirm persons—(41) See note, 48 L. R. A. (N. S.) 816; 10 Col. L. Rev. 353; 27 Harv. L. Rev. 278 (right of sick person to be carried in a baggage car on a cot); Buckley v. Hudson Valley Ry. Co., 212 N. Y. 440, 106 N. E. 121 (duty in ejecting sick or helpless person for non-payment of fare).

1219. Duty as to equipment—(42) Rosenblatt v. Chicago etc. Ry. Co., 115 Minn. 108, 131 N. W. 1060 (defective air brake).

(44) Koeller v. Wisconsin etc. Co., 130 Minn. 265, 153 N. W. 519 (held a question for jury whether it was negligent not to have a conductor).

1220. Duty to inspect equipment—(47) Rosenblatt v. Chicago etc. Ry. Co., 115 Minn. 108, 131 N. W. 1060.

1222. Duty to employ proper servants—(49) Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831.

TICKETS AND FARES

1226. Duties and authority of ticket agents—Liability of company for negligence, mistakes, and misrepresentations of ticket agents. Note, 122 Am. St. Rep. 638.

It is not an unreasonable regulation to require a ticket agent to handle the baggage and express business at a small station where the business is light. Allen v. Chicago etc. Ry. Co., 116 Minn. 119, 133 N. W. 462.

1232. Opportunity to purchase tickets—Increased fare on trains—It is a reasonable regulation to require a passenger without a ticket, who tenders cash for transportation, to pay ten cents more than the regular fare; the passenger being furnished with a receipt, which entitles him to a refundment of the ten cents. This rule is not in conflict with chapter 97, Laws 1907, which fixes the maximum rate of transportation of passengers at two cents per mile. It was conclusively established by the evidence that the plaintiff was afforded the usual and reasonable opportunity to purchase a ticket before the train started upon which he desired to take passage. Allen v. Chicago etc. Ry. Co., 116 Minn. 119, 133 N. W. 462.

1238. Transfer checks—Street railways—Only small damages are ordinarily recoverable for the wrongful refusal to honor a transfer check. Teryll v. St. Paul City Ry. Co., 121 Minn. 530, 141 N. W. 304; Id., 125 Minn. 528, 147 N. W. 273.

In an action for refusal to accept transfer checks and for discourteous treatment by the conductor in connection therewith, a verdict for $300 held excessive. Teryll v. St. Paul City Ry. Co., 121 Minn. 530; 141 N. W. 304. See Id., 125 Minn. 528, 147 N. W. 273 (verdict for $150 on the same evidence sustained).

BAGGAGE

1246. Liability for loss or damages—Rates—In interstate commerce the extent of liability is regulated by the Hepburn Act and the schedules filed with the Interstate Commerce Commission by the carriers. Ford v. Chicago etc. Ry. Co., 123 Minn. 87, 143 N. W. 249.

Liability for hand baggage left with cashier for safe keeping. Larson v. Great Northern Ry. Co., 116 Minn. 337, 133 N. W. 867.

Liability for hand baggage retained in control of passenger. 25 Harv. L. Rev. 178; L. R. A. 1915B, 608.

EJECTION OF PASSENGERS

1247. Duty of passenger to leave when ordered—Use of force—(83) Willard v. St. Paul City Ry. Co., 116 Minn. 183, 133 N. W. 465. See Note, 125 Am. St. Rep. 727.

1249. For non-payment of fare—Passenger on street car carried beyond destination. Riding around loop at St. Paul with intention of riding back to destination. Refusal to pay fare on return trip. Willard v. St. Paul City Ry. Co., 116 Minn. 183, 133 N. W. 465.

Ejection from street car. Offering worn coin for fare. Wife included in order to husband to leave car. Glewwe v. St. Paul City Ry. Co., 117 Minn. 471, 136 N. W. 2.

A recovery has been sustained where a passenger on a street car was ejected upon the refusal of the conductor to accept a Canadian coin for the fare. The conductor thought that it was a coin of the Province of New Brunswick. The coin had been received the preceding day by plaintiff from defendant as part of the change given him upon the payment of his fare. Evidence of this fact was held admissible. The company had not instructed its conductors not to accept Canadian coin and such coin passes current in this state. Konkle v. St. Paul City Ry. Co., 119 Minn. 117, 137 N. W. 738.

1250. Mistake in ticket—(89) See Baltimore & Ohio Ry. Co. v. Thornton, 188 Fed. 868.

1253. For drunkenness—(92) Note, L. R. A. 1915C, 134.

1256. Place of ejection—(95) See Buckley v. Hudson Valley Ry. Co., 212 N. Y. 440, 106 N. E. 121 (duty as to sick or infirm persons); L. R. A. 1915C, 134.

1260. Damages—(1) Willard v. St. Paul City Ry. Co., 116 Minn. 183, 133 N. W. 465 (passenger on street car refusing to leave car ejected with unreasonable force—verdict for plaintiff for $1,500 held justified by the evidence and not excessive); Glewwe v. St. Paul City Ry. Co., 117 Minn. 471, 136 N. W. 2 (ejection from street car—verdict for $150 held excessive on appeal and reduced to $100).

LIABILITY FOR INJURIES TO PASSENGERS

1261. Care required of carrier—General rules—The standard of care is not that of an ordinarily prudent person under similar circumstances. Held error to so charge as to the care required of a motorman of a street car. Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831.

Care required of street railway companies. Note, 118 Am. St. Rep. 461.

(9) Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831.

(15) Hoblit v. Minneapolis St. Ry. Co., 111 Minn. 77, 126 N. W. 407; Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831; Shields v. Minneapolis etc. Traction Co., 124 Minn. 327, 144 N. W. 1092.

(16) Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831.

(22) Campbell v. Duluth & N. E. R. Co., 111 Minn. 410, 127 N. W. 413; Schultz v. Minneapolis & St. L. R. Co., 123 Minn. 405, 143 N. W. 1131.

1262. Limiting liability by contract—Free passes—(23) See Santa Fe etc. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177 (rule inapplicable when railroad company is acting outside the performance of its duties as a common carrier—construction work); Charleston etc. Ry. Co. v.

Thompson, 234 U. S. 576 (exemption in pass issued to member of family of railroad employee valid under Hepburn Act).

1266. Collisions—(30) Campbell v. Duluth & N. E. R. Co., 111 Minn. 410, 127 N. W. 413 (train breaking in two—collision between two parts—plaintiff thrown from seat—air brake hose not connected—doctrine of res ipsa loquitur inapplicable).

1267. Derailments—(31) Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149 (liability of defendant admitted—woman thrown from seat to floor).

1268. Injuries from unsafe premises—Stations—A railroad company carrying passengers is bound to heat reasonably its station buildings for the accommodation of passengers, but not for the accommodation of licensees or trespassers. Barnett v. Minneapolis & St. L. R. Co., 123 Minn. 153, 143 N. W. 263; Id., 130 Minn. 300, 153 N. W. 600.

A recovery sustained where a passenger alighting from a train was injured because the station platform was insufficiently lighted. Bosch v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 202.

One who goes to a station to meet a passenger is not a trespasser. Nor is one who goes to mail a letter or to have a business consultation with another who is expected to be there to take a train. One using a platform of a station which is a public way is not a trespasser. Rudd v. Great Eastern Casualty & Indemnity Co., 114 Minn. 512, 131 N. W. 633.

One who goes to a station to inquire about trains is not a trespasser. English v. Minneapolis & St. L. R. Co., 117 Minn. 131, 134 N. W. 518.

(32) Hull v. Minneapolis etc. Ry. Co., 116 Minn. 349, 133 N. W. 852 (accumulation of snow and ice on platform); English v. Minneapolis & St. L. R. Co., 117 Minn. 131, 134 N. W. 518 (defective step to platform—defendant and another company operated a station in common—fact that plaintiff went to station to inquire about trains of the other company immaterial—acquiescence of company in use by public of common platform and step); Texas & Pacific Ry. Co. v. Stewart, 228 U. S. 357 (passenger leaving train to ascertain if it was the right one—tracks insufficiently lighted).

(36) See Mathews v. Great Northern Ry. Co., 119 Minn. 49, 137 N. W. 175 (woman groping in a dark station for the door of a toilet room entered wrong door and fell to basement—contributory negligence held a question for jury—recovery sustained).

See Digest, § 8157.

1270. Overcrowding cars—(38) See Rhea v. Minneapolis St. Ry. Co., 111 Minn. 271, 126 N. W. 823; Digest, § 1215.

1271. Passengers in improper place—Failure of a caretaker of a live poultry shipment to remain in the caboose as required by the contract

of carriage held, under the terms of the contract when taken together and the circumstances of the case, not to preclude, as a matter of law, a recovery for injuries received by him while riding in the car with the shipment. While in the car the caretaker assumed all risks reasonably incident to that mode of carriage but not those resulting from unnecessary and extraordinary occurrences involving dangers not incident to the proper handling of freight trains like the one in question. Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322.

Contributory negligence of passenger standing inside of car. Note, 50 L. R. A. (N. S.) 441, 450.

(40) See Schultz v. Minneapolis & St. L. Ry. Co., 123 Minn. 405, 143 N. W. 1131 (passenger riding in cupola of caboose contrary to rules of company—rules habitually violated—recovery sustained).

1272. Injuries to passengers in baggage car—(41) Shields v. Minneapolis etc. Co., 124 Minn. 327, 144 N. W. 1092.

1274. Injuries to passengers riding on platform of street car—Passenger fell while in the act of passing from the platform to inside of car. Recovery denied in the absence of any evidence of negligence on the part of the carrier. Rhea v. Minneapolis St. Ry. Co., 111 Minn. 271, 126 N. W. 823.

1275. Injuries to passengers boarding trains—(49) Hull v. Minneapolis etc. Ry. Co., 116 Minn. 349, 133 N. W. 852 (passenger boarding moving train—question of contributory negligence for jury—verdict for plaintiff sustained); Doran v. Chicago etc. Ry. Co., 128 Minn. 193, 150 N. W. 800 (plaintiff injured while boarding the caboose of a freight train—train started suddenly with a violent jerk without warning).

1276. Injuries to passengers boarding street cars—(52) Note, L. R. A. 1915A, 797.

1277. Injuries to passengers alighting from trains—A brakeman called out the name of a station twice and then opened the door of the car and of the vestibule, calling out the name of the station again. The train slowed down and stopped several blocks from the station. While passengers were on the platform and steps preparing to alight the train started without warning. Plaintiff, with his child three years old, was standing on the steps. The child jumped or fell from the train as it started. A recovery for the injury to the child sustained. Fox v. Chicago etc. Ry. Co., 121 Minn. 511, 141 N. W. 845.

Recovery sustained where plaintiff fell between a platform and the rails and his leg was crushed. He stood on the bottom step of the car preparatory to alighting when his ankle gave way, causing him to lose his balance and fall. The train started just as he was about to alight, and the ground of recovery was that the train had not stopped long

enough to give him a reasonable opportunity to alight. Anderson v. Canadian Northern Ry. Co., 130 Minn. 373, 153 N. W. 863.

Duty and liability of carrier to passenger alighting temporarily at intermediate point. Note, 51 L. R. A. (N. S.) 899.

(01) Burnside v. Minneapolis & St. P. Ry. Co., 110 Minn. 401, 125 N. W. 895.

(57) Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746 (person entering train to assist outgoing passenger—train did not stop statutory time); Anderson v. Canadian Northern Ry. Co., 130 Minn. 373, 153 N. W. 863. See Hull v. Minneapolis etc. Ry. Co., 116 Minn. 349, 133 N. W. 852; L. R. A. 1915C, 181.

(65) Patzke v. Minneapolis & St. L. R. Co., 113 Minn. 168, 129 N. W. 124; Fox v. Chicago etc. Ry. Co., 121 Minn. 511, 141 N. W. 845.

See Digest, § 1214.

1278. Injuries to passengers alighting from street cars—It is one of the duties of a conductor to see that passengers are safely off the car before the signal to start is given. A recovery has been sustained where the car was started suddenly while plaintiff was in the act of alighting, one of the grounds of negligence charged being that the car was being operated without a conductor. Koeller v. Wisconsin etc. Co., 130 Minn. 265, 153 N. W. 519.

Recovery sustained where plaintiff was thrown and injured by the car passing around a sharp curve at an excessive speed as she was arising to alight. Buckman v. St. Paul City Ry. Co., 115 Minn. 488, 132 N. W. 992.

Verdict for defendant sustained upon a charge of negligence that as a car stopped it lurched back on an upgrade just as the gates were opened for passengers to alight. Hoblit v. Minneapolis St. Ry. Co., 111 Minn. 77, 126 N. W. 407.

(67, 68) Koenig v. St. Paul City Ry. Co., 110 Minn. 212, 124 N. W. 832; Koeller v. Wisconsin etc. Co., 130 Minn. 265, 153 N. W. 519.

(70) Hoblit v. Minneapolis St. Ry. Co., 111 Minn. 77, 126 N. W. 407.

1279. Injuries from obstacles near tracks—(75) Lacey v. Minneapolis St. Ry. Co., 118 Minn. 301, 136 N. W. 878 (passenger on street car becoming nauseated put his head out of the window and was struck by upright plank used as sheathing in a sewer in course of construction—whether defendant was negligent in not warning passengers of obstacles near tracks or in not screening windows of car held a question for the jury—plaintiff not guilty of contributory negligence as a matter of law). See Note, 50 L. R. A. (N. S.) 42.

1280. Injuries to passengers extending body beyond line of moving car—(76) Lacey v. Minneapolis St. Ry. Co., 118 Minn. 301, 136 N. W. 878 (passenger on street car becoming nauseated put his head out of

window and was struck by obstacle near track—held not guilty of contributory negligence as a matter of law—negligence of defendant for jury); Shields v. Minneapolis etc. Co., 124 Minn. 327, 144 N. W. 1092 (sitting in doorway of baggage car with feet hanging out of door). See Note, 50 L. R. A. (N. S.) 42.

1282. Street car stopping at unsafe place—(78) Note, 32 L. R. A. (N. S.) 881.

1283. Assaults on passengers by employees—(79) Lamson v. Great Northern Ry. Co., 114 Minn. 182, 130 N. W. 945 (abusive and insulting language used by conductor toward passenger—evidence held not to justify punitive damages); Germann v. Great Northern Ry. Co., 114 Minn. 247, 130 N. W. 1021 (assault on passenger by colored cook employed in buffet car—assault provoked by passenger—verdict for $2,000 held excessive on appeal and a new trial granted); Germann v. Great Northern Ry. Co., 117 Minn. 310, 135 N. W. 750 (same as preceding case—evidence justified submission of question of punitive damages to jury—verdict for $2,000 reduced to $1,000 by trial court—so reduced sustained on appeal). See Note, 32 L. R. A. (N. S.) 1201; 40 Id., 999; 32 Am. St. Rep. 90.

1284. Assault or other injury from fellow-passenger—(80) Jansen v. Minneapolis & St. L. R. Co., 112 Minn. 496, 128 N. W. 826 (passenger, a priest, assaulted by a drunken passenger—damages for mental suffering recoverable—verdict for $200 held not excessive). See Note, 32 Am. St. Rep. 90; 32 L. R. A. (N. S.) 1206; 37 Id. 724; 27 Harv. L. Rev. 376 (liability of carrier to passenger assisting in restraint of disorderly fellow-passenger).

1285. Injuries from strangers—Strike—(81) Note, 97 Am. St. Rep. 526.

1287. Injuries from exposure to cold—(83) See Barnett v. Minneapolis & St. L. R. Co., 123 Minn. 153, 143 N. W. 263; Id. 130 Minn. 300, 153 N. W. 600.

1288. Injuries from fright—(84) Note, 45 L. R. A. (N. S.) 433.

1289. Freight and mixed trains—Assumption of risk—Mixed trains cannot be operated with the same degree of comfort and safety to passengers as those used exclusively for passenger traffic, and the bumping of cars and jolts ordinarily incident to the operation of the former, in coupling cars, slacking, or taking out the slack, is not negligence, though occasioning injury. Per contra, carriers of passengers on such trains are bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its purpose of transporting both freight and passengers, regard being had to the situation of the latter, known, or which ought to be known, to the employees in charge, and the former assumes only such risks and inconveniences as usually attend the

operation of such trains with all reasonable skill and caution as a freight train. Failure to perform such duty constitutes negligence. Schultz v. Minneapolis & St. L. R. Co., 123 Minn. 405, 143 N. W. 1131; Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117.

A railway company which receives passengers for transportation on freight trains must afford them a reasonable opportunity to enter and leave such trains in safety, and owes them the duty to guard against dangers which reasonable prudence could foresee and avoid. Doran v. Chicago etc. Ry. Co., 128 Minn. 193, 150 N. W. 800.

Whether a sudden stopping of a freight train due to a defective air brake was a natural incident of freight-train service, so that the risk was assumed by a passenger, held a question for the jury. Rosenblatt v. Chicago etc. Ry. Co., 115 Minn. 108, 131 N. W. 1060.

Plaintiff held not to have lost his status as a passenger by riding in the cupola of a caboose, a rule of the company against doing so having been habitually disregarded. Schultz v. Minneapolis & St. L. R. Co., 123 Minn. 405, 143 N. W. 1131.

Recovery sustained where plaintiff was thrown violently to the floor of a caboose by an unusual and violent movement of the train. Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117.

(85) Schultz v. Minneapolis & St. L. R. Co., 123 Minn. 405, 143 N. W. 1131; Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117.

1291a. Injuries to passengers of automobiles—Recovery against a carrier by automobile sustained where the chauffeur drove into a bridge in making a sharp turn while driving at an excessive speed. Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

1292. Care required of passenger—Where a passenger acts upon the express or implied invitation of trainmen he will not be charged with contributory negligence as a matter of law, unless the dangers are so obvious that a person of ordinary prudence would not risk them. Shields v. Minneapolis etc. Traction Co., 124 Minn. 327, 144 N. W. 1092.

(88) Hoblit v. Minneapolis St. Ry. Co., 111 Minn. 77, 126 N. W. 407 (woman alighting from a street car—failure to steady or support herself in any way); Barnett v. Minneapolis & St. L. R. Co., 123 Minn. 153, 143 N. W. 263 (duty of passenger to leave unheated station to avoid taking cold); Schultz v. Minneapolis & St. L. R. Co., 123 Minn. 405, 143 N. W. 1131 (a passenger is not guilty of contributory negligence as a matter of law because, at the time of the accident, he was violating a rule of the company habitually disregarded); Shields v. Minneapolis etc. Co., 124 Minn. 327, 144 N. W. 1092 (sitting in doorway of baggage car with feet hanging out of door).

1295. Proximate cause—(93) Fox v. Chicago etc. Ry. Co., 121 Minn. 511, 141 N. W. 845; Barnett v. Minneapolis & St. L. R. Co., 123 Minn.

153, 143 N. W. 263 (passenger taking cold in unheated station—subsequent illness); Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434; Barnett v. Minneapolis & St. L. R. Co., 130 Minn. 300, 153 N. W. 600; Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117.

1296. Presumption of negligence and burden of proof—(95) See Rhea v. Minneapolis St. Ry. Co., 111 Minn. 271, 126 N. W. 823 (no presumption of negligence from fact that decedent fell upon the floor of car and was injured, there being no evidence that defendant was responsible for the fall); Campbell v. Duluth & N. E. R. Co., 111 Minn. 410, 127 N. W. 413 (collision between two parts of a separated train—rule of res ipsa loquitur inapplicable); Note, 113 Am. St. Rep. 1020; 13 L. R. A. (N. S.) 601.

1296a. Parties—Joinder of servant—Effect of verdict—Where a suit to recover for personal injuries is brought by a passenger against a railway company and one of its employees, and a verdict is rendered against the company but in favor of the employee, such verdict determines that there was no negligence on the part of the employee which can be imputed to the company; but where the company is charged both with the negligence charged against the employee and with other negligence, such verdict also determines that the company was guilty of such other negligence. Doran v. Chicago etc. Ry. Co., 128 Minn. 193, 150 N. W. 800.

1296b. Pleading—Where contributory negligence is not pleaded or litigated by consent it should not be submitted to the jury. Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117. See § 7060.

A complaint against a carrier by automobile held to charge negligence not only in the speed but also in the management of the automobile. Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

Under an allegation in a complaint that the defendant negligently made up its train upon an improper and unsafe plan, and negligently failed to provide sufficient and proper couplings between the cars, evidence is admissible to show that the air brake hose had not been connected at the time the train started. Campbell v. Duluth & N. E. R. Co., 111 Minn. 410, 127 N. W. 413.

CARRIERS OF GOODS

IN GENERAL

1298. Discrimination in facilities—A contract by a common carrier to supply to a particular interstate shipper a specified number of cars on certain dates, to be used in such shipment, is not a violation of the act of Congress regulating interstate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), unless it appears that the

contract, if performed, will in fact extend to that shipper an undue or unreasonable preference over other shippers. W. H. Ferrell & Co. v. Great Northern Ry. Co., 119 Minn. 302, 138 N. W. 284.

(1) See Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436; W. H. Ferrell & Co. v. Great Northern Ry. Co., 114 Minn. 531, 131 N. W. 1135; State v. Minneapolis & St. L. R. Co., 115 Minn. 116, 131 N. W. 1075; Banner v. Great Northern Ry. Co., 119 Minn. 68, 137 N. W. 161; W. H. Ferrell & Co. v. Great Northern Ry. Co., 119 Minn. 302, 138 N. W. 284; State v. Great Northern R. Co., 122 Minn. 55, 141 N. W. 1102.

1299. Right to refuse goods—A common carrier is not at liberty to accept or decline shipments of lawful merchandise but must accept them and name to the shipper the rate of transportation. Missouri Pac. Ry. Co. v. Tucker, 230 U. S. 340.

See Digest, § 1334.

1300. Duty to furnish freight cars—Contracts—Damages—Where the usual course of business has been for a railway company to furnish cars at a warehouse maintained by a shipper, the shipper has the right to demand cars for its use, giving reasonable notice of its requirements; and, if loss results because of a wrongful refusal or neglect to furnish the cars, the shipper may recover. In such a case, the fact, particularly when communicated to the carrier, that the goods to be shipped are prepared for and immediately available for shipment, is a sufficient tender of the merchandise to the carrier. An action for loss so occasioned is in tort; no contract having been made for delivery at any point. The measure of damages is the difference in the value of the merchandise at the place of shipment, when offered for transportation, and its value at the same place, when shipping facilities were furnished. Richey & Gilbert Co. v. Northern Pacific Ry. Co., 110 Minn. 347, 125 N. W. 897.

A contract by a common carrier to supply to a particular interstate shipper a specified number of cars on certain dates, to be used in such shipment, is not a violation of the act of Congress regulating interstate commerce, unless it appears that the contract, if performed, will in fact extend to that shipper an undue or unreasonable preference over other shippers. W. H. Ferrell & Co. v. Great Northern Ry. Co., 119 Minn. 302, 138 N. W. 284.

(4) Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436 (contract to furnish cars need not be in writing—consideration); W. H. Ferrell & Co., 114 Minn. 531, 131 N. W. 1135 (complaint for failure to furnish cars as agreed sustained though it did not allege a written demand for the cars as provided by Laws 1907, c. 23—complaint good at common law); Zetterberg v. Great Northern Ry. Co., 117 Minn. 495, 136 N. W. 295 (id.); See Note, 44 L. R. A. (N. S.) 643 and Digest, § 1339a.

1302. Disclosing contents of packages—Fraud—Silence by one tendering a package to a common carrier for shipment may constitute a fraud upon the carrier, even without any intention upon the part of the shipper to deceive, if the shape, size, or appearance of the package misleads the carrier as to the value of the contents. Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

A shipment was billed by plaintiff's agent as emigrant movables. Held, that the designation covered plaintiff's goods, consisting of typewriter, dictionary, wearing apparel, trunk, and personal effects, and was not a falsification or misrepresentation which estops plaintiff from claiming the actual value of those goods; nor was such designation of the goods a violation of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 387 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 18, 1910, c. 309, 36 Stat. 547 (U. S. Comp. St. 1911, p. 1284); nor does that act, under the evidence in this case, require the court to instruct the jury that the limitation of liability in the bill of lading was valid. O'Connor v. Great Northern Ry. Co., 118 Minn. 223, 136 N. W. 743.

1303. Authority of agents—Evidence held to show that a local station agent had no authority to make a contract binding a carrier to pay for damage to property caused by a fire after the car containing the property had been turned over to the consignee for unloading. Chicago etc. Ry. Co. v. Kelm, 121 Minn. 343, 141 N. W. 295.

1303a. Shipments of grain—Tag showing quantity—Section 4498, G. S. 1913, requiring every shipper of grain to place a tag in each car shipped, showing the quantity of the grain therein, has no application to shipments originating in another state. The statute was intended to have application only to shipments within the state. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

BILLS OF LADING

1304. Definition—(9) See State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

1305a. As contract of parties—When a person delivers a package for transportation to an express company and accepts a receipt therefor, the receipt is presumed to contain the terms of the contract governing the shipment, and, if he desires to avoid the terms of the contract, the burden is upon the person who accepts such a receipt to show that he was in some manner misled by misrepresentation, fraud, or concealment, and mere failure to read or examine the receipt is not sufficient. Porteous v. Adams Express Co., 115 Minn. 281, 132 N. W. 296; Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154.

1310. Issued for goods not received—Estoppel—The rule stated in the Digest has been abrogated by statute. The carrier is now estopped

from denying the receipt of goods, as against bona fide holders of bills of lading. G. S. 1913, § 4326. See Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 216, 127 N. W. 926.

1311. Parol evidence—Parol evidence is admissible to explain trade abbreviations. Lampert Lumber Co. v. Minneapolis & St. L. R. Co., 127 Minn. 195, 149 N. W. 133.

In so far as a bill of lading is a mere receipt it may be contradicted by oral evidence. Vanderbilt v. Ocean S. S. Co., 215 Fed. 886.

LIMITATION OF LIABILITY

1312. Right to limit liability—In general—(23) McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164; Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727;

(01) Dodge v. Chicago etc. Ry. Co., 111 Minn. 123, 126 N. W. 627; Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154; O'Connor v. Great Northern Ry. Co., 120 Minn. 359, 139 N. W. 618; Ford v. Chicago etc. Ry. Co., 123 Minn. 87, 143 N. W. 249. See Adams Express Co. v. Croninger, 226 U. S. 491 (federal legislation is exclusive as to interstate shipments); Boston & Maine R. Co. v. Hooker, 233 U. S. 97 (Hepburn Act and Carmack amendment excludes state regulation—effect of schedules filed by railroad—notice to passenger); Atchison etc. Ry. Co. v. Robinson, 233 U. S. 173.

See Digest, § 1318.

1313. Presumption of common-law liability—Where property is injured or lost while in the hands of a common carrier, the shipper may sue the carrier upon the latter's common-law liability, without regard to the existence of any special contract of shipment that may have been entered into limiting the carrier's liability, thus leaving it to the defendant to plead such contract by way of defence. McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

1314. Consideration for limitation—It is not necessary that there should be a separate consideration apart from the usual charge for shipment. Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154.

(26) Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727. See 24 Harv. L. Rev. 59.

1316. Contract of limitation—Sufficiency—The contract may be embodied in the bill of lading. Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

1317. Notice of claim—Waiver—(32) See B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609 (burden of proof—sufficiency of evidence as to notice).

(37) Banks v. Penn. R. Co., 111 Minn. 48, 126 N. W. 410 (evidence to show waiver competent and sufficient); Gamble-Robinson Commission Co. v. Northern Pacific Ry. Co., 119 Minn. 40, 137 N. W. 19 (waiver cannot be predicated on a mere denial of liability when the claim is presented—evidence held not to show a waiver); Shama v. Chicago etc. Ry. Co., 128 Minn. 522, 151 N. W. 406 (evidence held to show waiver conclusively); Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220 (evidence held to show a waiver).

1318. Agreed valuation—A contract between a common carrier and a shipper, limiting the carrier's liability, in case of loss of the goods, to a stipulated valuation, will be upheld if it is made to appear that the contract was fairly entered into by the shipper, with full freedom of choice, and that it is also just and reasonable. Ostroot v. Northern Pacific Ry. Co., 111 Minn. 504, 127 N. W. 177; Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429; Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296; O'Connor v. Great Northern Ry. Co., 118 Minn. 223, 136 N. W. 743; Wood v. Chicago & N. W. Ry. Co., 118 Minn. 362, 136 N. W. 1095; McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164; Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220. See 26 Harv. L. Rev. 752.

Such contracts are exceptions to the common-law liability, and they should be carefully scrutinized by the courts, and only enforced when it is made to appear that they are just and reasonable, and were fairly entered into by the shipper, with full freedom of choice. If these facts are not made to appear the court may exclude such contracts from the consideration of the jury. Ostroot v. Northern Pacific Ry. Co., 111 Minn. 504, 127 N. W. 177; McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

The Carmack amendment of the Hepburn act (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]) does not prevent a common carrier from making valid shipping contracts limiting liability according to an agreed value upon interstate shipments under legal tariff rates. Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154.

Limitation of liability by contract in case of loss has not been abolished by the Interstate Commerce Act. Reasonable agreements in this regard are upheld. This is a subject about which the policy established in the several states prevails, since as well as before the enactment of the federal statutes. Hence an agreement inserted in a bill of lading limiting liability in case of loss has been held invalid, if contrary to the law of the state, even though made the basis of a contract of interstate carriage. O'Connor v. Great Northern Ry. Co., 118 Minn. 223, 136 N. W. 743.

According to the law of the state of New York, where a carrier, by his contract, limits his liability to a specified amount, in case the value of goods delivered for carriage is not stated by the shipper, if goods of greater value are so delivered, silence on the part of the shipper as to the real value, though there is no inquiry by the carrier, and no artifice to conceal the value, or to deceive, is a legal fraud, which discharges the carrier from liability for ordinary negligence for an amount exceeding the limitation of the contract. Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154.

The finding to the effect that defendant had legal rates graduated in accordance with the value of the shipment, so that it was lower when the value of the shipment was limited to fifty dollars or less, and correspondingly higher when valued in excess of said sum, is sustained by the evidence, so that no special consideration need be shown for the limited liability, other than the lower rates in force for shipments made thereunder. Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154.

Recovery for full damages sustained, though there was a special contract limiting the recovery to the agreed value, counsel not calling the attention of the court to the special contract. Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220.

(39) Porteous v. Adams Express Co., 112 Minn. 31, 37, 127 N. W. 429.

1319. Authority of agent of shipper.—(41) See O'Connor v. Great Northern Ry. Co., 118 Minn. 223, 136 N. W. 743; McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

LIABILITY FOR LOSS OR INJURY

1323. Carrier an insurer at common law—(50) N. W. Marble & Tile Co. v. Williams, 128 Minn. 514, 128 N. W. 419; Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115; Atlantic Coast Line Ry. Co. v. Riverside Mills, 219 U. S. 186, 205.

(51) See Digest, §§ 1312–1319.

1323a. Interstate commerce—Federal law exclusive—Hepburn Act—Under the commerce clause of the federal constitution Congress may regulate the contract between the carrier and shipper as to liability for loss in interstate shipments. Until legislation by Congress the extent of the liability is determined by the application of common-law principles, or by the public policy of the particular state, or it may be fixed by statute. By the Hepburn Act of June 29, 1906 (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1911, p. 1288]), Congress exercised its authority to regulate interstate shipments and the power of the state was at an end. Ford v. Chicago etc. Ry. Co., 123 Minn. 87, 143 N. W. 249.

1329. Goods taken from carrier under superior title—(58) Note, 34 Am. St. Rep. 731.

1330. Seizure of goods under process—(60) American Express Co. v. Mullins, 212 U. S. 311; Wells Fargo & Co. v. Ford, 238 U. S. 503. See Note, 34 Am. St. Rep. 731.

1331. Act of God—(61) See White v. Minneapolis & Rainy River Ry. Co., 111 Minn. 167, 126 N. W. 533; Cormack v. N. Y. etc. Ry. Co., 196 N. Y. 442.

1332. Loss from inherent nature of goods—(63) Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115. See Digest, § 1333.

1333. Perishable goods—Fruit and vegetables—A carrier is not an insurer against damages to freight from changes in temperature, unless the circumstances in which the transportation is undertaken impose upon the carrier that obligation; but if, after acceptance of the freight, its transportation is delayed, the carrier must use reasonable care to protect it during the delay. White v. Minneapolis & Rainy River Ry. Co., 111 Minn. 167, 126 N. W. 533.

(64) Whitaker v. Chicago etc. Ry. Co., 115 Minn. 140, 131 N. W. 1061 (shipment of strawberries from Missouri to St. Paul—burden of proof—instructions that strawberries have an inherent tendency to become heated and mouldy sustained); B. Presley Co. v. Illinois Central R. Co., 117 Minn. 399, 136 N. W. 11 (shipment of holly in box car in November—frozen en route—burden of proof—verdict for shipper sustained); Emerson v. Chicago etc. Ry. Co., 120 Minn. 84, 138 N. W. 1026 (carload of potatoes exposed in a temperature 10 degrees below zero so that they were frozen solid—recovery against carrier sustained); Gamble-Robinson Com. Co. v. Illinois Central R. Co., 125 Minn. 530, 147 N. W. 1134 (car of strawberries—failure to ice—defendant's negligence a question for the jury—immaterial that damaged condition of berries was not discovered until after connecting carrier had delivered them to plaintiff); Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115 (shipment of strawberries from Arkansas to St. Paul—duty of carrier of strawberries—burden of proof).

1334. Improper packing—A common carrier is, at common law, an insurer of the goods shipped, and is responsible for all losses, except those arising from certain excepted causes. One excepted cause is improper packing by the shipper. The rules applicable to contributory negligence do not apply to such a case. The carrier must, to relieve himself from liability, show that the fault of the shipper was the sole cause of the loss. If improper packing is apparent to the carrier or his servants, then the carrier may refuse to receive the shipment. If he does receive the

shipment, he assumes to carry the goods as they are, and the full common-law liability as carrier attaches. Although the carrier has knowledge of the defective packing, yet if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. On this point the evidence in this case presents a question for the jury. N. W. Marble & Tile Co. v. Williams, 128 Minn. 514, 151 N. W. 419. See Note, L. R. A. 1915D, 1077.

1335. Dead bodies—(67) See 8 Col. L. Rev. 326.

1335a. Measure of damages—The measure of damages for injury to goods is the difference between the value of the goods as they would have arrived, if carried properly, and their value as they did in fact arrive. B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609.

LIABILITY FOR DELAY

1337. Duty to carry promptly—(69) See Sleepy Eye Milling Co. v. Chicago etc. Ry. Co., 119 Minn. 199, 137 N. W. 813.

1338. Delay concurring with act of God—(70) See White v. Minneapolis & Rainy River Ry. Co., 111 Minn. 167, 126 N. W. 533.

1339a. Demurrage—(72) Chicago etc. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426 (holding statute unconstitutional and reversing Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819). See St. Louis etc. Ry. Co. v. Edwards, 227 U. S. 265.

See cases under § 1300.

DELIVERY OF GOODS

1340. Production of bill of lading—The owner and shipper of the property, who retains possession of the bill of lading, is entitled to the property as against the carrier. Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960.

A common carrier may not safely deliver a shipment to the order of a consignee named in an order bill of lading without the production of such bill of lading properly indorsed. The provision of an order bill of lading, adopted by the railroads in the form recommended by the Interstate Commerce Commission, which requires the bill of lading properly indorsed to be surrendered upon delivery of the shipment, is for the benefit of the shipper or owner as well as for the protection of the carrier. By shipping goods under such an order bill of lading consigned to the order of another, the owner and shipper is not estopped from

asserting a claim for conversion against the carrier who has made delivery to the order of the consignee named without requiring the production of the bill of lading with the indorsement therein called for. Judson v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 506.

(74) Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960.

1341. Consignee presumptively owner and entitled to delivery—Where goods are shipped by carrier, the consignee is presumed to be the owner. A direction in the bill of lading to "notify" a third party does not make such party the consignee, nor does it give rise to any presumption that he is the owner. The presumption of ownership in the consignee may be rebutted by proof of a completed sale to the party to be notified before the shipment. In such case, if the price is not paid, the vendor holds a vendor's lien until payment or delivery. If he consigns the goods to himself, the effect is to simply preserve such vendor's lien. Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819.

The presumption that the consignee is the owner is not conclusive. It may be shown that the consignor is the owner and entitled to recover. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954.

(77) Sleepy Eye Milling Co. v. Chicago etc. Ry. Co., 119 Minn. 199, 137 N. W. 813; Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819; Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115; Judson v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 506.

1343a. Time—A carrier is presumed to know when it delivered the goods. Banks v. Penn. R. Co., 111 Minn. 48, 126 N. W. 410.

1345. Unauthorized delivery or refusal to deliver as a conversion—Refusal of carrier to deliver goods as a conversion. Note, 50 L. R. A. (N. S.) 1172.

(83) Judson v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 506.

1346. Delivery on industrial tracks—Switching charges—A carrier is bound, unless there be custom or contract to the contrary, when it receives shipments in car load lots, to make delivery at the consignee's place of business when located on its industrial tracks, or to connecting carriers and switching roads when the consignee's business is located thereon. It is not, however, bound, at its own charge, to make such delivery beyond its own or leased tracks. Banner Grain Co. v. Great Northern Ry. Co., 119 Minn. 68, 137 N. W. 161.

LIABILITY AS WAREHOUSEMEN

1348. In general—(88) Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 453; Id., 127 Minn. 251, 149 N. W. 304.

1348a. Contracts for free storage—Validity—It is within the corporate powers of a common carrier to agree, as an inducement in securing business, that merchandise shipped over its roads shall be stored at terminal points in this state free of charge for the period of ninety days, subject to stipulated charges thereafter until removed; it appearing that the concession of free storage and the subsequent charges were in accordance with duly published tariff regulations and open without discrimination to all shippers, limited only by the facilities for storage. State v. Minneapolis & St. L. R. Co., 115 Minn. 116, 131 N. W. 1075.

TERMINATION OF LIABILITY

1349. General rules—Necessity of notice to consignee—The common-law liability of a common carrier of goods as an insurer does not terminate until delivery to the consignee, or, if there is no delivery, until notice to him of arrival and a reasonable opportunity of removal afforded him. At the termination of such reasonable time the liability of the common carrier is that of a warehouseman. The property involved was left by the plaintiff consignee with the defendant carrier for fifty-three hours after notice to him of its arrival at the point of destination, when it was destroyed by fire. Held, under the facts of the case, as a matter of law, and independently of the provisions of the shipping bill, that at the time of the fire the liability of the carrier as an insurer had ceased, and that its liability was that of a warehouseman. Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

Where goods were consigned to the shipper to be sold to a prospective purchaser at the place of destination, it was held that the carrier was bound by virtue of custom to notify the shipper of a failure of the purchaser to accept the goods within forty-eight hours of their arrival. Emerson v. Chicago etc. Ry. Co., 120 Minn. 84, 138 N. W. 1026.

(89, 90, 91) Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

(93) See Emerson v. Chicago etc. Ry. Co., 120 Minn. 84, 138 N. W. 1026.

1349a. Limitation by special contract—The carrier's common-law liability as an insurer may be limited by contract. If the shipper agrees to a limitation, and there is afforded him the option of taking the common-law liability, and the contract is just and reasonable, and is supported by a consideration, the limitation is valid; and the limitation in

the shipping bill of the carrier's liability, as an insurer, to forty-eight hours after notice to the consignee of the arrival of the freight, is, so far as the record in the case at bar shows, valid, as also is the provision that property not removed within forty-eight hours after notice of arrival may be kept in car or warehouse subject to storage charges and the carrier's responsibility as warehouseman. Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

1350. Necessity of putting goods in warehouse—Bulky goods—Spotting cars—Where a railway company places bulky freight, shipped in car load lots, and to be unloaded by the consignee, at the point designated by the consignee as the place where he desires to unload it, and possession thereof is turned over to and taken by consignee, so that the company has no further duty to perform, its absolute liability as carrier terminates, and it is liable for subsequent damage to the property only when such damage results from its negligence. Chicago etc. Ry. Co., v. Kelm, 121 Minn. 343, 141 N. W. 295.

See Note, 97 Am. St. Rep. 84.

CONNECTING CARRIERS

1354. Through cars—Liability—(1) See Hill v. Republic Iron & Steel Co., 112 Minn. 244, 127 N. W. 925.

1355. Liability for loss or injury—Hepburn Act—The provision of the Hepburn Act, making the initial carrier liable for loss or injury, in case of an interstate shipment, caused by it or any connecting carrier, is constitutional. Dodge v. Chicago etc. Ry. Co., 111 Minn. 123, 126 N. W. 627; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186.

(4) Dodge v. Chicago etc. Ry. Co., 111 Minn. 123, 126 N. W. 627; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186. See Note, 31 L. R. A. (N. S.) 1; 106 Am. St. Rep. 604.

1356. Presumption as to condition of goods—Burden of proof—(9) Lampert Lumber Co. v. Minneapolis & St. L. R. Co., 127 Minn. 195, 149 N. W. 133. See Note, 101 Am. St. Rep. 392.

ACTIONS

1356a. Election of remedies—Action ex delicto or ex contractu—The plaintiff generally has an election to sue either on the common-law tort liability of the carrier or on an express contract. McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164. See Digest, § 1259.

1356b. Limitation—Waiver—A stipulation requiring the shipper to present his claim and sue within a specified time may be waived. Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220; Naumen v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1076.

1357. Who may sue—A consignee may sue as the real party in interest. Sleepy Eye Milling Co. v. Chicago etc. Ry. Co., 119 Minn. 199, 137 N. W. 813; McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164. See Note, 36 L. R. A. (N. S.) 68.

(14) Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954.

1357a. Claims for goods lost or injured—Delay in settlement—Penalty—G. S. 1913, § 4314 et seq., imposing upon a common carrier a penalty of $25 for the failure to settle and adjust within sixty days a claim against it, and imposing a like penalty upon a person presenting a fraudulent claim, held not unconstitutional either as class legislation, as depriving carriers of their property without due process of law, or as depriving the parties affected of the equal protection of the law. Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960.

The statute does not apply to interstate commerce. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954.

1358a. Defences—Settlement—In an action by a consignee a settlement with the consignor held no defence. Sleepy Eye Milling Co. v. Chicago etc. Ry. Co., 119 Minn. 199, 137 N. W. 813.

1359. Pleading—Variance—A complaint may be predicated on the common-law liability of the carrier though there is a special contract, leaving it to the defendant to plead the special contract as a defence. McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

Where general allegations of negligence are followed by particular statements of specific acts of negligence, the general allegations are restricted and qualified by the particular ones. Allegations in a complaint, construed as a whole, held not broad enough to have justified the admission of evidence tending to show defendant's negligence in failing to provide a proper yard for care of sheep when unloaded. The record did not show litigation of that issue by consent. Plaintiff was not bound to have anticipated this ground of negligence, and to have moved to make the pleadings more definite and certain with respect to it. The admission of the evidence under the circumstances was reversible error. Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4.

An informal complaint, alleging that pursuant to an agreement plaintiff, as consignor and consignee, shipped cattle which arrived in an emaciated condition, "crippled, damaged, and depreciated in selling and actual market value" in a named sum, held to sufficiently allege ownership or interest and damage as against a general demurrer. Croff v. Great Northern Ry. Co., 112 Minn. 14, 127 N. W. 490.

A variance as to the place of delivery to the carrier held immaterial. Banks v. Penn. R. Co., 111 Minn. 48, 126 N. W. 410.

(17) See Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4.

See Dunnell, Minn. Pl. 2 ed. § 578.

1360. Burden of proof—It is error for the court to instruct the jury that proof of delivery to the carrier in good condition and delivery by the carrier in damaged condition makes out a "strong" presumption of negligence. Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

In an action against a common carrier to recover for injuries to horses while in transit, alleged generally to have been caused by rough and negligent handling by defendant, a presumption of negligence arises when plaintiff proves delivery to the carrier in good condition and receipt at destination in an injured condition. The fact that the owner or his agent accompanies the horses relieves the carrier from special care and oversight of the animals, but does not change the presumption, unless it is shown that the injury was caused by the negligence of the owner or his agent. The verdict in this case held sustained by the evidence. Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296.

Where a shipper sues a common carrier upon its common-law liability for injury to or loss of the property, and the defendant pleads and proves a special contract limiting its liability to losses occurring through its negligence, the burden is upon the defendant to prove that the loss was not caused by its negligence, and not upon the plaintiff to prove that it was so caused. McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164. See Note, L. R. A. 1915D, 644.

Where a carrier contracts against liability for an excepted risk, the burden is upon it to show by a preponderance of the evidence that the loss came from such risk and its own freedom from negligence in respect of it. Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

Where the carrier claims that a loss or injury was caused by an act of God, an act of a public enemy, the inherent quality or "proper vice" of the article, or some act or omission of the shipper, such as faulty packing, he has the burden of proving this fact by evidence that brings the case clearly and perfectly within the exception from general liability. To relieve himself from liability, the carrier must prove that the loss or injury arose solely from one or more of the excepted causes, and it avails him not to show that the shipper was negligent, if the loss or injury would not have resulted, except for the concurring fault of the carrier. N. W. Marble & Tile Co. v. Williams, 128 Minn. 514, 151 N. W. 419.

When the liability of a carrier as such has ceased, and it is liable as a warehouseman, the burden of proof is on it to prove that the loss did not occur through its negligence. This burden is not merely a burden

of going on with the evidence, nor a shifting of burden, but a burden of establishing by a preponderance of the evidence freedom from negligence. Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

The burden of proof is on the carrier to show that the shipper failed to present his claim within the time provided by the bill of lading. B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609 (evidence held not to justify a finding that claim was not presented in time).

Proof of a failure to unload stock for food and water as provided by the federal statute makes out a prima facie case of negligence. Lund v. Great Northern Ry. Co., 126 Minn. 259, 148 N. W. 112.

The burden of proving facts in avoidance of a bill of lading or receipt is on the shipper. Porteous v. Adams Express Co., 115 Minn. 281, 132 N. W. 296.

(25) Whitaker v. Chicago etc. Ry. Co., 115 Minn. 140, 131 N. W. 1061; Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296; B. Presley Co. v. Illinois Central R. Co., 117 Minn. 399, 136 N. W. 11; Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819; Lund v. Great Northern Ry. Co., 126 Minn. 259, 148 N. W. 112; Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

(26) McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164; Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

1360a. Damages—Proof of value—In the absence of direct evidence as to the value of property at the place of shipment, such value may be determined by taking the value at the place of delivery and deducting therefrom the expense of transportation thereto from the place of shipment. St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471.

1361. Evidence—Admissibility—Parol evidence of the meaning of trade abbreviations in a bill of lading, offered to prove the net pounds received by a carrier, held admissible. Lampert Lumber Co. v. Minneapolis & St. L. R. Co., 127 Minn. 195, 149 N. W. 133.

Records of the office of the state weighmaster are admissible to prove the weight of grain delivered. St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471.

Where goods were refused because of alleged injury in transit, and were returned to the point of shipment in the same car without having been unloaded, it was error to exclude competent evidence that they were in the same condition when they arrived on their return as when they were loaded for shipment. Harris v. Great Northern Ry. Co., 124 Minn. 357, 145 N. W. 115.

Evidence as to the customary time for unloading a car of damaged

berries held admissible. B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609.

Where, in an action to recover damages for rough handling and delay in transit of cars of live stock, one of the material issues was as to what were defendant's regular stock shipping days, on which special service was provided, it was reversible error to admit a letter from defendant's claim agent to a third party containing declarations sufficient to turn the scales in plaintiff's favor on such issue, there being nothing to show the agent's authority in the premises. Anderson v. Great Northern Ry. Co., 126 Minn. 352, 148 N. W. 462.

Certain exhibits held admissible to prove a waiver of a provision limiting the time within which an action might be brought. Naumen v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1076.

There was no error in the exclusion of evidence offered by defendant tending to show the total quantity of flax received at plaintiff's elevator and the quantity shipped out. Such evidence would have introduced collateral issues into the case, involving the correctness of weights given the depositors of the flax, the dockage upon each load, and the result would only remotely bear upon the issue whether there was a loss in the particular shipments involved in this action. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

Certain train books were used by conductors in testifying on an issue as to a shortage or leakage of cars. The books were used as memoranda but were not introduced in evidence. Evidence in rebuttal tending to impeach the accuracy of the books held admissible. N. W. Elevator Co. v. Great Northern Ry. Co., 121 Minn. 321, 141 N. W. 298.

(32) See Digest, § 7049.

1361a. Evidence—Sufficiency—Evidence held sufficient to justify a recovery by a shipper. B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609; N. W. Elevator Co. v. Great Northern Ry. Co., 121 Minn. 321, 141 N. W. 298; Raetti v. Great Northern Ry. Co., 124 Minn. 360, 145 N. W. 112.

Evidence held not to make out a prima facie case for a shipper. Zimmerman v. Chicago & N. W. Ry. Co., 129 Minn. 4, 151 N. W. 412.

Evidence held sufficient to show that the consignor was the owner of the goods. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

CARRIERS OF LIVE STOCK

1362. Liability for loss or injury—Due care may require a carrier to procure shelter for horses in a blizzard. Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220.

(35) Note, 130 Am. St. Rep. 432.

(36) Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296. See Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220 (caretaker missed train).

1363. Limitation of liability—A stipulation requiring the shipper to present his claim and sue within a specified time may be waived. Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220; Naumen v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 1076.

(38) Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296. See Digest, § 1315.

(40) Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296 (evidence held not to show an agreement as to value of horses shipped); Wood v. Chicago & N. W. Ry. Co., 118 Minn. 362, 136 N. W. 1095 (instructions as to limitation sustained); McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164 (contract held unreasonable and invalid); Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220 (intrastate shipment—contract limiting liability—court in charge did not refer to limitation—full recovery—counsel failed to call attention to error or omission—no error). See Digest, § 1318.

(41) Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220.

See §§ 1312–1319.

1363a. Stock pens—Duty to feed and water stock in pens—Where reasonably necessary, a railway company must keep and maintain stock pens in such condition and equipped with such facilities that animals confined therein awaiting shipment may receive proper care and attention during a reasonable time prior to loading. In the absence of statutory provisions, a railway company is not required to furnish feed or water to live stock in its pens awaiting shipment unless the company has accepted the care and control thereof. Zakrzewski v. Great Northern Ry. Co., 125 Minn. 125, 145 N. W. 801; Id., 131 Minn. —, 154 N. W. 966.

Evidence of the customary time and method of assembling stock for shipment is admissible on the issue of due care in such cases. Zakrzewski v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 966.

1364. Contributory negligence of shipper—(42) See McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164 (contributory negligence in allowing a drunken person to ride in car with stock—car probably caught fire from lantern of drunken person—burden of proof—sufficiency of record to present question).

1365. Burden of proof—Proof of a failure to unload stock for food and water as provided by the federal statute makes out a prima facie case of

negligence. Lund v. Great Northern Ry. Co., 126 Minn. 259, 148 N. W. 112.

(44) Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296; McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

1366. **Miscellaneous cases**—(45) Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4 (complaint for negligence in carrying sheep —allegations of negligence in rough handling, delay in transit, refusing to permit sheep to be unloaded in transit for rest, feed and water, and in neglecting to provide facilities for unloading—general allegations of negligence controlled by specific allegations—complaint held not broad enough to admit evidence of negligence in failing to provide a proper yard for the care of sheep when unloaded); Croff v. Great Northern Ry. Co., 112 Minn. 14, 127 N. W. 490 (informal complaint for damage to cattle sustained against demurrer); Knowlton v. Chicago & N. W. Ry. Co., 115 Minn. 71, 131 N. W. 858 (shipment of cattle—delay in transit—failure to unload in transit as required by federal statute—rough handling of cars—arbitrary apportionment of damages); Martin v. Chicago, G. W. R. Co., 115 Minn. 530, 131 N. W. 1134 (shipment of cattle—delay in transit—failure to furnish fit yards for feeding in transit—question of negligence and amount of damages for the jury); Clement v. Minneapolis etc. Ry. Co., 117 Minn. 99, 134 N. W. 230 (delay in forwarding live stock—train stopped to feed, water and rest other stock in train as required by statute—instructions as to effect of delay prior to receipt of plaintiff's stock held prejudicial); Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296 (rough treatment of horses—burden of proof—verdict for plaintiff sustained); Wood v. Chicago & N. W. Ry. Co., 118 Minn. 362, 136 N. W. 1095 (race horse thrown down by engine backed against car—verdict for plaintiff sustained); McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164 (loss of horses from fire originating in car); Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220 (shipment of horses—blizzard—failure to protect horses when unloaded and put in stock pens—verdict not excessive); Raetti v. Great Northern Ry. Co., 124 Minn. 360, 145 N. W. 112 (cattle injured in transit—claim of rough handling and under-feeding—verdict for plaintiff sustained); Lund v. Great Northern Ry. Co., 126 Minn. 259, 148 N. W. 112 (shipment of horses—failure to unload for food and water—rough handling—evidence held to sustain verdict for plaintiff—damages held not excessive); Anderson v. Great Northern Ry. Co., 126 Minn. 352, 148 N. W. 462 (where, in an action to recover damages for rough handling and delay in transit of cars of live stock, one of the material issues was as to what were defendant's regular stock shipping days, on which special service was provided, it was reversible error to admit a letter from defendant's claim agent to a third party containing

declarations sufficient to turn the scales in plaintiff's favor on such issue, there being nothing to show the agent's authority in the premises); Naumen v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 1076 (shipment between two points in this state held not interstate—waiver of limitation of time to bring suit—certain exhibits held admissible to prove waiver).

CARTWAYS—See Eminent Domain, 3024, 3025; Roads, 8459.

CASES AND BILLS OF EXCEPTIONS

1367. Definition and nature—(47) First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

(48) First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291; Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

1371. Stay pending settlement—A stay does not prohibit the adverse party from resorting to such ancillary remedies as garnishment or attachment. Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975.

1372. Time allowed for settlement—Extension—The time of notice of settlement of a case prescribed by statute may be shortened by an order to show cause. The court may extend the time for settlement of a case after the time has once expired, whether the case is to be settled before the judge who tried the case or, in the event of his disability, before another judge. Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

The retention of a case held not a waiver of the objection that it was not served in time. State v. Stolberg, 128 Minn. 537, 150 N. W. 924.

(76, 77, 78) See State v. Stolberg, 128 Minn. 537, 150 N. W. 924.

(79) Sinclair v. Investors Syndicate, 122 Minn. 526, 142 N. W. 1135; State v. Olsen, 124 Minn. 537, 144 N. W. 755; State v. Stolberg, 128 Minn. 537, 150 N. W. 920.

(80) State v. Childress, 127 Minn. 533, 149 N. W. 550 (after an appeal has been taken from an order denying a new trial).

1374. Contents—Mode of stating testimony—Documentary evidence—What a settled case or bill of exceptions should contain is a question to be determined by the trial judge; but he cannot act arbitrarily in the premises, and mandamus will lie to compel him to sign a proposed case or bill of exceptions, which is clearly shown to be a full and true statement of all the proceedings and evidence relevant to the particular ruling or decision sought to be reviewed. Neither the fact that the adverse party proposes no amendments, nor the official stenographer's transcript, is necessarily conclusive of the question. Beck v. Great Northern Ry. Co., 115 Minn. 259, 132 N. W. 1.

Matters which are a part of the record by statute should not be included. Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476. See Digest, §§ 337, 1367.

The original verdict filed with the clerk is part of the record and should not be included in a settled case. If a verdict included in a case conflicts with the original verdict so filed the latter controls. Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

1376. Notice of settlement—Order to show cause—The time of notice of settlement of a case prescribed by statute may be shortened by an order to show cause. Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

1380. Amendment by trial court—(5) Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37.

1384. Construction and conclusiveness on appeal—A certificate to a bill of exceptions that it contains "all the evidence and proceedings necessary to explain it, and relevant to the matters therein objected to, or relevant to said matters," held sufficient to present the question whether an error in admitting evidence was prejudicial. Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305.

(15) State v. O'Hagan, 124 Minn. 58, 144 N. W. 410.

1385a. Effect of dismissal of appeal—Use on second appeal—Where an appeal was taken from a non-appealable order denying a motion for judgment, and the appeal was dismissed and there was a subsequent appeal from the judgment, it was held that the settled case on the first appeal was in the supreme court for the purposes of the second appeal. Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169.

CEMETERIES

1387. Lands dedicated to public use—It is not necessary for the appropriation of land to cemetery purposes that it should be platted. State v. District Court, 114 Minn. 287, 131 N. W. 327.

Evidence held to justify findings that certain lands were acquired for and appropriated to cemetery purposes. State v. District Court, 114 Minn. 287, 131 N. W. 327.

1387a. Roads and streets through cemeteries forbidden—The statute providing that no road or street can be laid out through the cemetery of a cemetery association, or through any part of the lands of such association, held to prevent extending a street across land of such an association acquired and held for future use for cemetery purposes. State v. District Court, 114 Minn. 287, 131 N. W. 327.

1389a. Municipal regulation—The common council of the city of St. Paul, under the charter of such city, has power to regulate the burial of

the dead within the city limits, and this power includes the power to prevent the establishment of cemeteries and the enlargement of existing cemeteries. The ordinance of said city in question in this case held valid, but construed as forbidding the use of land for the burial of the dead without the consent of the city, and not as preventing the acquisition and holding of land for cemetery purposes. State v. District Court, 114 Minn. 287, 131 N. W. 327.

See Note, 87 Am. St. Rep. 678.

CERTIORARI

IN GENERAL

1391. Nature and object of writ—(36) See Degge v. Hitchcock, 229 U. S. 162.

(38) P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417 (certiorari is in effect a writ of error); State v. Mayor, 125 Minn. 425, 147 N. W. 820 (certiorari is in the nature of an appeal).

(39) State v. Mayor, 125 Minn. 425, 147 N. W. 820.

1396. Will not lie to an intermediate order—So long as proceedings before an executive officer are in fieri the courts will not interfere with them. Degge v. Hitchcock, 229 U. S. 162.

1397. To review action of municipalities, boards, officers, etc.—It is not the procedure which a municipal officer did follow, but the procedure the law required him to follow, that determines the right to a review by certiorari. In all cases where the writ is invoked there is some alleged deviation from the requirements of the law. The writ lies even if the action was arbitrary and without jurisdiction and void. State v. McColl, 127 Minn. 155, 149 N. W. 11.

(54) See Degge v. Hitchcock, 229 U. S. 162.

(56) State v. Mayor, 125 Minn. 425, 147 N. W. 820.

(58) State v. McColl, 127 Minn. 155, 149 N. W. 11.

1398. Proceedings held judicial—The action of a city council in revoking a liquor license. State v. Mayor, 125 Minn. 425, 147 N. W. 820.

The action of a county board in making a division of school funds under G. S. 1913, § 2696, upon the division of a school district. State v. County Board, Wright County, 126 Minn. 209, 148 N. W. 52.

(61) See State v. McColl, 127 Minn. 155, 149 N. W. 11.

1400. Held to lie—To review order staying proceedings in an equitable action until other defendants are brought in by personal service in this state. P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

To review action of governor in removing a county official from office. State v. Eberhart, 116 Minn. 313, 133 N. W. 857.

To review an order of the district court to a county attorney to furnish one under indictment with a copy of testimony, taken before the fire marshal, under Laws 1911, c. 203. State v. Steele, 117 Minn. 384, 135 N. W. 1128.

To review action of a city council in revoking a liquor license. State v. Mayor, 125 Minn. 425, 147 N. W. 820.

To review action of a county board in making a division of school funds under G. S. 1913, § 2696, upon the division of a school district. State v. County Board, Wright County, 126 Minn. 209, 148 N. W. 52.

To review action of a municipal officer in removing a subordinate officer where the right to remove is not absolute. State v. McColl, 127 Minn. 155, 149 N. W. 11 (under charter of St. Paul).

To review proceedings under the Workmen's Compensation Act. State v. District Court, 128 Minn. 221, 150 N. W. 623.

(82) Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383.

(88) Webb v. Lucas, 125 Minn. 403, 147 N. W. 273. See Merz v. Wright County, 114 Minn. 448, 131 N. W. 635 (certiorari held not exclusive remedy).

OUT OF SUPREME COURT

1404. Statutory provision—Stipulation of parties—The parties cannot by stipulation give the supreme court jurisdiction. State v. Bashko, 127 Minn. 519, 148 N. W. 1082.

PROCEDURE

1408. Time of application and issuance—Where the time within which the findings of the district court can be reviewed has expired, no judgment being entered, the parties cannot extend the time by stipulation. State v. Bashko, 127 Minn. 519, 148 N. W. 1082.

1409. Parties—(23) Note, 103 Am. St. Rep. 110.

1412. Return—It is proper to return the record, proceedings in the nature of a record, the rulings of the tribunal, and the evidence received. State v. Mayor, 125 Minn. 425, 137 N. W. 820.

The record considered is that made and certified by the tribunal whose proceedings are under review. The return, in so far as it is responsive to the writ, is conclusive, and the court of review will not inquire into charges of its falsity or require the respondents to state contrary to what they have certified. State v. Mayor, 125 Minn. 425, 147 N. W. 820.

(33) State v. Mayor, 125 Minn. 425, 147 N. W. 820.

CHAMPERTY AND MAINTENANCE

1416. What constitutes—It is not against public policy as champerty or maintenance, for an attorney to solicit business, or to advance money to a poor client for his living expenses during litigation, or to advise a client against the settlement of his case. An agreement between attorney and client, by which the former is to advance money for expenses and is permitted to deduct the amount thereof from the amount recovered, is not against public policy, where it does not appear that it was agreed that the client should not be liable for the expenses in case there was no recovery. Johnson v. Great Northern Ry. Co., 128 Minn. 365, 151 N. W. 125.

An assignment of a bare right to file a bill in equity for a fraud committed upon the assignor is void as savoring of maintenance. Cornell v. Upper Michigan Land Co., 131 Minn. —, 155 N. W. 99.

Certain assignments of land contracts held not void as savoring of maintenance. Cornell v. Upper Michigan Land Co., 131 Minn. —, 155 N. W. 99.

The mere fact that the grantor in a deed is to have a share in the profits resulting to the grantee from subsequent suits for trespass to the land does not render the transaction champertous or contrary to public policy. Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

(39) Gray v. Bemis, 128 Minn. 392, 151 N. W. 135. See Salo v. Duluth & Iron Range R. Co., 124 Minn. 526, 144 N. W. 1134.

See Note, 83 Am. St. Rep. 167; 12 L. R. A. (N. S.) 606.

CHARITIES

1418. Definition—(44) See McInerny v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837; 25 Harv. L. Rev. 83; Note, 63 Am. St. Rep. 248.

1419. Charitable trusts—Cy-pres—(46) See 5 Harv. L. Rev. 389; Note, 64 Am. St. Rep. 756; 14 L. R. A. (N. S.) 1.

1423. Gifts in trust—Absolute gifts—(51) See Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805.

1423a. Liability of charitable corporations for negligence—There is great diversity of opinion as to whether charitable corporations are liable for negligence. They are liable in this state for neglecting to guard dangerous machinery as required by statute. McInerny v. St.

Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837; Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705. See Note, 52 L. R. A. (N. S.) 505; 25 Harv. L. Rev. 720

CHATTEL MORTGAGES

IN GENERAL

1424. Definition and nature—(52) Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

(56) Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250; Dale v. Pattison, 234 U. S. 399.

1426. Held not a chattel mortgage—A delivery of possession of a policy of insurance as security for the payment of a loan held a pledge and not a chattel mortgage. Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

1427. What may be mortgaged—A tenant, with the assent of the landlord, gave a chattel mortgage on articles attached to the realty. The effect of this was to make these articles personal property as between these parties, but the rights of persons performing labor in annexing such articles to the freehold without knowledge of such contract could not be affected thereby. Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

(70) See Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265.

(77) Note, 109 Am. St. Rep. 510.

FORM AND EXECUTION

1431. Form — Execution — Acknowledgment — (5) See Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

(92) Note, 137 Am. St. Rep. 471.

DESCRIPTION OF THE PROPERTY MORTGAGED

1432. In general—(9) McCauley v. Wuest, 110 Minn. 529, 125 N. W. 1021; Big Stone County Bank v. Crown Elevator Co., 111 Minn. 399, 127 N. W. 181.

1433. Parol evidence to identify property—(22) Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

1434. Descriptions held sufficient—(24) Big Stone County Bank v. Crown Elevator Co., 111 Minn. 399, 127 N. W. 181 (indefinite description of real estate); Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995

("fourteen cows, all of said property now being in possession of said party of the first part, in the city of St. Paul, county of Ramsey," Minnesota).

CONSIDERATION

1436. In general—A finding that a note was included in a mortgage held justified by the evidence. Farmers Nat. Bank v. Scheidt, 121 Minn. 248, 141 N. W. 103.

STIPULATIONS

1439. Insecurity clause—Taking possession—(42) Blied v. Barnard, 116 Minn. 307, 133 N. W. 795.

1439a. Earnings from threshing outfit—A provision of a mortgage, executed to secure the purchase price of threshing machinery, that the gross earnings of the machinery should be paid to the mortgagee, free from operation liens, but that 40 per cent. of the earnings so received by the mortgagee should by it be paid to the mortgagor for operation expenses, construed, and held to give the mortgagor an immediate and absolute right to 40 per cent. of the proceeds, less expense of collection, of certain threshing accounts assigned by him pursuant to the terms of the mortgage, to the mortgagee, and by it collected. Transaction in which the said claims were assigned to the mortgagee considered, and held to import a direction from the mortgagor to the mortgagee to pay certain debts due, at the time of such assignment, from the mortgagor to the plaintiff and his assignors for labor performed in connection with the operation of the said machinery, so that the plaintiff had the right to recover from the mortgagee that proportion of the proceeds of the assigned accounts which, by the terms of the mortgage, belonged to the mortgagor for operating expenses. Meier v. Northwest Thresher Co., 119 Minn. 289, 138 N. W. 36.

FILING AND PRIORITIES

1441. What constitutes filing—Indexing—(49) See 25 Harv. L. Rev. 195.

1443. Place of filing—A chattel mortgage upon growing crops, filed in the town where the land is situated, is valid as between the parties, although not filed in the town wherein the mortgagor resides, and the burden is on the second mortgagee to prove that he became such in good faith, without notice, and for a valuable consideration then paid. Big Stone County Bank v. Crown Elevator Co., 111 Minn. 399, 127 N. W. 181.

(60) See 25 Harv. L. Rev. 83.

1444. Delay in filing—(64) In re Bird, 180 Fed. 229.

1445. Effect of filing—Constructive notice—The filing of a defectively executed mortgage does not operate as constructive notice if the defect appears on the face of the instrument; otherwise if it does not so appear. Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449 (acknowledgment before officer disqualified by interest); Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097 (mortgage to firm—one of the witnesses a member of the firm). See 13 Col. L. Rev. 73.

The filing of a defectively attested mortgage does not operate as constructive notice. Tiedt v. Boyce, 122 Minn. 283, 142 N. W. 195.

1446. Effect of not filing—(73) Big Stone County Bank v. Crown Elevator Co., 111 Minn. 399, 127 N. W. 181.

See Note, 137 Am. St. Rep. 471.

1449. Conflict with other liens—Waiver—Where a senior lien holder consents to the conversion by the debtor of the property burdened with the lien, his right of priority over a junior lien holder is lost; and the latter, whose claim is in the form of a chattel mortgage upon the property, may maintain an action against the mortgagor for the wrongful conversion of the property. In such an action the mortgagor cannot set up in defence the paramount lien of the senior creditor, for as to the junior creditor the right of priority ceased by reason of his consent to the wrongful conversion of the property. National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

A chattel mortgage lien is subject to a subsequent lien for transporting or storing the goods. Monthly Instalment Loan Co. v. Skellet Co., 124 Minn. 144, 144 N. W. 750.

Conflict between rights under a bill of sale for advancements made for the care of cattle and a chattel mortgage on the cattle, held determined by a former judgment between the parties. A division of the proceeds of the sale of cattle, where part of the cattle were covered by a mortgage and a part not, held properly made by the court, there being no forfeiture as a result of the confusion of the property. Clay, Robinson & Co. v. Larson, 125 Minn. 271, 146 N. W. 1095.

1451. Burden of proving good faith—(10) Big Stone County Bank v. Crown Elevator Co., 111 Minn. 399, 127 N. W. 181.

RIGHTS OF THE PARTIES—IN GENERAL

1454. Rights of mortgagor—A manufacturer who executes a chattel mortgage upon his raw material has no right, in the absence of an agreement so authorizing, to convert the material into manufactured articles and sell and dispose of the same upon the market. His act in doing so, without the consent of the mortgagee, constitutes a wrongful conver-

sion of the mortgaged property. National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

(26) See Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

1455. Rights of mortgagee—Where the mortgagor has abandoned the property covered by the mortgage, and the indebtedness secured thereby is unpaid, the mortgagee may lawfully take and retain possession of the property in the protection of his interests under the mortgage. Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440.

(30, 35) Tiedt v. Boyce, 122 Minn. 283, 142 N. W. 195.

See Note, 96 Am. St. Rep. 682.

PERFORMANCE

1456. Payment—Discharge—Release—Where a chattel mortgage was given to secure the performance of a bond to perfect a title to real estate, held that a perfection of the title after the time stipulated did not discharge the mortgage. Blied v. Barnard, 120 Minn. 399, 139 N. W. 714.

(46) National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579; Note, 43 L. R. A. (N. S.) 302.

1457. Tender—See 10 Col. L. Rev. 252.

FORECLOSURE

1459. Power of sale—Cumulative remedy—A second mortgagee probably has a right to insist that the first mortgage shall be foreclosed in the manner provided by statute. Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

(75) See Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

1460. Foreclosure by statutory sale—The purchaser is subrogated to the rights of the mortgagee. Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

1461. Foreclosure by action—A junior mortgagee may bring an action in equity to foreclose a chattel mortgage, and may make senior mortgagees parties thereto; but, where a senior mortgagee is rightfully in possession of the property under his paramount mortgage, the court will not divest him of his paramount rights therein by a sale in the foreclosure action, unless the junior mortgagee either redeem from the senior mortgage, or show that the property is of sufficient value, so that the proceeds from the sale will pay and satisfy the senior mortgage and leave a surplus, which, equitably, ought to be applied upon the junior mortgage. The plaintiff has done neither. Tiedt v. Boyce, 122 Minn. 283, 142 N. W. 195.

(95) United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 32, 128 N. W. 1112; Tiedt v. Boyce, 122 Minn. 283, 142 N. W. 195.

REMEDIES

1466. Election of remedies—A second mortgagee probably has the right to insist that the first mortgage be foreclosed in the manner provided by statute, but an irregular sale does not destroy the rights of the first mortgagee. The remedy of a second mortgagee in such a case is an action of replevin or trover, with the right to recover the property subject to, or the value thereof over and above, the obligation secured by the first mortgage. Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

1466a. Sale by agreement of parties—Effect on lien—The sale of mortgaged personal property at public auction under an arrangement between the mortgagor and mortgagee, though not as a foreclosure of the mortgage in accordance with the statutes, but in good faith, for the purpose of raising funds to discharge the mortgage debt, and without purpose to defraud subsequent mortgagees, does not constitute a waiver of the rights of the mortgagee, as against a second mortgagee of the same property. The first mortgagee, or purchasers of the property at such sale, may interpose the first mortgage in defence to an action by the second mortgagee, in which a wrongful sale of the property is charged. Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

1475. Action for conversion by mortgagee against mortgagor—A manufacturer who executes a chattel mortgage upon his raw material has no right, in the absence of an agreement so authorizing, to convert the material into manufactured articles and sell and dispose of the same upon the market. His act in doing so, without the consent of the mortgagee, constitutes a wrongful conversion of the mortgaged property. Where a senior lien holder consents to the conversion by the debtor of the property burdened with the lien, his right of priority over a junior lien holder is lost; and the latter, whose claim is in the form of a chattel mortgage upon the property, may maintain an action against the mortgagor for the wrongful conversion of the property. In such an action the mortgagor cannot set up in defence the paramount lien of the senior creditor, for as to the junior creditor the right of priority ceased by reason of his consent to the wrongful conversion of the property. National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

1477. Action for conversion by mortgagor against stranger—See Note, 137 Am. St. Rep. 893.

1479. Action of replevin by mortgagee against mortgagor—(58) Blied v. Barnard, 116 Minn. 307, 133 N. W. 795; Blied v. Barnard, 120 Minn. 399, 139 N. W. 714.

1483. Action of replevin by one mortgagee against another—Where a sale is made by agreement between the mortgagor and first mortgagee, the first mortgagee, or purchasers of the property at the sale, may interpose the first mortgage in defence to an action by the second mortgagee, in which a wrongful sale of the property is charged. Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

CITIZENSHIP

1487. Who are citizens—(84) School District v. Bolstad, 121 Minn. 376, 141 N. W. 801; Hitchcock v. Consolidated School District, 123 Minn. 119, 143 N. W. 120.

CLUBS

1499. Assessment of members—The relation of members to unincorporated social clubs and societies is contractual, and the articles of association or by-laws constitute the terms of their agreement. Provisions of the articles of association imposing upon members the payment of dues and assessments at stated times, and subscribed to by them, create a legal obligation upon the part of each member to pay the same, so long as the society remains a going concern and his membership therein continues. Unpaid dues may be assigned by the association, and the assignee thereof may maintain an action to recover the same. Anderson v. Amidon, 114 Minn. 202, 130 N. W. 1002.

COAL TAR—See Food, 3782b.

COMMISSION MUNICIPAL GOVERNMENT—See Municipal Corporations, 6539a.

COMMON LAW

1501. Definition—Existence of common law in United States, 24 Harv. L. Rev. 6.

1502. Nature—The controlling regard of the common law is not for doctrine, but for common sense. Its paramount object is to work out substantial not metaphysical, justice. Its just claim to distinction is to be found, not in the logical consistency of its applied theories, but in the practical wisdom with which it has adapted its rules to varying subject-matter and conditions. Gould v. Winona Gas Co., 100 Minn. 258, 264, 111 N. W. 254; Keever v. Mankato, 113 Minn. 55, 63, 158 N. W. 775.

(15, 16, 20) Sullivan v. Minneapolis & Rainy River Ry. Co., 121 Minn. 488, 142 N. W. 3.

1503. How far in force in this state—(25) Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293; Mandelin v. Mandelin, 120 Minn. 198, 139 N. W. 152.

COMMUTATION OF SENTENCE—See Criminal Law, 2503d.

COMPOSITION WITH CREDITORS

1512. Relation of parties—Trust—Fraud—All parties joining in a composition are bound by the terms of the contract entered into for that purpose, and neither has the right to depart therefrom in an attempt to advance over others his own special interests; nor has he the right to institute proceedings at variance with the purpose of the trust, or which would naturally embarrass or hinder the trustees in the performance of their duties. Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

(41) See Zavelo v. Reeves, 227 U. S. 625.

COMPROMISE AND SETTLEMENT

1517. Offer of compromise inadmissible—(47) Quirk v. Consumers Power Co., 127 Minn. 526, 149 N. W. 193.

1518. Necessity of dispute or doubt—(48) Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112.

1519. Favored—Contracts against invalid—A party may compromise a claim without the consent of his attorney. Contracts between a client and his attorney limiting the right of the client to compromise or settle a claim are contrary to public policy and void. 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.

(49) Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386; Desaman v. Butler Bros., 118 Minn. 198, 136 N. W. 747; Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355.

1520. Consideration—(50) Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112.

1522. Enforceability of claim—(54) Montgomery v. Grenier, 117 Minn. 416, 136 N. W. 9; Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112; Post v. Thomas, 212 N. Y. 264, 106 N. E. 69. See Note, 25 L. R. A. (N. S.) 275.

1524. Fraud—Mistake—Avoidance—One who may avoid a settlement for fraud ratifies it by accepting and retaining money paid thereon. Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705; Valley v. Crookston Lumber Co., 128 Minn. 387, 151 N. W. 137. See Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 132 N. W. 333.

When it fairly appears that an offer to return the money received on a settlement of a cause of action for personal injuries will be refused, and the amount so received is credited defendant in the verdict, and substantial justice has thus been done, the failure of plaintiff to offer to return the money received is not ground for a new trial. Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 132 N. W. 333.

A compromise may be attacked collaterally on the ground that it was unauthorized and fraudulently entered into by an attorney. Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

Opinions expressed by one contracting party to another upon doubtful questions of law, arising in the course of compromise of a disputed claim, are not actionable representations, even though the person giving the opinion be an attorney at law. Valley v. Crookston Lumber Co., 128 Minn. 387, 151 N. W. 137.

A finding that an adjustment of a loss from hail was procured by fraud sustained. Johnson v. Minnesota Farmers Mutual Ins. Co., 128 Minn. 1, 150 N. W. 174.

An improvident and fraudulent settlement by a guardian of his ward's cause of action, though approved by the court in which the action is pending, may be vacated and set aside upon a showing of the facts, even though the defendant in the action be not affirmatively shown to have participated in the fraud. Dasich v. La Rue Mining Co., 126 Minn. 194, 148 N. W. 45.

There being no defence pleaded that the settlement was procured through the fraud of plaintiff, such settlement is not destroyed by a finding that defendant under a mistake of fact not known entered into it, there being no finding that the truth would not have been ascertained upon a proper inquiry, and no proof that plaintiff by any act of his induced defendant to refrain from making such inquiry. Shanahan v. Rochester German Ins. Co., 126 Minn. 373, 148 N. W. 269.

See Digest, § 8374.

1526. Evidence—Admissibility—(59) Butler v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355 (testimony of an attorney that in his opinion he would have been able to prove the allegations of a complaint in another action, held admissible on the issue of good faith in a settlement).

1527. Evidence—Sufficiency—(60) Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112; Shanahan v. Rochester German Ins. Co., 126 Minn. 373, 148 N. W. 269 (evidence held to sustain a finding that a compromise and settlement was effected of a claim arising from the loss of property covered by an insurance policy); Corrigan v. Foot, 126 Minn. 531, 148 N. W. 98.

1527a. Damages for breach—For the breach of a contract to compromise a claim and deliver property to the value of a certain amount, the amount fixed held the measure of damages. Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112. See Vogel v. D. M. Osborne & Co., 34 Minn. 454, 26 N. W. 453.

CONDITIONS PRECEDENT AND SUBSEQUENT—See Contracts, 1728, 1736; Corporations, 2055; Deeds, 2675; Estates, 3163b; Evidence, 3377, 3381; Pleading, 7533, 7534.

CONFLICT OF LAWS

IN GENERAL

1529a. Ignorance of foreign law no excuse—One cannot plead ignorance of a foreign law, either common or statutory, by which his rights and liabilities are governed. Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620.

1529b. Territorial limitation of laws—The laws of a state have no extraterritorial force. Duluth v. Orr, 115 Minn. 267, 132 N. W. 265.

COMITY AND PUBLIC POLICY

1530. Comity—(71) See Archer-Daniels Linseed Co. v. Blue Ridge Despatch, 113 Minn. 367, 129 N. W. 765.

CONTRACTS

1532. In general—As a general rule, where a contract consists of an offer made in one place and an acceptance made in another, the place of acceptance is the locus of the contract, and where an agent takes applications subject to the approval of his principal or of another agent, the contract is made at the place of such approval. But where a formal written contract is contemplated, which is to become effective only upon delivery, the contract is made where it is delivered, though it may have been signed elsewhere. True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

(78) Porteous v. Adams Express Co., 115 Minn. 281, 132 N. W. 296 (contract for carriage by common carrier); Wood v. Johnson, 117 Minn. 267, 135 N. W. 746 (assumption of mortgage); Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154 (contract for carriage by common carrier); Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455 (adoption by agreement); True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948 (a contract to sell land); Kolliner v. Western Union Tel. Co., 126 Minn. 122, 147 N. W. 961 (contract to send a telegram); Culver v. Johnson, 131 Minn. ——, 154 N. W. 739 (indemnity insurance).

(79) True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948 (contract to sell lands in another state); Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853 (certificate issued by benefit society); N. W. Mutual Life Ins. Co. v. McCue, 223 U. S. 234 (insurance policy). See Note, 55 Am. St. Rep. 44.

(80) Carpenter v. U. S. Express Co., 120 Minn. 59, 139 N. W. 154 (contract by common carrier for transportation of goods—express company).

(82) Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620.

(83) Culver v. Johnson, 131 Minn. ——, 154 N. W. 739 (indemnity insurance).

(87) True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

1533. Intention of parties—When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption. When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract. Green v. N. W. Trust Co., 128 Minn. 30, 150 N. W. 229.

1534. Relating to realty—The local law determines whether the title to land is good. Johnson-Van Sant Co. v. Martens, 113 Minn. 486, 129 N. W. 859.

A contract to sell lands in Washington may be a Minnesota contract, and, if so, the statutes of Minnesota as to cancelation of land contracts must be complied with. Where the land is in Washington, the negotiations conducted in Washington, the contracts in writing and delivered in Washington, and they provide for payments to be made in Washington, the contracts are Washington contracts and are governed by the laws of that state as to their manner of performance, termination, and discharge. The fact that an application made in Washington to purchase land in that state provided that it was subject to the approval of the land commissioner of defendant in St. Paul did not make the contract a Minnesota contract, where the application further provided for a formal written contract to be executed in duplicate and mutually delivered. Where a contract consists of an offer made in one place and an acceptance made in another, the place of acceptance is the locus of the contract; but where a formal written contract is contemplated, which is to become effective only upon delivery, the contract is made where it is delivered, though it may have been signed elsewhere. True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

The obligation of a contract is the law under which it was made, even though it may affect lands in another state; and in an action which does not affect the land itself but which is strictly personal, the law of the state where the contract is made gives the right and measure of recovery. A contract made in one state for the sale of land in another can be enforced in the former according to the lex loci contractu and not according to the lex rei sitae. Selover, Bates & Co. v. Walsh, 226 U. S. 112.

(91) Wood v. Johnson, 117 Minn. 267, 135 N. W. 746 (assumption of mortgage); Selover, Bates & Co. v. Walsh, 226 U. S. 112.

1536. Sales of personalty—Where an order is given for goods and is accepted by delivery of the goods to a carrier for shipment with the intention of transferring the property to the buyer, the sale is governed by the law of the place of shipment. State v. Gruber, 116 Minn. 221, 133 N. W. 571.

1538. Pledge—The legal effect of a transaction involving pledge or hypothecation depends upon the local law. Dale v. Pattison, 234 U. S. 399.

1538a. Insurance—It has been assumed that the rights of parties under a certificate issued by a benefit society were governed by the laws of the state under which the society was organized. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853. See N. W. Mutual Life Ins. Co. v. McCue, 223 U. S. 234; Note, 52 L. R. A. (N. S.) 275.

Certain tornado insurance policies covering property in Wisconsin held governed by the law of that state. Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. ——, 154 N. W. 515.

1539. Debts—The general rule is that simple contract debts have, for the purposes of administration, their situs at the residence of the debtor, though prior to the death of the creditor their situs was at his domicil. Other contracts for the payment of money, such as negotiable promissory notes and bonds, do not come within this rule, and have a situs after the death of the owner wherever found. The relation of a bank and a depositor is that of debtor and creditor, and the situs of the debt as property after the death of the creditor is at the residence of the creditor. Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010.

For purposes of administration and taxation all simple contract debts, including bills and notes, have a situs at the domicil of the debtor. State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

1540. Interest—Usury—Express agreement—Where notes are claimed to be usurious, and there is no expressed or actual intent as to whether the governing law of the transaction is the law of one state or another, to either of which it may with propriety be referred in part, and there is no attempt to evade the usury law, the court will indulge the presumption that the law of the state which upholds the transaction is the law intended by the parties; and applying this rule it is held that the law of Montana, under which the transaction involved was valid, was the proper law of the contract where purchase-money notes were made to a corporation of that state, secured on lands located there, sold to a South Dakota corporation, having an office in Minnesota, under the laws of which the transaction was invalid, though the negotiations were had in Minnesota, and the notes executed and payable there, and the trust deed securing them executed there to a Minnesota trust company as trustee. Green v. N. W. Trust Co., 128 Minn. 30, 150 N. W. 229.

1540a. Bills and notes—The manner of giving and the sufficiency of a notice of dishonor, in case where commercial paper is indorsed in one jurisdiction and is payable in another, is governed by the law of the place where it is payable. The laws of the place where the indorsement is signed or is delivered so that it becomes a contract govern the validity and extent of the contract and therefor the necessity of some presentment, demand, protest, and notice of dishonor. The law of the place where commercial paper is payable governs the days of grace, the time and manner of making presentment, the demand, and the protest, and of giving the notice of dishonor. Guernsey v. Imperial Bank, 188 Fed. 300. See Note, 121 Am. St. Rep. 870.

TORTS

1541. In general—An action by a married woman for personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of her domicil. Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8.

An action by a servant against his master for negligence is an action for tort, governed by the law of the place of the injury, regardless of where the contract of employment was made. Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620.

A recovery in one jurisdiction for a tort committed in another must be based on the ground of an obligation incurred at the place of the tort which is not only the ground, but also the measure, of the maximum recovery. Western Union Tel. Co. v. Brown, 234 U. S. 542.

(9) Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172; Walson v. McGregor, 120 Minn. 233, 139 N. W. 353; State v. District Court, 126 Minn. 501, 148 N. W. 463; Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620; Cuba Railroad Co. v. Crosby, 222 U. S. 473.

1542. Injury to land—(11) See 15 Col. L. Rev. 169.

1544. Negligence of fellow servants—Who are fellow servants at common law is determined by the lex loci delicti. Walson v. McGregor, 120 Minn. 233, 139 N. W. 353.

(15) Koecher v. Minneapolis etc. Ry. Co., 122 Minn. 458, 142 N. W. 874.

REMEDIES

1545. General rule—In an action in one of our state courts, based on the federal Employer's Liability Act, the five-sixths jury law of this state applies. Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106; Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

(16) Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172 (who shall appear for a minor); Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606 (recovery of unpaid stock subscriptions); Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455 (remedy of child adopted by agreement to secure share of estate of adopting parent); Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942 (limitation of actions and all matters of procedure); Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385 (five-sixths jury law).

1546. Limitation of actions—(18) Casey v. American Bridge Co., 116 Minn. 461, 134 N. W. 111; Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942. See Note, 46 L. R. A. (N. S.) 687; 7 Col. L. Rev. 553.

1547. Parties—(20) Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8 (right of married woman to sue in her own name); Brunette v. Minneapolis, 118 Minn. 444, 137 N. W. 172 (who shall represent a minor in an action).

1548. Evidence—Burden of proof—Witnesses—(23) Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40. See Central Vermont R. Co. v. White, 238 U. S. 507; 27 Harv. L. Rev. 95.

1549. Pleading—(24) Vander Wegen v. Great Northern Ry. Co., 114 Minn. 118, 130 N. W. 70; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175.

1550. Damages—(25) Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8 (action by married woman for personal injuries—damages governed by law of place of injury); Kolliner v. Western Union Tel. Co., 126 Minn. 122, 147 N. W. 961 (damages for neglect to transmit and deliver a telegram). See § 1541; 10 Col. L. Rev. 261.

PENAL AND CRIMINAL LAWS

1552. In general—The question whether a statute of one state, which in some aspects may be called penal, is a "penal law" in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305.

Plaintiff is a corporation created under the laws of the state of Washington. The statutes of Washington require corporations to pay an annual license fee, and provide as a penalty for nonpayment of such fee that no corporation in default thereof shall be permitted to maintain any action in the courts of that state. Plaintiff was in default of payment of such license fee when this action was brought. The supreme court of

Washington has construed these statutes as revenue acts pure and simple, and has held that the provisions thereof are for the purpose of enabling the state to enforce the payment of its revenue, and that a corporation in default does not forfeit the right to exist, but continues to be a corporation until a forfeiture is adjudicated by proper proceedings in a proper court. Held, that the purpose of the acts is to punish an offence against the public justice of the state of Washington, that they are of the class of penal acts which will not be enforced outside of the state where they were enacted, and that plaintiff may maintain an action in this state. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305.

It is not criminal under the laws of this state to aid or abet the doing of an act in another state, though such act would violate the laws of this state if done within its borders. State v. Gruber, 116 Minn. 221, 133 N. W. 571.

MISCELLANEOUS

1553. Situs of personalty—(30) See Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

See Digest, §§ 1539, 3962, 3963, 9155–9159.

1554. Realty—Title—Conveyances—The local law determines whether the title to realty is good. Johnson-Van Sant Co. v. Martens, 113 Minn. 486, 129 N. W. 859.

It is true that the title to real estate must be determined by the laws of the state in which it is situated. However, the fact that real estate is situated beyond the jurisdiction of the court does not prevent it from acting in personam, and commanding, with reference thereto, its own citizens, of whom it has jurisdiction, whenever it is necessary to enable the court to do justice between the parties before it. It may in such cases compel a conveyance of real estate situated in another state. Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176.

(32) See Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129; Olmsted v. Olmsted, 216 U. S. 386.

(33) See Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176.

See Digest, § 1534.

1555. Descent and testamentary disposition—The fiction of law that the situs of the personal property of a non-resident decedent is in the state or country of his domicil is only for the purpose of distributing the residue of the estate, subject to the expenses of administration and the rights of creditors in the state where the property is actually found. Property not subject to administration or distribution need have no situs by fiction of law to come into the possession of the true owner. Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428. See § 2726a.

Conflict of laws as to wills. Note, 2 L. R. A. (N. S.) 408.

(34) Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129; Jones v. Jones, 234 U. S. 615.

(35) Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010; State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

1557. Marriage—(37) Lando v. Lando, 112 Minn. 257, 127 N. W. 1125; Note, 43 L. R. A. (N. S.) 355.

(38) Note, 85 Am. St. Rep. 552.

CONFUSION OF GOODS

1561. In general—An owner of property which is intermingled and confused with similar property of another, without his fraud, and without his negligence, does not forfeit his property; and it is for the court to make a division of the property or its proceeds on such practicable basis as will likely result in giving to each his own. Clay, Robinson & Co. v. Larson, 125 Minn. 271, 146 N. W. 1095.

(52) See 13 Col. Law Rev. 630; Note, 101 Am. St. Rep. 913.

CONSPIRACY

1562. Concert of action—(58) See Knight v. Leighton, 110 Minn. 254, 257, 124 N. W. 1090; Sweaas v. Evenson, 110 Minn. 304, 125 N. W. 272.

1564. What constitutes—To constitute a conspiracy the end sought must be unlawful or the means adopted for its accomplishment must be unlawful. If the result sought be lawful and lawful means are adopted for its accomplishment it is immaterial what motive prompted the conspirators. Boasberg v. Walker, 111 Minn. 445, 127 N. W. 467. See Note, 3 Am. St. Rep. 473.

1565. To prevent employment—A conspiracy between A and B for B to make false charges to A against C, an employee of A, to secure the discharge of C, is probably actionable. Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63.

1566. Boycott—(63) Gompers v. Bucks Stove & Range Co., 221 U. S. 418. See §§ 8438, 9674; 8 Harv. L. Rev. 8; 33 L. R. A. (N. S.) 1034.

1566a. Evidence—Acts and declarations of fellow conspirators—Where a conspiracy is shown between two or more persons to do an unlawful act, the declarations of one, since deceased, made in furtherance of the conspiracy, are admissible against the co-conspirators, though they were not present at the time the declarations were made. See State v. Hunter, 131 Minn. ——, 154 N. W. 1083.

1567. Pleading—(85) Boasberg v. Walker, 111 Minn. 445, 127 N. W. 467 (complaint for conspiracy to secure the vacation of an alley held insufficient); Sawyer v. National Surety Co., 112 Minn. 28, 127 N. W. 435 (complaint against surety company—plaintiff's name placed on "declined list"—complaint held not to state a cause of action for conspiracy); Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051 (complaint held to state a cause of action for conspiracy to defraud a wife of her interest in her husband's realty by means of fraudulent judgments).

CONSTITUTIONAL LAW

IN GENERAL

1568. Nature of constitution—(68) State v. Mankato, 117 Minn. 458, 136 N. W. 264.

1569. People source of power—(71) State v. Mankato, 117 Minn. 458, 136 N. W. 264.

AMENDMENT OF CONSTITUTION

1573. Submission to people—(80) Farrell v. Hicken, 125 Minn. 407, 411, 147 N. W. 815.

1574. When takes effect—(83) See State v. Duluth St. Ry. Co., 128 Minn. 314, 150 N. W. 917.

CONSTRUCTION OF CONSTITUTION

1576. In general—The constitution is generally construed as a limitation and not a grant of power. State v. Weatherill, 125 Minn. 336, 147 N. W. 105. See § 1602.

The constitution should receive a practical, common sense construction. Lawver v. Great Northern Ry. Co., 112 Minn. 46, 127 N. W. 431.

The constitution should be so construed as to leave the powers of government flexible and adaptive. Eubank v. Richmond, 226 U. S. 137.

Constitutional provisions being mere limitations, the question to be considered, in determining whether a particular act of the legislature violates a particular constitutional provision, is not whether the people, in adopting such provision, had in mind the act of the legislature in question, and were attempting to authorize it, but whether, having in mind the possibility of some future attempt on the part of the legislature to enact such an act, they were attempting to frustrate it in advance. State v. Mankato, 117 Minn. 458, 136 N. W 264.

The several provisions of the constitution must be construed together, as a whole, and with reference to the purposes for which the consti-

tution was ordained. It is not permissible to select a single isolated provision, and give it effect according to its literal reading, without reference to modifications made by the express language of other provisions of the instrument. State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

A construction which would stand in the way of political or social progress should be avoided when reasonably possible. The constitution should be construed in harmony with the ideals and conceptions of public policy of the people of the state as expressed in its laws. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

A constitution is a very human document. In the absence of an express command or prohibition, general constitutional language or policy is to be construed in the light, not only of the conditions prevailing at the time of the adoption of the constitution, but also with reference to the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which such changes have produced. Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209.

(89) Lawver v. Great Northern Ry. Co., 112 Minn. 46, 127 N. W. 431.

(91) State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

(93) State v. Weatherill, 125 Minn. 336, 147 N. W. 105.

(97) State v. Standard Oil Co., 111 Minn. 85, 95, 126 N. W. 527; State v. Mankato, 117 Minn. 458, 136 N. W. 264; State v. Wolfer, 119 Minn. 368, 138 N. W. 315; Farrell v. Hicken, 125 Minn. 407, 413, 147 N. W. 815. See Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953.

1580. Mandatory and directory provisions—(2) State v. Weatherill, 125 Minn. 336, 147 N. W. 105. See § 8954.

1584. Self-executing—Whether a provision is self-executing must be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. In general, it is said that prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void; so is any provision that indicates that it was intended as a present enactment, complete in itself as definitive legislation not contemplating subsequent legislation to carry it into effect. It is not important that other legislation may be contemplated to supplement it. If the provision is to be operative at all events and the nature and extent of the rights conferred and the liabilities imposed are fixed by it, so that they can be determined by examination and construction of its terms, and the provision itself furnishes a complete working rule of conduct, it will be held self-executing, and the legislative authority will not be required to go through the perfunctory process of passing it in order to give it vitality. State v. McColl, 127 Minn. 155, 149 N. W. 11.

A provision for the taxation of all forms of property held not self-executing. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

(8) State v. McColl, 127 Minn. 155, 149 N. W. 11.

THREE DEPARTMENTS OF GOVERNMENT

1587. In general—The fact that under the constitution the responsibility of maintaining the separation in the powers of government rests ultimately with the judiciary should make a court, from whose decision there is no appeal, hesitate before assuming a power as to which there is any doubt, and resolve all reasonable doubts in favor of a co-ordinate branch of the government, unless such conclusion leads to a palpable wrong or absurdity. Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292.

This constitutional provision is inapplicable to municipal governments. The commission form of municipal government is not unconstitutional on the ground that it blends executive and legislative functions. State v. Mankato, 117 Minn. 458, 136 N. W. 264.

The legislature cannot, by the imposition of excessive fines or penalties for the violation of a statute, deter or prevent persons from applying to the courts for the determination of judicial questions affecting them. State v. Chicago etc. Ry: Co., 130 Minn. 144, 153 N. W. 320.

(18) State v. Wolfer, 119 Minn. 268, 138 N. W. 315; Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899. See 26 Harv. L. Rev. 744.

1589. What are judicial questions and functions—The power to create a municipality and to define its boundaries is legislative, but the location of the boundaries on the ground may be assigned to the courts. Snow v. Excelsior, 115 Minn. 102, 132 N. W. 8.

The question whether an order of the Railroad and Warehouse Commission is reasonable is a judicial question. State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247.

The question whether railroad passenger or freight rates prescribed by statute are reasonable or unreasonable and confiscatory is a judicial question, exclusively for determination by the courts. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

The determination of the rates to be charged by public service corporations is a legislative or administrative function and not a judicial function. St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262.

It is a judicial function to determine whether a licensing board in refusing a license acted arbitrarily, oppressively, or unreasonably, or contrary to the evidence or the law. Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869. See § 9622a.

(25) State v. Probate Court, 112 Minn. 279, 128 N. W. 18 (duties of probate court in relation to inheritance taxes); State v. Eberhart, 116 Minn. 313, 133 N. W. 857 (judicial review of action of governor in removing county officers); Hunstiger v. Kilian, 131 Minn. 474, 153 N. W. 869 (judicial review of action of a licensing board).

(26) State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

(27) State v. Wolfer, 119 Minn. 368, 138 N. W. 315; Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869.

1590. Held not a delegation of judicial power—A law authorizing the board of control to transfer prisoners from the reformatory to the state prison and vice versa. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

1592. Imposing non-judicial duties on courts—A law imposing on the probate courts the duty of ascertaining the amount of inheritance taxes has been sustained. State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

The legislature may grant an appeal to the courts from the action of a licensing board refusing a license to engage in a business. Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869.

(43) Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899.

1593. Control of executive officers by judiciary—(52) State v. Eberhart, 116 Minn. 313, 133 N. W. 857. See Note, 52 L. R. A. (N. S.) 415.

(53) State v. Eberhart, 116 Minn. 313, 133 N. W. 857.

1595. Assumption of legislative power by courts—The power to create a municipality and to prescribe its territorial limits is a legislative one which cannot be exercised by the courts, but the courts may locate on the ground the boundary line of a municipality. Snow v. Excelsior, 115 Minn. 102, 132 N. W. 8.

The courts cannot fix rates for public service corporations. St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262; State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

1596. Assumption of judicial power by legislature—The legislature may prescribe the procedure of courts. Zimmerman v. Chicago & N. W. Ry. Co., 129 Minn. 4, 151 N. W. 412.

1597. Delegation of legislative power—Initiative and referendum. Note, 50 L. R. A. (N. S.) 195.

(65) See, as to administrative regulations, United States v. Grimaud, 220 U. S. 506.

1598. Held an unauthorized delegation of legislative power—(70) See Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723.

1599. Held not a delegation of legislative power—A law conferring certain powers on the courts in connection with the consolidation of school districts. Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723.

A law authorizing the county board or the county auditor to license auctioneers. Wright v. May, 127 Minn. 150, 149 N. W. 9.

A law for the construction of a state rural highway. Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899.

1600. Administrative powers and boards—Administrative orders are subject to judicial review, but courts ought not to set aside such orders simply because they deem them unwise or inexpedient. State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247.

The legislature may authorize an appeal to the courts from the action of administrative boards, but on such an appeal the court will not reverse the action of the board unless it is arbitrary, oppressive or unreasonable, or without evidence to sustain it, or contrary to law. Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869.

The proceedings of a licensing board in granting or refusing a license or permit to engage in a business are administrative and quasi judicial. Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869.

There is a distinction between legislative and administrative functions, and under a statutory power to make regulations an administrative officer or board cannot abridge or enlarge the conditions imposed by statute. United States v. George, 228 U. S. 14.

Administrative boards have no authority to punish a witness before them for contempt. State v. Fitzgerald, 131 Minn. ——, 154 N. W. 750.

Right of parties to notice and an opportunity to be heard. See § 1642.

Application of rules of evidence in administrative proceedings. 29 Harv. L. Rev. 208.

Jurisdictional limitations on commissions. 27 Harv. L. Rev. 545.

(88) State v. Wolfer, 119 Minn. 368, 138 N. W. 315 (statute authorizing board of control to transfer prisoners from the reformatory to the state prison, and vice versa, sustained); State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839 (administrative powers of state tax commission sustained); Wright v. May, 127 Minn. 150, 149 N. W. 9 (licensing of auctioneers by county board or county auditor); Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869 (licensing offensive trades). See United States v. Grimaud, 220 U. S. 506; 25 Harv. L. Rev. 704; 28 Id., 95; 46 Am. L. Rev. (N. S.) 137.

EXTENT OF LEGISLATIVE POWER

1602. Limited only by state and federal constitutions—The provisions of a state constitution do not confer any powers upon the legislature, but are mere limitations, and the legislature has all the powers of an absolute sovereign of which it has not been deprived by the constitution. State v. Mankato, 117 Minn. 458, 136 N. W. 264.

(90) State v. Mankato, 117 Minn. 458, 136 N. W. 264; State v. Erick-

son, 119 Minn. 152, 137 N. W. 385; State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839; State v. St. Louis County, 124 Minn. 126, 144 N. W. 756; State v. Weatherill, 125 Minn. 336, 147 N. W. 105; Farrell v. Hicken, 125 Minn. 407, 413, 147 N. W. 815; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71; Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

POLICE POWER

1603. Definition and nature—The police power is but another name for the power of government. Mutual Loan Co. v. Martell, 222 U. S. 225, 233.

The police power is not limited to the regulation of matters pertaining to the public health, the public morals or the public safety, but extends to matters involving public convenience and the general welfare or prosperity. Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169; Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193; Noble State Bank v. Haskell, 219 U. S. 104.

The right of contract is subject to police regulation. The legislature may provide that if parties enter into a contract respecting a particular subject-matter the terms of the contract shall be those prescribed by law. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

The legislature has the power to determine the public policy of the state, and, in furtherance of any policy adopted by it, may enact proper laws tending to induce conformance therewith. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

The question of what is within the police power is not one of abstract theory alone. Tradition and the habits of the community count for more than logic. Justice Holmes, Laurel Hill Cemetery v. San Francisco, 216 U. S. 358.

Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions that induced it. Mutual Loan Co. v. Martell, 222 U. S. 225.

(1) See Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169.

(96) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169; Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193; Noble State Bank v. Haskell, 219 U. S. 104.

(98, 99) Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193; State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

1604. Limitations—Test of reasonableness—The police power cannot be used as a mask for removing private property from the protection of

the constitution. Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 475, 133 N. W. 169.

The subject-matter being within the police power, the test is reasonableness, which involves a dual limitation, positive and negative, namely, adaptability to the end sought and absence of excessiveness. The measure must, on the one hand, tend to accomplish the purpose of its adoption, and, on the other, must not go beyond the reasonable demands of the occasion. State v. Ryder, 126 Minn. 95, 107, 147 N. W. 953.

Public service corporations, or persons, subject to the performance of uncompensated duties for the public welfare, may not be proceeded against arbitrarily nor in an unreasonable manner. The question whether a particular act or thing required by the public authorities in this respect is arbitrary and unreasonable is a judicial question and may be raised by the person proceeded against in any appropriate legal way, by affirmative action, or by way of defense in mandamus proceedings to compel the performance of the thing required. It is ordinarily one of fact, to be heard and determined as other issues of fact are heard and determined, and the burden is upon the complaining party to establish the allegations of unreasonableness. State v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136.

Here as elsewhere in the law lines are pricked out by the gradual approach and contact of decisions on the opposing sides. Noble State Bank v. Haskell, 219 U. S. 104.

(3) State v. Hanson, 118 Minn. 85, 92, 136 N. W. 412.

(5) State v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136.

(9) Wright v. May, 127 Minn. 150, 149 N. W. 9.

1605. Discretion of legislature, municipalities and administrative boards—Power of courts—It is well settled that in the matter of the exercise of the police power all questions of propriety and public necessity, being legislative in character, are committed to the legislature, or to such other inferior tribunals or boards as the exercise of the power may lawfully be delegated. The determination of the question in that manner is ordinarily final, and not open to judicial review, except where expressly or by necessary implication it is so provided by law. It is also well settled that an order or determination by proper authority that public interests require a particular exercise of the police power is presumptively valid, not only as respects the question of public necessity, but the reasonableness of the order as well. The rule is founded on the necessity of committing a wide discretion to the tribunal authorized to determine such questions, and the courts rarely interfere even in those cases where judicial review is provided for. The presumption applies to ordinances of municipal corporations regulating and controlling the construction and operation of street railways. State v. St. Paul City Ry.

Co., 117 Minn. 316, 135 N. W. 976; State v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136.

The methods, regulations, and restrictions to be imposed to attain, so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The courts have no power to determine the merits of conflicting theories, nor to declare that a particular method of advancing and protecting the public is superior or likely to insure greater safety or better protection than others. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen. Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445; State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

We must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the bill of rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law-making power. Justice Holmes, Noble State Bank v. Haskell, 219 U. S. 104.

The legislature is in the first instance the judge of what is necessary for the public welfare. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. Erie Railroad Co. v. Williams, 233 U. S. 685, 699.

(11) Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445; State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545; State v. Ryder, 126 Minn. 95, 147 N. W. 953; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71. See 28 Harv. L. Rev. 790.

(12) State v. Hanson, 118 Minn. 85, 136 N. W. 412.

1606. Cannot be surrendered—The right of the state, under the exercise of its police power, to legislate on the subject of the sale of intoxicating liquors, cannot be surrendered. State v. Osakis, 112 Minn. 365, 128 N. W. 295.

1607. Delegation—(15) State v. Eck, 121 Minn. 202, 141 N. W. 106.

1608. Licenses for occupations—Fees—The issuance of licenses for occupations is an exercise of the police power of the state. The establishment of regulations for the government of such occupations is a legislative function; the enforcement of such regulations is an administrative function. The proceedings of a license board in such cases is,

however, quasi judicial. Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869. See § 9622a.

1609. Seizure, confiscation and destruction of property—(18) Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445 (seizure and destruction of milk not conforming to a standard fixed by law); State v. Hanson, 114 Minn. 136, 130 N. W. 79 (intoxicating liquors); State v. Ryder, 126 Minn. 95, 147 N. W. 953 (furniture used in houses of prostitution).

1610. Held within police power—A law providing for the abatement of premises and occupations dangerous to the public health. J. T. McMillan Co. v. State Board, 110 Minn. 145, 124 N. W. 828.

A law forbidding discrimination in the sale of petroleum. State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

A law forbidding persons under twenty-one years of age to be or remain in a dance house. State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068.

An ordinance prescribing as a test of purity and wholesomeness of milk brought into the city for sale that drawn from cows previously subjected to the tuberculin test and found free from disease and authorizing the summary seizure and destruction of milk not conforming to the standard. Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445.

An ordinance prohibiting the use of soft coal in railroad switch engines. State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

A law providing for a search of unlicensed drinking places and the seizure and forfeiture of intoxicating liquor and other property found therein. State v. Hanson, 114 Minn. 136, 130 N. W. 79.

An ordinance requiring fruits, dates, candies, etc., exposed for sale, to be protected from flies and dust. State v. O'Connor, 115 Minn. 339, 132 N. W. 303.

An ordinance requiring a railroad company to construct, at its own expense, a bridge for its tracks over an artificial waterway between two lakes in Minneapolis. Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169.

A law regulating weights and measures. State v. Armour & Co., 118 Minn. 128, 136 N. W. 565.

An ordinance requiring a railroad company to lower its tracks in a city. Twin City Separator Co. v. Chicago etc., Ry. Co., 118 Minn. 491, 137 N. W. 193.

An ordinance requiring coal to be weighed on municipal scales. State v. Eck, 121 Minn. 202, 141 N. W. 106.

A law for the suppression of houses of prostitution. State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951; State v. Ryder, 126 Minn. 95, 147 N. W. 953.

A law providing for the compensation of injured workmen. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

An ordinance regulating tanneries. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

A law to prevent corrupt practices at elections. Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

A law for the licensing of auctioneers. Wright v. May, 127 Minn. 150, 149 N. W. 9.

A law limiting the speed of motor vehicles when meeting or passing horses driven by a woman, child or aged person. Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275.

An ordinance regulating the issuance and use of street railway transfers. St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

A law requiring railroad companies to construct at their own expense sidewalks at public crossings in municipalities. State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879.

(59) See Digest, § 4905.

(73) See Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169; Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80.

(78) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819.

(79) J. T. McMillan Co. v. State Board, 110 Minn. 145, 124 N. W. 828.

1611. Held not within police power—A law restricting the manufacture and sale of oleomargarine. State v. Hanson, 118 Minn. 85, 136 N. W. 42.

A law to compel those offering special inducements to the public or to prospective purchasers or customers in trade to pay a certain amount of such inducement or offer in cash, if such prospective purchaser or customer so elects, in lieu of the sum promised in trade. Kanne v. Segerstrom Piano Mfg. Co., 118 Minn. 483, 137 N. W. 170.

(01) State v. Sperry & Hutchinson Co., 110 Minn. 378, 126 N. W. 120. See Note, 2 L. R. A. (N. S.) 588; 24 Harv. L. Rev. 66.

VESTED RIGHTS

1613. Impairment unconstitutional—Subject to police power—All vested rights of property are held subject to a valid exercise of the police power. An owner of property has no vested or constitutional right to use or allow the use of it for purposes injurious to the public health or morals, and if he has knowledge or notice in the premises he cannot complain if loss ensues, when the law deals therewith in any way reasonably necessary for the suppression of the evil in connection

with which it is used. State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951. See § 8950.

1615. Rules of substantive law—No one has a property right or vested interest in a rule of law. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

The defences of contributory negligence, assumption of risk and fellow-servant may be abolished by the legislature. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

1616. Rules of evidence—(92) State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

1617. Remedies—(93) Oppegaard v. Renville County, 110 Minn. 300, 125 N. W. 504; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

1618. Rights held vested—A right to a pension as a member of the Minneapolis Fire Dept. Relief Association. Stevens v. Minneapolis Fire Dept. Relief Assn., 124 Minn. 381, 145 N. W. 35.

See Digest, § 4826.

1619. Rights held not vested—Rights of county in funds for drainage purposes. State v. George, 123 Minn. 59, 142 N. W. 945.

Right to practice law. State v. Giantvalley, 123 Minn. 227, 143 N. W. 780.

A right to a pension from the federal government. Stevens v. Minneapolis Fire Dept. Relief Assn., 124 Minn. 381, 145 N. W. 35.

A right to a pension not accrued. Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075.

See Digest, § 4826.

CURATIVE ACTS

1620. In general—(16) Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

1621. Curative acts held valid—An act validating defective plats. Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

IMPAIRMENT OF CONTRACTS

1628. Changing or abolishing remedies—There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made. Bernheimer v. Converse, 206 U. S. 516; National Surety Co. v. Architectural Decorating Co., 226 U. S. 276.

1631. Police power—(50) State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

1631a. Existing laws—All contracts are made subject to existing laws and cannot be impaired thereby. Monthly Instalment Loan Co. v. Skellet Co., 124 Minn. 144, 144 N. W. 750.

1636. Held not to impair obligation—A law placing a limitation on the right of eminent domain. Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18.

A law changing the requirement as to notice of claims on bonds of public contractors. Architectural Decorating Co. v. National Surety Co., 115 Minn. 382, 132 N. W. 289, affirmed, 226 U. S. 276.

An ordinance requiring a street railroad company to construct a new line. State v. St. Paul City Ry. Co., 117 Minn. 316, 135 N. W. 976; State v. St. Paul City Ry. Co., 127 Minn. 191, 149 N. W. 195.

A law relating to drainage contracts. State v. George, 123 Minn. 59, 142 N. W. 945.

A law giving a lien on personal property for transporting or storing it, and giving it precedence over prior liens. Monthly Instalment Loan Co. v. Skellet Co., 124 Minn. 144, 144 N. W. 750.

A law for the suppression of houses of prostitution. State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

An inheritance tax law. State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

(96) Byers v. Minn. Commercial Loan Co., 118 Minn. 266, 136 N. W. 880.

DUE PROCESS OF LAW

1637. Definition and nature—(98) See 26 Harv. L. Rev. 18–29.

1640. Federal supreme court final arbiter—(17) State v. Daniels, 118 Minn. 155, 136 N. W. 584; W. J. Armstrong Co. v. New York etc. Ry. Co., 129 Minn. 104, 151 N. W. 917.

1641. Notice and an opportunity to be heard—A party is entitled to notice and an opportunity to be heard before he can be deprived of membership in an association carrying with it a vested right to a pension, or other property interest. Stevens v. Minneapolis Fire Dept. Relief Assn., 124 Minn. 381, 145 N. W. 35.

Proceedings before a committee of a mutual benefit society for the expulsion of a member are quasi judicial and he is entitled to notice and an opportunity to be heard. Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120.

See Digest, §§ 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 essen-

tial. Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88.

1646. Held due process of law—A law providing for the abatement of occupations and premises dangerous to public health. J. T. McMillan Co. v. State Board, 110 Minn. 145, 124 N. W. 828.

A law forbidding discrimination in the sale of petroleum. State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

A law requiring written notice of the rescission of a land contract. Finnes v. Selover, Bates & Co., 114 Minn. 339, 131 N. W. 371.

A law requiring foreign insurance companies to appoint the state insurance commissioner as their attorney with power to accept service of process. State v. Queen City Fire Ins. Co., 114 Minn. 471, 131 N. W. 628.

An order of the state Railroad and Warehouse Commission requiring a railroad company to put in a side track to a quarry. State v. Chicago etc. Ry. Co., 115 Minn. 51, 131 N. W. 859.

A law authorizing the seizure and forfeiture of intoxicating liquors and other property found in an unlicensed drinking place. Hawkins v. Langum, 115 Minn. 100, 131 N. W. 1014.

An ordinance requiring a railroad company to construct at its own expense a bridge for its tracks over an artificial waterway between two lakes in a city. Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169.

An ordinance requiring a street railway company to construct a new line. State v. St. Paul City Ry. Co., 117 Minn. 316, 135 N. W. 976; State v. St. Paul City Ry. Co., 127 Minn. 191, 149 N. W. 195.

A law requiring railroad companies to carry members of the state militia for one cent a mile. State v. Chicago etc. Ry. Co., 118 Minn. 380, 137 N. W. 2. See 26 Harv. L. Rev. 360.

A law providing for the reassessment of undervalued property for taxation. State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839.

A law providing for a rescale of timber sold by the state from state lands. State v. Brooks-Scanlon Lumber Co., 122 Minn. 400, 142 N. W. 717.

A provision of the charter of St. Paul, relating to special assessments. Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

A law restricting the right to a pension. Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075.

A law for the suppression of houses of prostitution. State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951; State v. Ryder, 126 Minn. 95, 147 N. W. 953; State v. Stroup, 131 Minn. ——, 155 N. W. 90.

A law imposing a penalty on carriers for failure to settle and adjust

claims within a certain time. Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960.

A law providing for the compensation of injured workmen. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

A law authorizing logging companies to improve navigable streams for the purpose of floating logs. Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517.

(74) Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169. See Digest, §§ 8119, 8121.

(81) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819; Martin v. Great Northern Ry. Co., 110 Minn. 118, 124 N. W. 825.

See cases under §§ 1610, 1636.

1647. Held not due process of law—A law depriving a carrier of a fair and reasonable compensation for services. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

A penal statute which prescribes no standard of conduct that it is possible to know. International Harvester Co. v. Kentucky, 234 U. S. 216; Collins v. Kentucky, 234 U. S. 634.

EX POST FACTO LAWS

1648. Definition—(4) Note, 37 Am. St. Rep. 582.

RETROACTIVE LAWS

1651. Constitutionality—If the legislature has the power by retroactive or other legislation to revive a right once existing, but lost by reason of a failure to comply with statutory requirements essential to its preservation, the purpose to do so should clearly appear, and be not left to inference. Whittier v. Farmington, 115 Minn. 182, 131 N. W. 1079.

LIBERTY

1652. Liberty of contract—It has been said that the law jealously protects freedom of contract because of constitutional right and on the ground of public policy. White v. Jefferson, 110 Minn. 276, 282, 124 N. W. 373, 641, 125 N. W. 262.

Liberty means more than freedom from servitude. It includes the right to enter any lawful employment, subject to reasonable tests of fitness. One cannot be excluded from a lawful employment by arbitrary legislative tests. Smith v. Texas, 233 U. S. 630.

The liberty of contract guaranteed by the constitution is freedom from arbitrary and unreasonable restraint. The right to contract is subject to reasonable regulations under the police power. The public

welfare is paramount to the right of an individual to enter into contracts. Chicago etc. Ry. Co. v. McGuire, 219 U. S. 549; Atlantic Coast Line Ry. Co. v. Riverside Mills, 219 U. S. 186; Mutual Loan Co. v. Martell, 222 U. S. 225; Mondou v. N. Y. etc. R. Co., 223 U. S. 1; Erie Railroad Co. v. Williams, 233 U. S. 685; Miller v. Wilson, 236 U. S. 373; Bosley v. McLaughlin, 236 U. S. 385.

When the federal supreme court holds a state statute unconstitutional as an infringement of liberty of contract a state court is bound to follow it in the case of a similar statute. State v. Daniels, 118 Minn. 155, 136 N. W. 584, following Adair v. U. S., 208 U. S. 161.

The provision of the federal Employer's Liability Act declaring void any contract, designed to exempt a carrier from the liabilities of the act, is not invalid as an infringement of liberty of contract. Mondou v. N. Y. etc. R. Co., 223 U. S. 1; Rodell v. Relief Dept., 118 Minn. 449, 137 N. W. 174.

Several statutes of this state have been held not to infringe liberty of contract. State v. Armour & Co., 118 Minn. 128, 136 N. W. 565 (statute forbidding discrimination in the sale of petroleum); Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359 (statute requiring notice to an employer of an assignment of wages); State v. Droppo, 126 Minn. 68, 147 N. W. 829 (Laws 1913, c. 484, prohibiting the soliciting of orders for the sale of intoxicating liquors in certain territory); Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71 (Workmen's Compensation act).

A statute which forbids an employer from requiring an employee to agree not to belong to a labor union while in the service of the employer is an unconstitutional infringement of liberty of contract. Adair v. U. S., 208 U. S. 161; Coppage v. Kansas, 236 U. S. 1; State v. Daniels, 118 Minn. 155, 136 N. W. 584. These cases have been very justly criticised. 42 Am. L. Rev. 164; 28 Harv. L. Rev. 496.

Chapter 287, Laws 1911, an act to compel those offering special inducements to the public or to prospective purchasers or customers in trade to pay a certain amount of such inducement or offer in cash, if such prospective purchaser or customer so elects, in lieu of the sum promised in trade, and to provide a penalty for the failure to do so, held invalid. Kanne v. Segerstrom Piano Mfg. Co., 118 Minn. 483, 137 N. W. 170.

See 27 Harv. L. Rev. 372; 28 Id. 496; 42 Am. L. Rev. 164; 18 Yale L. Journal 485.

REMEDIES FOR WRONGS

1656. Nature of right—A right without a remedy is an anomaly in the law. United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 32, 128 N. W. 1112.

(26) Willis v. Mabon, 48 Minn. 140, 153, 50 N. W. 1110; Way v. Barney, 116 Minn. 285, 133 N. W. 801; Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

1660. Held not to deny a remedy—The provision for dismissal of applications in proceedings under the Torrens law. Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

CRUEL AND UNUSUAL PUNISHMENT

1661. What constitutes—(47) State v. Ryder, 126 Minn. 95, 147 N. W. 953. See Weems v. United States, 217 U. S. 349; 24 Harv. L. Rev. 54; Note, L. R. A. 1915C, 558.

RIGHT TO OBTAIN JUSTICE FREELY

1662. Nature of right—(49) See State v. Ryder, 126 Minn. 95, 147 N. W. 953 (whether certain provisions of Laws 1913, c. 562, for the suppression of houses of prostitution, are invalid within this provision, undetermined).

1664. Held not to deny right—A law for the abatement of premises and occupations dangerous to the public health. J. T. McMillan Co. v. State Board, 110 Minn. 145, 124 N. W. 828.

A law for the abatement of houses of prostitution. State v. Stroup, 131 Minn. ——, 155 N. W. 90.

CLASS LEGISLATION

1669. General principles—When the legislature has determined that a sufficient distinction exists between two classes of persons to justify applying rules to one class which do not apply to the other, such determination is binding upon the courts, unless they can point out that the distinction is purely fanciful and arbitrary, and that no substantial or logical basis exists therefor. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

(71, 72) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

1670. Principles of classification—(74) See Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960.

1671. Uniformity of operation—An ordinance permitting tanneries already in existence to continue in operation, but providing that no tannery should be established thereafter without first obtaining permission from the city council, has been sustained. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

1673. Constitutional prohibitions—(78) Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806; Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960; State v. Taubert, 126 Minn. 371, 148 N. W. 281.

1674. Held class legislation—A fire ordinance forbidding the lease of the third or attic floor of two-story frame buildings. State v. McCormick, 120 Minn. 97, 138 N. W. 1032.

(80) Bofferding v. Mengelkoch, 129 Minn. 184, 152 N. W. 135.

1675. Held not class, unequal, or partial legislation—A law forbidding discrimination in the sale of petroleum. State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

A law forbidding persons under twenty-one years of age from being or remaining in a dance house. State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068.

A law requiring savings banks to pay a registry mortgage tax upon mortgages owned by them, without exempting such mortgages from taxation otherwise. State v. Farmers & Mechanics Savings Bank, 114 Minn. 95, 130 N. W. 445, 851, affirmed, 232 U. S. 516.

A law requiring railroad companies to carry members of the militia for one cent a mile. State v. Chicago etc. Ry. Co., 118 Minn. 380, 137 N. W. 2. See 26 Harv. L. Rev. 360.

A law giving foreign fraternal associations thirty days in which to answer, while all other corporations are given but twenty days. Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815.

A law taxing the right to membership in a stock exchange or board of trade. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

A law requiring notice to employers of assignments of wages. Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

A law amending the primary election statutes. State v. Erickson, 125 Minn. 238, 146 N. W. 364.

A law imposing a penalty on carriers for failure to settle and adjust claims within a certain time. Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960.

A law providing for the compensation of injured workmen. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

A law relating to the pensioning of widows of firemen, making a distinction between widows of common-law marriages and widows of ceremonial marriages. Mineger v. Minneapolis Fire Dept. Relief Assn., 126 Minn. 332, 148 N. W. 279.

An ordinance permitting tanneries already in existence to continue in operation, but providing that no tannery should be established thereafter without first obtaining permission therefor from the city council. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

A law limiting the speed of motor vehicles when meeting or passing horses driven by a woman, child or aged person. Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275.

(1) Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 12.

(85) Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806.

(92) See Missouri, Kansas & Texas Ry. Co. v. Cade, 233 U. S. 642.

SPECIAL LEGISLATION

1676. History and object of constitutional provisions—The constitutional amendment prohibiting special legislation repealed by implication section 1 of article 11 of the constitution, and since then the submission of questions for the creation of new counties by popular vote has been one of favor by the legislature, and not because it was required by the constitution to do so. State v. Pioneer Press Co., 66 Minn. 536, 68 N. W. 769; State v. District Court, 113 Minn. 298, 129 N. W. 514.

(4) State v. Reed, 125 Minn. 194, 145 N. W. 967.

1678. Discretion of legislature—Construction—(12) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068; State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545; State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496; Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815; Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806; State v. Erickson, 125 Minn. 238, 146 N. W. 364; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

1679. General principles of classification—The legislature may impose special restrictions regulating the sale and distribution of one class of commodities, unless beyond reasonable doubt no substantial conditions or usages of trade differentiate that class from others. State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

Legislation which regulates business may well make distinctions depend upon the degree of evil. Engel v. O'Malley, 219 U. S. 128.

A classification may rest on narrow distinctions. Legislation is addressed to evils as they appear and even degrees of evil may determine its exercise. German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

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. Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224.

A classification may be made with reference to the evil to be prevented, and if the class discriminated against is or reasonably might be considered to define those from whom the evil is mainly to be feared, it properly may be picked out. A lack of abstract symmetry does not mat-

ter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. Patsone v. Pennsylvania, 232 U. S. 138.

Dealing with practical exigencies, the legislature may be guided by experience. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. It may proceed cautiously, step by step, and if an evil is specially experienced in a particular branch of business it is not necessary that the prohibition should be couched in all-embracing terms. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. Miller v. Wilson, 236 U. S. 373; Bosley v. McLaughlin, 236 U. S. 385.

Common carriers have frequently been classified for the purposes of specific legislation, and the classification sustained where all of that class are affected alike. Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960.

Excluding domestic servants, farm laborers, casual employees, and such railroads and railroad employees as are engaged in interstate commerce from the provisions of the Workmen's Compensation Act does not render it unconstitutional as class legislation. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

(15) Lowry v. Scott, 110 Minn. 98, 124 N. W. 635; State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545; State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496; State v. Erickson, 119 Minn. 152, 137 N. W. 385; Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806; State v. George, 123 Minn. 59, 142 N. W. 945; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71; State v. Minnesota Tax Commission, 128 Minn. 384, 150 N. W. 1087; Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 121.

(16) State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

(18) State v. Reed, 125 Minn. 194, 145 N. W. 967.

(19) State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

(21) See State v. Erickson, 125 Minn. 238, 146 N. W. 364.

1680. Population as a basis of classification—Neither population nor area is made a basis of classification of counties by the constitution. State v. Wasgatt, 114 Minn. 78, 130 N. W. 76.

(22) Gould v. St. Paul, 110 Minn. 324, 125 N. W. 273; State v. Scott, 110 Minn. 461, 126 N. W. 70; Gard v. Otter Tail County, 124 Minn. 136, 144 N. W. 748. See § 1682.

(23) Lowry v. Scott, 110 Minn. 461, 126 N. W. 70.

(26, 27) State v. St. Louis County, 124 Minn. 126, 144 N. W. 756.

1682. Classification of cities under section 36—Article 4, § 36, of the constitution of Minnesota, permits the classification of cities for legislative purposes into four classes, on a basis of population. The legislature, by R. L. 1905, § 746, divided the cities of the state for legislative purposes into four classes, as permitted by the constitution. It is within the constitutional power of the legislature to provide that, for the purpose of classification of cities, population shall be determined according to the state census alone. The constitutional right of the legislature to pass a law fixing a test by which population is to be determined carries with it the right to change the test, and this right is not taken away or suspended by the fact that its exercise may result in shifting some city from one class into another. The legislature has no power to adopt a means of determining population which is arbitrary and designed merely as an evasion of the constitution; but we cannot say that the statute adopted in this case, making the state census alone the test of population, whereas under the previous law resort was had to the latest census, state or federal, was wholly arbitrary, evasive or without reason. State v. St. Louis County, 124 Minn. 126, 144 N. W. 756.

(29) State v. St. Louis County, 124 Minn. 126, 144 N. W. 756.

(30) See Balch v. St. Anthony Park West, 129 Minn. 305, 152 N. W. 643.

1683. Uniformity of operation—(32) State v. Erickson, 125 Minn. 238, 247, 146 N. W. 364; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71; State v. Gilbert, 127 Minn. 452, 149 N. W. 951.

1685. Existing special legislation—(37) See Gard v. Otter Tail County, 124 Minn. 136, 144 N. W. 748.

(40) Balch v. St. Anthony Park West, 129 Minn. 305, 152 N. W. 643.

1691. Laws sustained since amendment of 1892—A law relating to primary elections. State v. Scott, 110 Minn. 461, 126 N. W. 70; State v. Erickson, 119 Minn. 152, 137 N. W. 385; State v. Erickson, 125 Minn. 238, 146 N. W. 364.

A law relating to county lines. State v. St. Louis County, 117 Minn. 42, 134 N. W. 299.

A law to prevent discrimination in the sale of milk, cream and butter fat. State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496.

A law relating to drainage contracts. State v. George, 123 Minn. 59, 142 N. W. 945.

A law relating to vital statistics, and excluding all counties having a population of 100,000 from the operation of a certain section of the law. Gard v. Otter Tail County, 124 Minn. 136, 144 N. W. 748.

A law prohibiting sales of intoxicating liquors to minors. State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

A law authorizing a railroad in connection with the University of Minnesota. State v. Reed, 125 Minn. 194, 145 N. W. 967.

(81) Gould v. St. Paul, 110 Minn. 324, 125 N. W. 273.

1692. Laws held invalid since amendment of 1892—A law providing for a county examiner of townships, villages, cities, school districts, etc., in counties having a population of more than 100,000 and an area of more than 5,000 square miles. State v. Wasgatt, 114 Minn. 78, 130 N. W. 76.

(95) Lowry v. Scott, 110 Minn. 98, 124 N. W. 635.

VARIOUS CONSTITUTIONAL PROVISIONS

1695. Privileges and immunities of citizens—Federal constitution—The refusal of a court to entertain jurisdiction of an action brought in Minnesota by a citizen of Iowa, upon a transitory cause of action for a tort committed there, against a railway company incorporated in Illinois, having a line of railway in Iowa and Minnesota, and doing business in each, and subject to the service of process and jurisdiction in each, is violative of section 2 of article 4 of the federal constitution, granting to the citizens of each state the privileges of citizens in the several states. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal constitution. * * * "But, subject to the restrictions of the federal constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land. State v. District Court, 126 Minn. 501, 148 N. W. 463.

This provision of the constitution does not cover the right to engage

in particular lines of business requiring a license, where there is a substantial reason for limiting the right to engage in the business to residents. Wright v. May, 127 Minn. 150, 149 N. W. 9.

1699. Rights and privileges of citizens—State constitution—The general statutes of this state providing for the licensing of auctioneers, and limiting the privilege to voters, are not obnoxious to this provision of the constitution. Wright v. May, 127 Minn. 150, 149 N. W. 9.

1700. Equal protection of the laws—All persons subject to legislation, limited as to the objects to which it is directed, must be treated alike under like circumstances and considerations, both in the privileges conferred and the limitations imposed. Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. But the inequality must be substantial, and affect a substantial right, and result in unequal burdens. State v. Farmers & Mechanics Bank, 114 Minn. 95, 130 N. W. 445, 851.

The constitutional requirement that all persons shall receive the equal protection of the laws is not infringed by legislation, which applies only to those persons falling within a specified class, if it applies alike to all persons within such class, and reasonable grounds exist for making a distinction between those who fall within such class and those who do not. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

A law requiring railroad companies to carry members of the militia for one cent a mile has been held not to deprive the companies of the equal protection of the laws. State v. Chicago etc. Ry. Co., 118 Minn. 380, 137 N. W. 2.

1701. Fourteenth amendment—The fourteenth amendment was not intended to and does not strip the states of the power to exert their lawful police authority. The equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority; therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition. Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806.

(34) Wright v. May, 127 Minn. 150, 149 N. W. 9.

(35) State v. Brooks-Scanlon Lumber Co., 122 Minn. 400, 142 N. W. 717.

(36) State v. Queen City Fire Ins. Co., 114 Minn. 471, 131 N. W. 628; State v. Farmers & Mechanics Sav. Bank, 114 Minn. 95, 130 N. W. 445, 851; Way v. Barney, 116 Minn. 285, 133 N. W. 801; State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496; State v. St. Paul

City Ry. Co., 117 Minn. 316, 135 N. W. 976; State v. Chicago etc. Ry. Co., 118 Minn. 380, 137 N. W. 2; Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806; Riskin v. Great Northern Ry. Co., 126 Minn. 138, 147 N. W. 960; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71; State v. Taubert, 126 Minn. 371, 148 N. W. 281; Wright v. May, 127 Minn. 150, 149 N. W. 9; State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

(37) State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

(38) State v. Daniels, 118 Minn. 155, 136 N. W. 584.

CONTEMPT

1702. In general—A party will not be punished for contempt in refusing to obey a judgment based on a statute subsequently so amended as to justify the refusal. Minegar v. Minneapolis Fire Dept. Relief Assn. 126 Minn. 332, 148 N. W. 279.

What tribunals may punish for contempt. State v. Fitzgerald, 131 Minn. —, 154 N. W. 750; Note, 117 Am. St. Rep. 950.

(39) State v. Langum, 125 Minn. 304, 146 N. W. 1102.

(41) See Minegar v. Minneapolis Fire Dept. Relief Assn., 126 Minn. 332, 148 N. W. 279.

(43) See Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383.

1703. What constitutes—A petition to a court for re-submission of certain charges of a violation of law to a grand jury held not a contempt. State v. Young, 113 Minn. 96, 129 N. W. 148.

A failure of an administrator to distribute funds, received for the killing of the decedent, in accordance with the order of the district court, held a constructive contempt. State v. District Court, 114 Minn. 364, 131 N. W. 381.

A disobedience of a void order of court is not punishable as a contempt. State v. District Court, 118 Minn. 170, 136 N. W. 746.

(45) Note, 137 Am. St. Rep. 875.

(46) State v. District Court, 113 Minn. 304, 129 N. W. 583; Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383; Gompers v. Bucks Stove & Range Co., 221 U. S. 418. See Digest, §§ 4504, 4505.

(48) State v. District Court, 110 Minn. 446, 125 N. W. 1020.

(53) State v. Young, 113 Minn. 96, 129 N. W. 148.

1703a. Distinction between criminal and civil contempts—Effect of invalidity of order disobeyed—A proceeding in civil contempt is one instituted in a civil action for the benefit of a party to the action, and where punishment is imposed it is remedial and is imposed for the ben-

efit of the party and to aid in the enforcement of his rights. The contempt proceeding being in aid of the enforcement of the order disobeyed, it falls with the annulment of that order. A proceeding in criminal contempt is one instituted for the sole purpose of penalizing the defendant. Its purpose being public, an order punishing a person for criminal contempt does not fall on account of irregularity of the order disobeyed, unless the court was without jurisdiction to make it. Orders in this case imposing fines to be paid to the plaintiff were orders in civil contempt, and since the order disobeyed was reversed on appeal the orders imposing the fines must also be reversed. Orders imposing simple fines for contempt of court in violating an injunction, where the forbidden acts have been wholly performed and cannot be recalled, are orders in criminal contempt. Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383.

1704. Direct contempt—Procedure—Judgment—Alleged irregularity in a judgment for contempt held not reviewable on habeas corpus. State v. Langum, 112 Minn. 121, 127 N. W. 465.

(57) See, as to form of warrant of commitment to jail, State v. Langum, 125 Minn. 304, 146 N. W. 1102.

1705. Constructive contempt—Procedure—The affidavit, the initiatory step in constructive contempt proceedings, need not be in any particular form, nor its allegations as direct, specific, and certain as required by law in indictments for criminal offences. The judgment of conviction in such proceedings must be construed in connection with the affidavit and order to show cause, the foundation of the proceeding, and need not recite all the facts there disclosed. State v. District Court, 113 Minn. 304, 129 N. W. 583.

(59) Gompers v. Bucks Stove & Range Co., 221 U. S. 418.

1706. Jurisdiction—In a habeas corpus proceeding, where a duly elected and qualified judge of a municipal court is engaged in the hearing of a preliminary examination of a prisoner duly brought before him, he has jurisdiction to punish for contempt of court committed in open court, although there have been proceedings taken under section 131, R. L. 1905, to oust him of jurisdiction to hear that particular case. State v. McDonough, 117 Minn. 173, 134 N. W. 509.

1708. Punishment—A sentence of thirty days in jail for direct contempt by an attorney at law sustained. State v. District Court, 110 Minn. 446, 125 N. W. 1020.

When the court is authorized by the facts to impose the punishment prescribed by section 4649, R. L. 1905, for contempt of court, it may award to the aggrieved party the costs and expenses of the contempt proceedings, including a reasonable attorney's fee. Services of an attorney, rendered in the presence of the court, do not require evidence of

their reasonable value. The court, when proper to be allowed, may fix the amount thereof from its knowledge of their value. Defendant was restrained by injunction from constructing a ditch and thereby lowering the waters of a meandered lake. Defendant in violation of the injunction constructed the ditch. Held, that the court was authorized to require defendant, to purge himself of the contempt, to fill up the ditch. State v. District Court, 113 Minn. 304, 129 N. W. 583.

(65, 66) State v. District Court, 114 Minn. 364, 131 N. W. 381 (constructive contempt—record held to show prejudice). See State v. Langum, 125 Minn. 304, 146 N. W. 1102 (general statute inapplicable to municipal courts).

CONTINUANCE

1710. A matter of discretion—(70) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987; Bernth v. Smith, 112 Minn. 72, 127 N. W. 427; Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275; State v. Ingraham, 118 Minn. 13, 136 N. W. 258; Kloppenburg v. Minneapolis etc. Ry. Co. 123 Minn. 173, 143 N. W. 322. See Digest, § 2470.

CONTRACTORS' BONDS—See Drains, 2834; Mechanics' Liens, 6093; Municipal Corporations, 6720, 6721; Suretyship, 9104a.

CONTRACTS

IN GENERAL

1723. What constitutes—A telegram from A to B asking B if he would honor a draft for a certain amount, and a telegram from B to A in reply, "I will," held to constitute a complete contract. In contracts by telegraph words may be supplied by intendment. Oil Well Supply Co. v. MacMurphey, 119 Minn. 500, 138 N. W. 784.

(12) Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

1724. Express contracts—Contracts implied in fact—A contract implied in fact requires a meeting of minds—an agreement—just as much as an express contract. The difference between the two is largely in the character of the evidence by which they are established. Lombard v. Rahilly, 127 Minn. 449, 149 N. W. 950.

An express contract may be inferred from the acts of the parties as well as their spoken words. A contract may be of a mixed nature, that is, partly expressed in words and partly implied from acts and circumstances. Both are to be taken into account in determining whether a

contract was made; the law imputing to a person an intention corresponding to the reasonable meaning of his words and actions. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

1725. Bilateral and unilateral contracts distinguished—(15) First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084. See Digest, § 1758.

1726. Definiteness and certainty—An option for the purchase of a particular parcel of land at a specified price per acre is not void for uncertainty as the acreage can be determined by measurement, and the price is payable at the time the option is exercised. Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387.

(16) Wilkes v. Holmes, 126 Minn. 349, 150 N. W. 1098 (contract for exchange of corporate stock for automobile held sufficiently definite). See Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316; § 8781.

1727. Entire and severable contracts—The mere fact that compensation is to be made at so much per pound, foot, yard, bushel, acre, or the like, does not alone render the contract severable. Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

There can be no apportionment of an entire contract. Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

(17) Duluth Log Co. v. John C. Hill Lumber Co., 110 Minn. 124, 124 N. W. 967.

(18) Edward Thompson Co. v. Schroeder, 131 Minn. —, 154 N. W. 792.

1727a. Executory and executed contracts—Whether a contract is to be deemed executory or executed depends on the intention of the parties. Ordinarily, a contract is deemed executory when something remains to be done or agreed upon in the future, or when it depends upon some contingency or future act of one of the parties. But when it appears that the intention of the parties, gathered from the language of the entire contract construed in the light of the surrounding circumstances, was that nothing further was to be done under the contract to render it complete and binding, the contract is deemed an executed one, and not executory. And this intention may be found, notwithstanding a conveyance was to be made in the future. Coates v. Cooper, 121 Minn. 11, 140 N. W. 120. See Karbach v. Grant, 131 Minn. —, 154 N. W. 1071 (contract held executory).

1728. Conditions precedent and subsequent—(20) See §§ 1728, 1736, 2055, 2675, 3163b, 3381, 7533, 7534.

1729. Termination by death—(23) Note, 45 L. R. A. (N. S.) 349.

1730a. Recitals—Estoppel—Recitals in a contract, which are consistent and certain in their terms, relevant to the subject-matter of the

contract, and with reference to which the contract was made, estop the parties thereto from denying the facts recited. Red Wing Sewer Pipe Co. v. Donnelly, 102 Minn. 192, 113 N. W. 1; Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80. See Digest, §§ 1055, 3178.

1730b. Law and fact—Whether there has been a meeting of minds—an agreement—is a question for the jury, unless the evidence is conclusive. Lombard v. Rahilly, 127 Minn. 449, 149 N. W. 950.

PARTIES

1731. Contractual capacity—Intoxication—A contract entered into by a person in such a state of intoxication that he is unable to comprehend its terms is voidable, but not void. If, after having knowledge of and comprehending its terms, he affirms it, it becomes valid and binding. His failure to disaffirm it within a reasonable time after having such knowledge is deemed an election to affirm it. Matz v. Martinson, 127 Minn. 262, 149 N. W. 370. See Note, 107 Am. St. Rep. 536; 25 L. R. A. (N. S.) 596; L. R. A. 1915B, 1121.

To justify the setting aside of a written contract for want of mental capacity the evidence must be clear and convincing. Carlson v. Elwell, 128 Minn. 440, 151 N. W. 188.

(29) Butler v. Badger, 128 Minn. 99, 150 N. W. 233; Carlson v. Elwell, 128 Minn. 440, 151 N. W. 188; McDonnell v. Chicago etc. Ry. Co., 130 Minn. 125, 153 N. W. 255. See McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

1731a. Right to choose—Substitution—Where F., doing business as a building company, contracted with the defendant to furnish certain material and labor for a building, the price thereof to be applied upon a debt due from F. to a firm of which the defendant was a member, and subsequently the building company was incorporated, and the corporation actually furnished such material and labor, but the defendant had no notice or knowledge of such facts, the defendant could not be held liable to the corporation, either for the material and labor so furnished, or for material and labor furnished pursuant to a similar contract executed subsequently to the plaintiff's incorporation, but likewise without notice to or knowledge by the defendant that he was not still dealing with F., or for extras furnished by the plaintiff under the same circumstances. The question of the making of the agreement between the defendant and F., and the question as to whether the defendant had notice or knowledge of the matters subsequently occurring, or of the fact that the material and labor was actually furnished by the plaintiff, held, under the evidence, for the jury. Fitzpatrick Building Co. v. Healy, 120 Minn. 237, 139 N. W. 495.

1732. Misnomer—Assumed name—The misnomer of a party to a contract does not affect the validity of the contract. Lenning v. Retail Merchants Mutual Fire Ins. Co., 129 Minn. 66, 151 N. W. 425.

(31) Lenning v. Retail Merchants Mutual Fire Ins. Co., 129 Minn. 66, 151 N. W. 425. See Note, L. R. A. 1915D, 982.

1733. Strangers—(32) Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

EXECUTION AND DURATION

1734. Signing—(34) Wilkes v. Holmes, 128 Minn. 349, 150 N. W. 1098 (the fact that a contract was not signed by one of the plaintiffs, though he was named in the body of the contract, held not sufficient proof of an agreement that the contract was not to take effect until signed by both plaintiffs).

1735. Signing without reading—(38) Note, 138 Am. St. Rep. 810.

1735a. Blanks—Authority to fill out—Where a written contract is delivered with blanks the party to whom it is delivered may have implied authority to fill them. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518. See Digest, §§ 264, 875, 3199.

1736. Delivery—Conditional—There is a radical difference between a conditional delivery, which is not to become complete and effective until the happening of some condition precedent, and a complete delivery, which is sought to be defeated by subsequent contingencies that may or may not arise. In the one case, there is no contract until the condition has been complied with. In the other, there is a binding contract, notwithstanding the happening of the contingency relied upon to defeat it. Samuel H. Chute Co. v. Latta, 123 Minn. 69, 73, 142 N. W. 1048.

(39) Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524 (the execution of a written instrument ordinarily includes delivery). See Digest, § 2662.

(41) Wilkes v. Holmes, 128 Minn. 349, 150 N. W. 1098.

See Digest, § 3377.

1738. By telephone—(43) See Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148.

See Note, 127 Am. St. Rep. 538.

1739. Duration—Notice of termination—Contracts sometimes provide for a notice of termination. Pappas v. Stark, 123 Minn. 81, 142 N. W. 1046.

A contract by one party to sell goods to another as ordered, but for no fixed period, is terminable at will of either party, and no right to damage can be predicated on its termination. Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790.

See Digest, §§ 5808, 7390.

OFFER AND ACCEPTANCE

1740. In general—The acceptance of an offer may be by conduct. National Citizens Bank v. Babcock, 113 Minn. 493, 129 N. W. 1045.

An offer of specified compensation to the person obtaining the highest vote based on paid subscriptions to a newspaper, after acceptance and part performance of the terms of the offer, becomes an executory contract between the person making and the person so accepting the terms of the offer. The person making such offer is bound by its terms after such acceptance, and cannot, without the consent of the other party, either change the terms of the offer or give to them an interpretation contrary to their true meaning. Mooney v. Daily News Co., 116 Minn. 212, 133 N. W. 573.

A telegraphic offer of employment, which is manifestly the result of prior verbal negotiations, and which alone does not purport to contain all the essential terms of a contractual offer, must be considered as though the language thereof had been used at the conclusion of the negotiations, or, conversely, as though express reference to the substance of the negotiations had been incorporated in the telegram; and the terms of the contract created by a telegraphic acceptance of such offer are to be gathered from the telegrams and the negotiations taken together, and not from the telegrams alone. O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677.

In a case within the statute of frauds an agreement to deal on the basis of a rejected offer must be in writing. Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127.

(47) Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125 (offer of defendant to furnish plaintiff with ice for his meat market as ordered—plaintiff ordered ice in response to the offer—the offer and order held to constitute a contract); Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127 (offer to sell—acceptance varying from offer).

See Digest, §§ 8499, 10000.

1741. Withdrawal—Revocation of offer—Irrevocable offers. 27 Harv. L. Rev. 644.

1742. Mutual assent—Meeting of minds—It is not essential that the minds of the parties should meet on any particular words to express their agreement. Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

It is not necessary that the minds of the parties should meet on those terms which the law will supply by intendment in the absence of an express agreement. Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148; Green v. Hayes, 120 Minn. 201, 139 N. W. 139.

A contract implied in fact requires a meeting of minds—an agreement - just as much as an express contract. Lombard v. Rahilly, 127 Minn. 444, 149 N. W. 950.

A meeting of minds is usually presumed from the execution of a written instrument. McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 265, 141 N. W. 164.

The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing, but on their having said the same thing. Parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. See Justice Holmes, 10 Harv. L. Rev. 463.

The test is objective rather than subjective. The question is not what the party really meant, but what his words and actions justified the other party in assuming that he meant. The law imputes to a person an intention corresponding to the reasonable meaning of his words and actions. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

Whether there was a meeting of minds—an agreement—is a question for the jury, unless the evidence is conclusive. Lombard v. Rahilly, 127 Minn. 449, 149 N. W. 950.

(58) O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677.

See Digest, §§ 8499, 8785, 10000.

1743. Mistake—Where an oral estimate or bid upon work is given, to be followed by a written bid, and a mistake in the price is made in the latter, the one to whom the bid is offered cannot by an acceptance make a contract if he knows of the mistake and the bidder's ignorance of its occurrence. In such case the bidder, having performed the work in ignorance of the mistake, may recover the reasonable value, upon proof that the other party, cognizant of the mistake, nevertheless, in bad faith, directed the work to be done when he knew that the bidder believed the written bid conformed in price to the oral bid previously given. Tyra v. Cheney, 129 Minn. 428, 152 N. W. 835.

1748. Acceptance by mail or telegraph—(68) Burton v. United States, 202 U. S. 344. See O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677; Note, 110 Am. St. Rep. 742.

CONSIDERATION

1750. Definition—(70–78) 27 Harv. L. Rev. 503.

1753. Options—Unilateral contracts—(82) Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791; Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

1757. Moral consideration—(87) Note, 39 Am. St. Rep. 735, 26 L. R. A. (N. S.) 520.

1758. Mutual promises—Mutuality of obligation—If from the terms of the contract mutuality of engagement is necessarily implied, a binding obligation is created thereby. Whenever the accepted proposition or contract is for the sale or delivery of a specific article or number of articles, or a specific amount of service or materials, or where, by the terms of the contract, the number of such articles, or the amount of such service or materials, is ascertainable, a promise of the other party may be implied, though not expressed in the contract, and hence the engagements are mutual. Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

(90) C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773; Davis v. Nat. Casualty Co., 115 Minn. 125, 131 N. W. 1013; Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

(91) First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791 (an absolute part of a contract held to furnish a consideration for an optional part); Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316. See Note, 1 L. R. A. (N. S.) 445.

(96) Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

See Digest, §§ 8496, 8774, 10003.

1759. One contract consideration for another—(99) Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203; Crystal Lake Cemetery Assn. v. Farnham, 129 Minn. 1, 151 N. W. 418.

1760. Forbearance—An agreement not to contest a will held not a valid consideration for a note, there being no reasonable basis for the contest and the threat of contest not being made in good faith. Montgomery v. Grenier, 117 Minn. 416, 136 N. W. 9.

A promise to stay proceedings and forbear entering judgment is a sufficient consideration for an appeal bond. First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

(1, 6) Thayer v. Estate of Pray, 111 Minn. 449, 127 N. W. 392.

(3) Security Nat. Bank v. Pulver, 131 Minn. ——, 155 N. W. 641.

1764. Promising to do what one is legally bound to do—(11) Thysell v. Holm, 124 Minn. 541, 145 N. W. 164.

1765. Pre-existing obligations—The payment of a valid and undisputed past-due debt is not a sufficient consideration for a new contract. Chicago etc. Ry. Co. v. Kelm, 121 Minn. 343, 141 N. W. 295.

A promise to pay a past-due debt is not a legal consideration. Thysell v. Holm, 124 Minn. 541, 145 N. W. 164.

1766. Promises of extra compensation—(18) See 5 Mich. L. Rev. 570.

1772. Held to have a sufficient consideration—A contract not to take legal proceedings to compel the payment of a legacy. Thayer v. Estate of Pray, 111 Minn. 449, 127 N. W. 392.

A contract for the cutting of timber. Blake v. J. Neils Lumber Co., 111 Minn. 513, 127 N. W. 450.

A contract to furnish railroad cars to a shipper. Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436.

A contract involving an advance of money for the purchase of land. Emmel v. Zapp, 112 Minn. 375, 127 N. W. 1134, 128 N. W. 572.

A contract extending the time of payment of a mortgage debt. Sime v. Lewis, 112 Minn. 403, 128 N. W. 468.

A contract for tiling and marble work in a building. C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773.

A note given for a contract to buy lands on shares. Latzke v. Albrecht, 113 Minn. 322, 129 N. W. 508.

A promise of a landlord to make repairs in consideration of an agreement of the tenant to continue as a tenant from month to month. Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466.

A contract of members of a club to pay assessments. Anderson v. Amidon, 114 Minn. 202, 130 N. W. 1002.

A promise by a husband to make a payment to his wife in discharge of his obligation to provide for her after a divorce. Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

A contract reserving mineral rights in a deed. Buck v. Walker, 115 Minn. 239, 132 N. W. 205.

A contract between two railroad companies for the use by one of the bridge of the other. Northern Pacific Ry. Co. v. Wisconsin Central Ry. Co., 117 Minn. 217, 135 N. W. 984.

A contract between several parties, jointly and severally liable on certain notes, apportioning the debt among them and agreeing to pay the amount of the debt apportioned to each. Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

A bond on appeal. First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

An option to take back a part of an interest in a mining lease. Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

An option to purchase land contained in a lease. Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387. See Digest, § 5404.

A note, the consideration being the subsequent issuance of a life insurance policy. Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870.

An agreement, unilateral in form, to repurchase shares of corporate stock, the agreement being a part of a settlement. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

An option to purchase leased premises. Crystal Lake Cemetery Assn. v. Farnham, 129 Minn. 1, 151 N. W. 418.

A contract of a manufacturer to sell to a wholesaler such goods as the latter might need for his trade for a season. Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

1773. Held not to have a sufficient consideration—A cancelation or release of an indebtedness. Allen v. Batz, 116 Minn. 38, 133 N. W. 79.

A note given in consideration of an agreement not to contest a will. Montgomery v. Grenier, 117 Minn. 416, 136 N. W. 9.

(31) Dowagiac Mfg. Co. v. Van Valkenburg, 111 Minn. 1, 126 N. W. 119.

(33) West Coast Co. v. Bradley, 111 Minn. 343, 127 N. W. 6.

(49) Thysell v. Holm, 124 Minn. 541, 145 N. W. 164.

MODIFICATION AND SUBSTITUTION

1776. Consideration—(54) See Note, L. R. A. 1915B, I.

1778a. Law and fact—Whether a contract was modified by mutual agreement or abrogated is a question for the jury, unless the evidence is conclusive. Carson v. Dawson, 129 Minn. 453, 152 N. W. 842.

PERFORMANCE

1781. Substantial performance sufficient—The supreme court is indisposed to place any further restrictions on the doctrine of substantial performance. Brown v. Hall, 121 Minn. 61, 140 N. W. 128.

(60) Wilkins v. Sublette, 111 Minn. 339, 126 N. W. 1089; Brown v. Hall, 121 Minn. 61, 140 N. W. 128; Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179.

(64) See Austin v. National Casualty Co., 125 Minn. 390, 147 N. W. 281.

1782. Sufficiency in particular cases—(65) Brown v. Hall, 121 Minn. 61, 140 N. W. 128 (contract to remove "deadhead" logs from a river); Austin v. National Casualty Co., 125 Minn. 390, 147 N. W. 281 (contract to bring about a consolidation of insurance companies and reinsurance).

1783. To satisfaction of other party—(66) Blied v. Barnard, 116 Minn. 307, 133 N. W. 795; Id., 120 Minn. 399, 139 N. W. 714.

See Digest, § 1851.

1785. Time of performance—General rules—(69) Colliton v. Warden, 111 Minn. 435, 127 N. W. 1; Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944. See Digest, §§ 8523, 10032.

(70) See Digest, § 9630.

(71) Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668.

1786. Time of the essence—Stipulations making time of the essence may be waived. Maryland Steel Co. v. United States, 235 U. S. 451.

(73) Connell Bros. Co. v. H. Diederichsen & Co., 213 Fed. 737. See Note, 104 Am. St. Rep. 265.

See Digest, § 10033.

1789. Impossibility—Act of God—A party agreeing to pay insurance premiums is relieved of liability when the company becomes insolvent and ceases to do business. Merritt v. Haas, 113 Minn. 219, 129 N. W. 379.

A party to a contract is excused from performance by an act of God rendering performance impossible, unless it unequivocally appears from the contract that it was intended that he should be bound absolutely. Coleman v. Miss. & Rum River Boom Co., 114 Minn. 443, 127 N. W. 192, 131 N. W. 641.

(83) Anderson v. Wije, 112 Minn. 527, 127 N. W. 1134 (contract to crop land—some evidence of rains—evidence held insufficient to raise question whether performance was prevented by act of God); Coleman v. Miss. & Rum River Boom Co., 114 Minn. 443, 127 N. W. 192, 131 N. W. 641 (contract to maintain a boom along a river bank—flood).

1789a. Approval of public authorities—If a party contracts to do certain things involving the necessity of securing the approval of public authorities and he contracts to secure such approval, but is unable to do so, and as a consequence there is no substantial performance of his contract, he cannot recover for his services. Austin v. National Casualty Co., 125 Minn. 390, 147 N. W. 281.

1790. Prevented by other party—(86) See Austin v. National Casualty Co., 125 Minn. 390, 147 N. W. 281.

1790a. Excused by statute declaring act unlawful—If one agrees to do a thing, which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise. Seaman v. Minneapolis etc. Ry. Co., 127 Minn. 180, 149 N. W. 134. See Owen v. J. Neils Lumber Co., 125 Minn. 15, 145 N. W. 402.

1792. Part performance—Acceptance—Waiver—(89) See Digest, § 1855.

(90) See Dunnell, Minn. Pl. 2 ed. § 915.

1795a. Contract to pay creditors of another—Partial failure of consideration—Prorating deficiency—Where, under a contract to pay the creditors of another, there is a partial failure of consideration, the deficiency should be borne by the creditors pro rata in the proportion

that the claim of each bears to the total consideration. Gunn v. McAlpine, 125 Minn. 343, 147 N. W. 111.

1796. Law and fact—(97) Brown v. Hall, 121 Minn. 61, 140 N. W. 128; Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125; Smith v. Mary, 131 Minn. ——, 154 N. W. 963.

1797a. Negligence in performance—One who is negligent in the performance of a contract is liable in damages to the other party to the contract. Pearson v. Tri-State Tel. & Tel. Co., 111 Minn. 331, 126 N. W. 1091.

BREACH

1799. Repudiation—Anticipatory breach—Disabling one's self—If a party to an executory contract renounces it, tender of performance by the other party is generally unnecessary; but, in order that such other may recover damages for a breach, he must show ability to perform on his part. Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071.

A repudiation of a contract by one party, acquiesced in by the other, is tantamount to a rescission. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

Damages sustained up to the time of the trial are recoverable.. Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424.

(3) Israel v. N. W. Nat. Life Ins. Co., 111 Minn. 404, 127 N. W. 187.

(4) See 13 Col. L. Rev. 163 (place and mode of repudiation).

1800. Default in instalments—(11) See 19 Yale L. Journal 615.

1803. Excuses performance by other party—Where a manufacturer agreed to furnish goods to a wholesaler as they should be required for his trade for a season, a breach of the contract by the former relieved the latter of the duty to send to the former further orders for goods in order to recover damages for the breach. Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

1805. Law and fact—(20) Colliton v. Warden, 111 Minn. 435, 127 N. W. 1.

RESCISSION BY ACT OF PARTY

1807. By mutual consent—Abandonment—A repudiation of a contract by one party, acquiesced in by the other, is tantamount to a rescission. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

Whether a contract has been rescinded by mutual consent or modified is a question for the jury, unless the evidence is conclusive. Carson v. Dawson, 129 Minn. 453, 152 N. W. 842.

Evidence held to justify a finding that the parties to a contract for the drainage of land had abandoned it. Praught v. Bukosky, 116 Minn. 206, 133 N. W. 564.

1808. For breach—The failure of a party to an executory contract to perform the same in some substantial respect vests in the other party the right to rescind the contract, and to recover what he parted with on the strength of the contract, at the same time returning what he received. Evidence held not to show a waiver of this right by plaintiff, or that he affirmed the contract after knowledge of the breach thereof by defendant. Karbach v. Grant, 131 Minn. —, 154 N. W. 1071.

1810. For fraud—Restoration—Ratification—An innocent misrepresentation by one party to a contract may give the other party a right to rescind it. Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

A contract cannot be repudiated in part and affirmed in part. Taking any step to enforce a contract is an election not to rescind it on account of anything known at the time. Even a defrauded party cannot take successively inconsistent positions. Wagner v. Magee, 130 Minn. 162, 153 N. W. 313.

One who may avoid a contract for fraud ratifies it by accepting and retaining money paid thereon. Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705. See § 1815.

A representation of intention as to future acts or events, not having been falsely made with the purpose to deceive, is not, though the act or event did not occur as represented, a sufficient ground upon which to predicate a charge of fraud, or be made the basis for the rescission of a contract induced and brought about by the representation. Bigelow v. Barnes, 121 Minn. 148, 140 N. W. 1032.

When by a fraudulently procured contract a pecuniary obligation is thereby incurred by the defrauded party, such incurred obligation is a sufficient damage or prejudice to entitle him to rescind the contract for the fraud. Edward Thompson Co. v. Schroeder, 131 Minn. —, 154 N. W. 792.

The plaintiff having by fraudulent representations induced an exchange of stock owned by him for lands owned by the defendant, the stock by agreement of the plaintiff and the defendant being afterwards temporarily pledged for a debt primarily that of the plaintiff, and having been sold by the pledgee to pay the debt through the fraud of the plaintiff, he cannot complain that the stock was not restored to him upon a rescission of the exchange by the defendant. Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308.

(26) Van Metre v. Nunn, 116 Minn. 444, 133 N. W. 1012.

(27) Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Edward Thompson Co. v. Schroeder, 131 Minn. —, 154 N. W. 792. See § 3828.

(28) Mayer v. Knudsen, 126 Minn. 85, 147 N. W. 819.

(30) Mayer v. Knudsen, 126 Minn. 85, 147 N. W. 819; Wagner v. Magee, 130 Minn. 162, 153 N. W. 313.

See Digest, §§ 1188, 1814, 1815, 3834, 8604, 8611, 10097.

1811. Partial—A contract for the sale of two sets of law books held divisible so that the buyer was authorized to rescind the contract as to one set for fraud in relation thereto. Edward Thompson Co. v. Schroeder, 131 Minn. ——, 154 N. W. 792.

1812. Not allowable at pleasure—Laches—Where a party has express authority to rescind a contract he may lose his right to do so by laches. Odden v. Jamison, 129 Minn. 489, 152 N. W. 871.

FRAUD

1814. Effect—In general—Between the original parties to a written contract a party whose signature thereto has been obtained by fraud may avoid it though he was lacking in ordinary prudence in the premises. Van Metre v. Nunn, 116 Minn. 444, 133 N. W. 1012. See Digest, § 3822.

A clause in a written contract, in the language, "No representations or guaranties have been made by your salesman which are not herein expressed," does not preclude or estop the other contracting party from showing that the contract was procured by fraudulent representations. Edward Thompson Co. v. Schroeder, 131 Minn. ——, 154 N. W. 792.

1815. Election of remedies—Restitution—Ratification—Ordinarily a party cannot rescind for fraud without returning whatever he may have received under the contract, but this rule may be relaxed in the interest of substantial justice. A party guilty of fraud is not entitled to anything more than substantial justice, and a fair opportunity to receive what he parted with. Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 132 N. W. 333; Rase v. Minneapolis etc. Ry. Co., 118 Minn. 437, 137 N. W. 176; Clark v. Wells, 127 Minn. 353, 149 N. W. 547; Valley v. Crookston Lumber Co., 128 Minn. 387, 151 N. W. 137. See 28 Harv. L. Rev. 315.

Where a party to a contract, upon learning that the contract was fraudulently made, unequivocally disaffirmed the contract and refused to comply further with its terms, a subsequent delay of more than a year in tendering a return of the contract and demanding the money paid thereon did not terminate the right to rescind; the other party to the contract having declared it forfeited on other grounds. Ballard v. Lyons, 114 Minn. 264, 131 N. W. 320.

When it fairly appears that an offer to return the money received on a settlement of a cause of action for personal injuries will be refused, and the amount so received is credited defendant in the verdict, and substantial justice has thus been done, the failure of plaintiff to offer to re-

turn the money received is not ground for a new trial. Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 132 N. W. 333.

If, through the fault of the wrongdoer, the party defrauded is unable to return all the property received in the condition in which he received it, it is sufficient, if he restore the property so far as he is able, and secure to the wrongdoer the equivalent of what cannot be returned. If the wrongdoer refuses to receive the property when tendered back, the defrauded party may properly do what is necessary to conserve its value, and does not thereby waive his rescission. Where he receives a going business, he may, without waiving his rescission, continue it as a going business during the pendency of the suit to recover what he parted with, if he remain ready, at all times, to turn over to the wrongdoer both the business, in substantially the condition in which he received it, and the profits derived therefrom. Clark v. Wells, 127 Minn. 353, 149 N. W. 547.

A restoration of the property is not a condition precedent to equitable relief if it has been rendered impossible by the fraud of the other party. Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308.

A mere attempt to rescind will not bar an action for fraud. Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

One having knowledge of general facts affecting contemplated contractual relations cannot contract in disregard thereof and thereafter allege ignorance of details as a ground of action for fraud. Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65.

The right to rescind for fraud may be lost by an affirmance after notice of the fraud. Mayer v. Knudsen, 126 Minn. 85, 147 N. W. 819.

A party cannot rescind and at the same time enjoy the benefits of the contract. If, with full knowledge of the facts, he uses or enjoys the benefits of the contract, or puts it out of his power to restore what he has received under it, he cannot rescind it. Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705; Valley v. Crookston Lumber Co., 128 Minn. 387, 151 N. W. 137.

One who has been induced to enter a contract, through fraudulent representations, as to who is the other party thereto, or as to the provisions of the contract, may treat it as void. But if, after knowledge of the fraud, he sues the party whose contract it purports to be, obtains judgment for damages for a breach thereof, and enforces or compromises such judgment, he thereby ratifies and adopts the contract in all its terms as if no fraud had attended its inception. Taking any step to enforce the contract is an election not to rescind it on account of anything known at the time. A contract cannot be repudiated in part and affirmed in part. Wagner v. Magee, 130 Minn. 162, 153 N. W. 313.

An action in equity to rescind will not lie if there is an adequate remedy at law. It will not lie where the defrauded party has an adequate

remedy by waiving the tort and suing in assumpsit for money had and received. Schauk v. Schuchman, 212 N. Y. 352, 106 N. E. 127.

(40) International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895; Clark v. Wells, 127 Minn. 353, 149 N. W. 547; Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914. See Magnuson v. Burgess, 124 Minn. 374, 145 N. W. 32.

(41) Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65.

See Digest, §§ 1185, 1188, 1810–1814, 3834, 8604, 8611, 8612, 10097.

CONSTRUCTION

1816. Object—Intention of parties—The object is not to ascertain the intention of the parties, but their intention as expressed by the language used or their conduct. The law imputes to a person an intention corresponding to the reasonable meaning of his words and actions. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905. See § 1742.

Courts are powerless to make contracts for parties. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

(48) Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089.

1817. When language unambiguous—Though a particular provision of a contract is unambiguous when considered by itself, an ambiguity requiring construction may arise when the provision is considered in connection with the other provisions of the contract. It is not only provisions which are ambiguous in themselves that are open to construction. Fitger Brewing Co. v. American Bonding Co., 127 Minn. 330, 149 N. W. 539.

1817a. Surrounding circumstances—Negotiations—If the language of a contract is ambiguous resort may be had to the surrounding circumstances and the negotiations leading to the contract. See Digest, §§ 3397–3407.

1818. With reference to pertinent rules of law—A contract includes, not only what the parties said, but also what is necessarily implied by law from their language. Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

(54) See Monthly Instalment Loan Co. v. Skellet Co., 124 Minn. 144, 144 N. W. 750.

1820. Practical construction—(56) Coates v. Cooper, 121 Minn. 11, 140 N. W. 120; Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089; Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955; Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203; Lynch v. Monarch Elevator Co., 130 Minn. ——, 153 N. W. 597; Old Colony Trust Co. v. Omaha, 230 U. S. 100. See Park Rapids Lumber Co. v. Aetna Ins. Co., 129 Minn. 328, 152 N. W. 732 (held no practical construction).

(57) Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38 (acts of parties subsequent to the execution of a deed held properly excluded).

1822. To be sustained if reasonably possible—When reasonably possible a contract should be so construed as to give it effect rather than to nullify it. Eklaw v. Nelson, 124 Minn. 335, 144 N. W. 1094. See Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386.

1823. As a whole—(63) Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301.

1824. Absurd and unjust results to be avoided—(65) Fitger Brewing Co. v. American Bonding Co., 127 Minn. 330, 149 N. W. 539.

1825. Ordinary and reasonable sense of words—Personal pronouns—The law imputes to a person an intention corresponding to the reasonable meaning of his words and conduct. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

First personal pronouns in the body of an instrument generally refer to the person or persons executing the instrument. Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109.

1827. To effectuate object of contract—A contract is to be construed so as to effectuate its object, and where it contains inconsistent provisions it will be so construed as to carry out its main object, as disclosed by the instrument as a whole. Fitger Brewing Co. v. American Bonding Co., 127 Minn. 330, 149 N. W. 539.

1831. Related instruments—(80) Brown v. Hall, 121 Minn. 61, 140 N. W. 128.

1832. Against party using words—(81) Murray Cure Institutes Co. v. McClure, 110 Minn. 1, 124 N. W. 213; Meier v. Northwest Thresher Co., 119 Minn. 289, 138 N. W. 36. See Barnum v. White, 128 Minn. 58, 150 N. W. 227 (contract drafted by an attorney who was a party to the contract).

See Digest, § 4659.

1833. Grammatical rules not controlling—A contract is to be given a practical construction, regardless of grammatical niceties. Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

1835a. Supplying omitted words—Where contracts are entered into by telegraph the parties generally use as few words as possible, and it is permissible for the courts to supply omitted words by intendment. Oil Wells Supply Co. v. Mac Murphey, 119 Minn. 500, 138 N. W. 784.

1840. Particular contracts construed—(99) Murray Cure Institutes Co. v. McClure, 110 Minn. 1, 124 N. W. 213 (contract between hospital and patient—held not to constitute a release of a claim for malpractice);

McBrady v. Monarch Elevator Co., 113 Minn. 104, 129 N. W. 163 (contract for buying grain—dockage—credit for overage); Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301 (contract for the hire of horses); Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80 (contract between the city of Minneapolis and the Minneapolis Street Railway Company in relation to the construction of a bridge by the company for its tracks over a parkway); Hodgdon v. Peet, 122 Minn. 286, 142 N. W. 808 (contract to pay a certain amount received on a claim against a city); Pappas v. Stark, 123 Minn. 81, 142 N. W. 1046 (contract for the privilege of maintaining a boot-blacking stand and checking privileges in a hotel); Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125 (contract to furnish ice for a meat market as ordered); Vollmer v. Big Stone County Bank, 127 Minn. 340, 149 N. W. 545 (order to pay money out of the proceeds of an auction—priority of claims); Barnum v. White, 128 Minn. 58, 150 N. W. 227 (plaintiff deeded certain lots to defendants—latter agreed to take necessary action to convert lots into money, to conduct all necessary lawsuits, to pay all costs and expenses thereof, and to divide proceeds with plaintiff—deduction of "all sums advanced and paid"—held that costs and expenses of litigation could not be deducted—offsets—meaning of "proceeds" of sales).

See Digest, § 1848.

1841. Law and fact—(2) T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316; Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203 (error in submitting construction to jury held harmless). See Foltmer v. First Methodist Episcopal Church, 127 Minn. 129, 148 N. W. 1077.

(3) T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316; Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750; Blocher v. Mayer Bros. Co., 127 Minn. 241, 149 N. W. 285; Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203 (where extrinsic evidence is admissible to show the practical construction); O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865.

BUILDING AND CONSTRUCTION CONTRACTS

1842. Plans and specifications—A contract to furnish cut stone as per plans and specifications held to be in the nature of an executory contract of sale upon condition precedent, so that acceptance and use of the stone waived all non-conformity thereof to plans and specifications known to the owner prior to such acceptance and use. Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993.

1843. Bids—Where an oral estimate or bid upon work is given, to be followed by a written bid, and a mistake in the price is made in the latter,

the one to whom the bid is offered cannot by an acceptance make a contract if he knows of the mistake and the bidder's ignorance of its occurrence. In such case the bidder, having performed the work in ignorance of the mistake, may recover the reasonable value, upon proof that the other party, cognizant of the mistake, nevertheless, in bad faith, directed the work to be done when he knew that the bidder believed the written bid conformed in price to the oral bid previously given. Tyra v. Cheney, 129 Minn. 428, 152 N. W. 835.

See Digest, § 6707.

1846. Workmanlike manner—In an action for the contract price the defendant is entitled to a deduction for unworkmanlike construction. Johnson v. Church of St. Charles, 126 Minn. 338, 148 N. W. 281 (held that court was in error in charging the jury that they could allow only nominal damages because of unworkmanlike construction resulting in the placing of certain pipes in such a position as to make them unsightly).

1848. Particular contracts and stipulations construed—Contract for grading for railroad. Contractor held entitled to the same compensation for removing materials from borrow pits, in building embankments as was provided for the removal of similar materials in excavating for the grade. Grant v. Guthrie, 115 Minn. 406, 132 N. W. 746.

Contract to furnish cut stone for certain buildings as per plans and specifications held to be in the nature of an executory contract of sale upon condition precedent, so that acceptance and use of stone waived all non-conformity thereof to plans and specifications known to the owner prior to such acceptance and use. Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993.

A stipulation for furnishing "mill work" for a church building. Foltman v. First Methodist Episcopal Church, 127 Minn. 129, 148 N. W. 1077.

1850. Substantial performance—The supreme court is indisposed to place any further restrictions on the doctrine of substantial performance. Brown v. Hall, 121 Minn. 61, 140 N. W. 128.

Whether there has been a substantial performance is a question for the jury, unless the evidence is conclusive. Smith v. Mary, 131 Minn. ——. 154 N. W. 963.

(31) Sykes v. St. Cloud, 60 Minn. 442, 62 N. W. 613; Snyder v. Crescent Milling Co., 111 Minn. 234, 126 N. W. 822; Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179. See Smith v. Russell, 125 N. Y. S. 952; Woodward, Quasi Contracts, § 175; 19 Yale Law Journal, 610; Note, 134 Am. St. Rep. 678; 24 L. R. A. (N. S.) 327.

(32–34) See 19 Yale Law Journal, 610.

1852. Acceptance as in full performance—(36) See Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993; Note, 115 Am. St. Rep. 256.

1853. Architect or engineer as umpire—Certificate—A contract to furnish cut stone for certain buildings as per plans and specifications held not to require an architect's certificate as a condition precedent to a recovery. Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993.

Where the parties themselves decide the questions agreed to be submitted to an architect for decision, or the contract is abandoned, a determination by the architect is not a condition precedent to a right to recover. Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259.

1855. Abandonment of contract—(45) See 6 Mich. L. Rev. 80.

1857. Taking work from contractor—(53) See Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259.

1859. Extra work or materials—Recovery—Contracts sometimes provide that there shall be no compensation for extra work or materials unless they are furnished upon a written order. See Carson v. Dawson, 129 Minn. 453, 152 N. W. 842; Note, 48 L. R. A. (N. S.) 564.

Where, in the construction of a bridge, the piers were placed too near together and one of them had to be blown out in order to let a dredge through, it was held that the cost of rebuilding should fall on the contractor. Biegert v. Maynard, 122 Minn. 126, 142 N. W. 20.

1860. Modification—(60) Carson v. Dawson, 129 Minn. 453, 152 N. W. 842.

1864. Pleading—Where the plaintiff declares upon an express contract, and the evidence shows that it has not been strictly performed, he must recover, if at all, under the doctrine of substantial performance, an inseparable component of which is that the defendant, under proper pleading, may recover the damages suffered by reason of the plaintiff's failure of strict performance. Substantial performance may be proved under a general allegation of performance, and, where such is sought to be done, evidence of waiver of strict performance and acceptance of the work is admissible upon the issue thus raised. Where the defendant's claim of recoupment is based upon the fact that the plaintiff's failure of strict performance necessitated the services of a third party, for which a lien was allowed by law, he should allege and prove the value of such services, and not the amount of the lien established by such third party and a judgment, not binding upon the plaintiff, therefor in an action to which the plaintiff was not a party; such lien and judgment be-

ing admissible for the sole purpose of showing that the lien claim was actually made and the judgment entered, and not for the purpose of being exhibited to the jury, or of proving the value of the services in question. The plaintiff cannot recover for services other than those stated in the complaint, though the defendant seeks recoupment for the plaintiff's failure strictly to perform the contract sued on. Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179.

Refusal of the court, in an action on a contract for exchange of labor in the construction of dwellings, to allow the defendant to prove the reasonable value of certain material, which under the agreement the plaintiff was to have furnished, but which the defendant claimed to have furnished, held not error, where no such issue of offset was made by the pleadings, and the evidence failed to show that the defendant was entitled to credit therefor. Larson v. Anderson, 122 Minn. 39, 141 N. W. 847.

(64) Snyder v. Crescent Milling Co., 111 Minn. 234, 126 N. W. 822 (complaint on contract alleged reasonable value of services—trial conducted on theory that action was on special contract—plaintiff testified over objection that his services were reasonably worth a certain amount —error held harmless).

See Dunnell, Minn. Pl. 2 ed. § 917.

1865. **Railroad construction contracts**—(65) Grant v. Guthrie, 115 Minn. 406, 132 N. W. 746.

ILLEGAL CONTRACTS

1870. **Public policy—In general**—Primarily it is the prerogative of the legislature to declare what contracts and acts are contrary to public policy, and forbid them; hence public policy is what a statute enacts. Courts cannot declare contracts or acts authorized by statute to be contrary to public policy; but in the absence of a statute they may declare void, as against public policy, contracts which are clearly injurious to the interests of the public. Buck v. Walker, 115 Minn. 239, 132 N. W. 205; Irons v. Independent School District, 119 Minn. 119, 137 N. W. 303.

The legislature has the power to determine the public policy of the state, and, in furtherance of any policy adopted by it, may enact proper laws tending to induce conformance therewith. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

The most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 411.

(77) Santa Fe etc. Ry. Co. v. Grant Bros. Const. Co., 228 U. S. 117.

1871. Contracts held contrary to public policy—A contract whereby a litigant surrenders control of his lawsuit to one who has no interest in the cause of action. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281.

(82) Note, 121 Am. St. Rep. 726.

(89) See Digest, § 4834.

(91) Adams v. Adams, 25 Minn. 72. See Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794; Note, 44 L. R. A. (N. S.) 379.

(92) 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.

1872. Held not contrary to public policy—A contract by a husband for the support of his wife after a divorce, not entered into to facilitate the divorce. Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

A contract for the hire of horses requiring their return in as good condition as when received. Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301.

A contract forfeiting membership in a Catholic fraternal association upon becoming a member of a secret non-Catholic aid association. Geronime v. German Roman Catholic Aid Assn., 127 Minn. 247, 149 N. W. 291.

A contract providing that an insurance company should defend an action against the insured. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281.

A contract of adoption. Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

1873. Contracts in violation of statutes—If one agrees to do a thing, which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise. Seaman v. Minneapolis etc. Ry. Co., 127 Minn. 180, 149 N. W. 134.

(5) See Note, 12 L. R. A. (N. S.) 575.

1875. Illegal consideration—(11) Note, 117 Am. St. Rep. 493.

(12) See Cohen v. Conrad, 110 Minn. 207, 124 N. W. 992.

1879. Illegality collateral to contract—(16) Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

1880. Entire contracts—(17) Burho v. Carmichiel, 117 Minn. 211, 135 N. W. 386.

1881. Severable contracts—(18) Cohen v. Conrad, 110 Minn. 207, 124 N. W. 992.

1885. No right of action upon—A claim will not be enforced which arises from and is for a share of the profits resulting from an illegal or fraudulent transaction to which the claimant was a party; but, where the claimant has a valid demand independent of the illegal act, an ac-

tion upon it will be entertained, notwithstanding the commission of illegal acts during the course of the business. Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

Contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Sage v. Hampe, 235 U. S. 99.

The owner of a building who, during the term of a lease thereof, unlawfully fails to equip the building with fire escapes as required by statute, cannot maintain an action upon the lease for rent. Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856.

Rule of in pari delicto. Note, 113 Am. St. Rep. 724.

Recovery of money paid on an illegal contract. See Woodward, Quasi Contracts, §§ 132–153.

(24) De La Motte v. N. W. Clearance Co., 126 Minn. 197, 148 N. W. 47; Continental Wall Paper Co. v. Voight, 212 U. S. 227.

(26) Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

1891. Pleading—Where the issue made by the pleadings is whether an alleged contract was actually made, it is error to admit evidence to show the invalidity of the contract, or that it was not fairly made. Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

(37) Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566. See Goldish v. Andrew Schoch Grocery Co., 129 Minn. 134, 145 N. W. 803 (sale of goods contrary to state pure food law).

PARTIES TO ACTIONS

1892. Parties defendant—General rule—(40) See Dunnell, Minn. Pl. 2 ed. §§ 48–53.

1893. All parties to contract must join as plaintiffs—(44) Rowland v. McLaughlin Bros., 110 Minn. 398, 125 N. W. 1019.

See Dunnell, Minn. Pl. 2 ed. § 46.

1894. Parties plaintiff—Who may sue—Real party in interest—Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute. See Digest, § 7315; Dunnell, Minn. Pl. 2 ed. §§ 33–39.

(45) Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638 (contract made in interest of plaintiff, who was a party to it, and in consideration thereof parted with her interest in the land involved—held a proper party plaintiff) Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428. See Dunnell, Minn. Pl. 2 ed. §§ 41–43.

1895. Party in whose name contract made for another—(47) Holliston v. Ernston, 124 Minn. 49, 144 N. W. 145. (agent making contract in his own name for benefit of undisclosed principal). See Dunnell, Minn. Pl. 2 ed. § 34.

1896. Contract for benefit of third party—To authorize a stranger to a contract to sue thereon, it must appear that the promisor undertook to perform some duty or obligation due from the promisee to such stranger, and that the contract was made for the benefit of such stranger. Clark v. P. M. Hennessey Construction Co., 122 Minn. 476, 142 N. W. 873.

A stranger to a contract whereby he is to be benefited, there being nothing except the promise, cannot recover upon it; but a third party, for whose benefit a contract is made, has a right of action on it, if there be a duty or obligation to him on the part of the promisee, or he is connected with the consideration, or has a legal or equitable claim to the benefit of the promise. Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333.

An adopted child may enforce an agreement between his natural parents and his adopting parents providing for his inheritance from the latter. Odenbreit v. Utheim, 131 Minn. ——, 154 N. W. 741.

The avoidance of circuity of action is not alone enough to authorize a third party to sue. See Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428.

(48) See Scott-Graff Lumber Co. v. Independent School District, 112 Minn. 474, 128 N. W. 672; Wood v. Johnson, 117 Minn. 267, 135 N. W. 746; Moore v. Mann, 130 Minn. 318, 153 N. W. 609; German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220; Note, 71 Am. St. Rep. 176; 25 L. R. A. 257; 2 L. R. A. (N. S.) 783.

(49) Barry v. Jordan, 116 Minn. 34, 133 N. W. 78; Wood v. Johnson, 177 Minn. 267, 135 N. W. 746.

See Dunnell, Minn. Pl. 2 ed. § 42.

1897. Promise to pay debt of plaintiff—Where, under a contract to pay the creditors of another, there is a partial failure of consideration, the deficiency should be borne by the creditors pro rata in the proportion that the claim of each bears to the total consideration. Gunn v. McAlpine, 125 Minn. 343, 147 N. W. 111.

(56) Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

1899. Defendants—Joint obligations—Statute—(60) Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203.

See Dunnell, Minn. Pl. 2 ed. § 51.

PLEADING

1902. How alleged—In hæc verba—Inducement—In setting out the terms of a contract it is neither necessary nor proper for the pleader to allege the legal inferences which he draws from them. Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

When the contract is set out in hæc verba an issue as to whether the contract is entire or severable may be raised by a denial. See Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

When one contract constitutes an inducement to another the pertinent portions of the former may be alleged in a complaint on the latter. Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203.

An allegation that it was "mutually agreed" is one of fact and appropriate. Starkey v. Minneapolis, 19 Minn. 203, (166); Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39.

1903. Common indebitatus assumpsit count—Under this form of complaint a recovery cannot be had over objection for the breach of an executory contract. St. Paul Motor Vehicle Co. v. Johnston, 127 Minn. 443, 149 N. W. 667.

See Dunnell, Minn. Pl. 2 ed. §§ 528–534.

1904. As express or implied—Where a complaint contains the appropriate allegations of both an express and an implied contract, a recovery may be had upon proof of either, in the absence of timely objection on the trial. Laird Norton Yards v. Rochester, 117 Minn. 114, 134 N. W. 644; Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481; Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444; Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901. See § 10377.

In an action on a contract implied in fact for materials and labor, the making of the contract being denied, it is not necessary for the defendant to plead facts tending to show that the materials and labor were furnished without expectation of pay and that the minds of the parties never met in an agreement. Lombard v. Rahilly, 127 Minn. 449, 149 N. W. 950.

(72) Bernth v. Smith, 112 Minn. 72, 127 N. W. 427; Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179; Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137; Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

(73) Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137.

See Dunnell, Minn. Pl. 2 ed. § 587.

1905. Implied contracts—Necessity of alleging promise—An allegation of a promise to pay, which the law implies, is not necessary under

the code. The addition of such allegation makes the complaint one upon both an express and implied contract. It does not defeat recovery upon an implied contract, but permits recovery upon proof of either an express or implied contract. Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444. In this case it is said, obiter, that it is improper to plead the promise implied by law.

The allegation of a request or of circumstances equivalent to a request is an essential allegation. Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

1906. How much of contract to be alleged—(76) Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347.

1907. Consideration—(80) A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113.

(81) Jarrett v. Great Northern Ry. Co., 74 Minn. 477, 77 N. W. 304.

See Dunnell, Minn. Pl. 2 ed. § 590.

1908. Want of consideration—Want of consideration may sometimes be new matter to be specially pleaded. See A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113.

1909. Failure of consideration—Failure of consideration is new matter to be specially pleaded. A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113.

1910. Performance—Substantial performance—Where the plaintiff declares upon an express contract, and the evidence shows that it has not been strictly performed, he must recover, if at all, under the doctrine of substantial performance, an inseparable component of which is that the defendant, under proper pleading, may recover the damages suffered by reason of the plaintiff's failure of strict performance. Substantial performance may be proved under a general allegation of performance, and, where such is sought to be done, evidence of waiver of strict performance and acceptance of the work is admissible upon the issue thus raised. Where the defendant's claim of recoupment is based upon the fact that the plaintiff's failure of strict performance necessitated the services of a third party, for which a lien was allowed by law, he should allege and prove the value of such services, and not the amount of the lien established by such third party and a judgment, not binding upon the plaintiff, therefor in an action to which the plaintiff was not a party; such lien and judgment being admissible for the sole purpose of showing that the lien claim was actually made and the judgment entered, and not for the purpose of being exhibited to the jury or of proving the value of the services in question. The plaintiff cannot recover for services other than those stated in the complaint, though the defendant seeks

recoupment for the plaintiff's failure strictly to perform the contract sued on. Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179.

(87) See Digest, § 7533.

See Dunnell, Minn. Pl. 2 ed. § 593.

1911. Breach—(88) Colliton v. Warden, 111 Minn. 435, 127 N. W. 18. See Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

See Dunnell, Minn. Pl. 2 ed. § 594.

1912. Demand—(90) See Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

See Dunnell, Minn. Pl. 2 ed. § 595.

1913. Execution—An admission in an answer that the defendant executed the instrument sued on, in the form and manner set out in the complaint, carries an admission of all that is essential to a valid execution of the instrument, with the terms contained therein, including the authority of agents by whom it was executed. First State Bank v. C. E. Stevens Land Co., 123 Minn. 218, 143 N. W. 355.

See Dunnell, Minn. Pl. 2 ed. § 585.

1914. Modified contract—Where the stipulations of a written contract have been altered, and the contract is declared on as altered, the alteration may be proved under a denial. Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14.

1917. Promise to pay money on demand—(96) Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668.

1918. Denial of execution—The defendant may prove facts tending to show that there was no meeting of minds—no agreement. Lombard v. Rahilly, 127 Minn. 445, 149 N. W. 950.

CONTRIBUTION

1920. Liability—General rule—Where one of two or more persons interested in a common fund is obliged in order to secure or preserve the fund for himself and others interested, to maintain an action and incur expenses, equity will compel all interested to contribute to the cost. Hodgdon v. Peet, 122 Minn. 286, 142 N. W. 808.

(2) Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041; Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617; Manthey v. Schueler, 126 Minn. 87, 147 N. W. 824.

1922. When right accrues—(5) Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

1922a. Between life tenant and remainderman—If a life tenant pays off an incumbrance on the estate he may enforce contribution from the remainderman. Whitney v. Salter, 36 Minn. 103, 30 N. W. 755. See 29 Harv. L. Rev. 229.

1923. Between joint debtors—Statute—(6) Munch v. McGrath, 124 Minn. 475, 145 N. W. 163 (action under statute—plaintiff leased to defendant a dam with right to flow lands—third parties recovered against both plaintiff and defendant for the flowage—plaintiff paid the judgment —held that plaintiff could not recover contribution from defendant because the lease contemplated the flowage).

1924. Between wrongdoers—The right to contribution is not defeated by joining wrongdoers as defendants. Fortmeyer v. Nat. Biscuit Co., 116 Minn. 158, 133 N. W. 461.

(8) See 11 Col. L. Rev. 665; Note, 36 L. R. A. 583.

1925. Between co-debtors—One of two makers of a promissory note, who gives his personal note to the payee upon the maturity of the note, and the same is accepted as payment of it, and it is thereupon surrendered and discharged, may maintain an action for contribution against his comaker. Larson v. Slette, 125 Minn. 267, 146 N. W. 1094.

(9) Oswald v. Pillsbury, 61 Minn. 520, 63 N. W. 1072; Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041; Larson v. Slette, 125 Minn. 266, 126 N. W. 1094 (action by two makers of a note, who paid it, to recover of a co-maker his proportionate share).

1925a. Parties plaintiff—All the parties interested in securing contribution held properly joined as plaintiffs in an action to enforce it. Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

CONVERSION

WHAT CONSTITUTES

1926. Definition—To constitute a conversion of personal property of another there must be some exercise of the right of complete ownership and dominion over it, to the total exclusion of the rights of the owner, or else some act done which destroys it or changes its character or in some way deprives the owner of it permanently or for an indefinite length of time. Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

(12) See Sheldon-Mather Timber Co. v. Itasca Lumber Co., 117 Minn. 355, 135 N. W. 1132; Varney v. Curtis, 213 Mass. 309, 100 N. E. 650.

1926a. What may be converted—Every species of personal property subject to private ownership is susceptible of conversion. Porges v. U. S. Mtg. & Trust Co., 203 N. Y. 181, 96 N. E. 424 (conversion of bank check by bank—unauthorized indorsement and deposit by agent).

1927. Mere ministerial dealing with goods—(26) Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

1928. Intent—Knowledge—Motive—(28) See Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

1929. Realty—Fixtures—(29) See Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 222; Melton v. Fullerton Weaver Realty Co., 214 N. Y. 571, 108 N. E. 849.

1931. Knowledge and consent of owner—(32) See Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134; Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597.

(33) See Daly v. C. E. Falk & Co., 131 Minn. ——, 154 N. W. 1081.

1932. Acts held to constitute a conversion—Mortgaging a crop by a tenant under a farm contract. Mead v. Mead, 115 Minn. 524, 132 N. W. 1132.

Delivering a note and check held in escrow contrary to the conditions of the escrow agreement. Barrett v. Messer, 115 Minn. 476, 132 N. W. 991.

A wrongful transfer of a warehouse receipt. Gamble-Robinson Commission Co. v. Whitaker, 116 Minn. 79, 133 N. W. 167.

An unauthorized disposition of logs without scaling and paying for them as provided in the agreement under which they were received by a lumber company. Sheldon-Mather Timber Co. v. Itasca Lumber Co., 117 Minn. 355, 135 N. W. 1132.

A conversion of raw material into a manufactured article and a sale thereof by a mortgagor. National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

Act of a corporation in turning over stock to a creditor of a stockholder. Daly v. C. E. Falk & Co., 131 Minn. ——, 154 N. W. 1081.

Refusing to pay over money to plaintiff which was received by defendant from a sale of lands to third parties, the lands having been sold by plaintiff to defendant under an agreement that defendant should resell them and apply the proceeds to the payment of the purchase price. Alexander v. Ward, 126 Minn. 340, 148 N. W. 123.

(36) Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474; Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494. See Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971.

(38) Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

(42) See Digest, §§ 1935, 8747.

(60) Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

1933. Acts held not to constitute conversion—Certain transfers by an executor to parties entitled to the property under a will. Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053.

Neglect of a bailee to notify the bailor of a sale of the premises where a gratuitous bailment is kept is not a conversion where no loss or misappropriation follows; nor is the advertising of goods for sale through mistake a conversion so long as there is no sale or loss or misappropriation; nor is the sale of a few articles which have in some manner become commingled with the bailor's goods a conversion of the whole stock, in the absence of evidence as to how the commingling took place. Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

(65) See Varney v. Curtis, 213 Mass. 309, 100 N. E. 650.

1934. Conversion of various forms of property—Cows. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

Poles. Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494.

Eggs. Gamble-Robinson Commission Co. v. Whitaker, 116 Minn. 79, 133 N. W. 167.

Automobile. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

(10) Mead v. Mead, 115 Minn. 524, 132 N. W. 1132.

(76) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120; Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118; Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597.

(77) Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494; Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131

N. W. 474; Sheldon-Mather Timber Co. v. Itasca Lumber Co., 117 Minn. 355, 135 N. W. 1132; National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

(78) Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255; Larson v. Slette, 125 Minn. 269, 146 N. W. 1095; Larson v. First Nat. Bank, 125 Minn. 275, 146 N. W. 1097; Alexander v. Ward, 126 Minn. 340, 148 N. W. 123.

(79) Barrett v. Messer, 115 Minn. 476, 132 N. W. 991 (note and check).

(81) Hawkins v. Mellis, Pirie & Co., 127 Minn. 393, 149 N. W. 663; Daly v. C. F. Falk & Co., 131 Minn. ——, 154 N. W. 1081.

(83) Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

(96) Gardner v. Northern Pacific Ry. Co., 118 Minn. 275, 136 N. W. 1028.

1935. Conversion by various classes of persons—Thresher. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

Tenant under farm contract. Mead v. Mead, 115 Minn. 524, 132 N. W. 1132.

Administrator. Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

Vendee of land. Alexander v. Ward, 126 Minn. 340, 148 N. W. 123.

(20) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120; Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995; Manter v. Petrie, 123 Minn. 333, 143 N. W. 907.

(21) Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597.

(24) Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029. See 10 Col. L. Rev. 250.

(25) Barrett v. Messer, 115 Minn. 476, 132 N. W. 991; Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

(26) Greenberg v. Millette, 110 Minn. 161, 124 N. W. 824.

(29) Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

(30) Sleepy Eye Milling Co. v. Chicago etc. Ry. Co., 119 Minn. 199, 137 N. W. 813; Judson v. Minneapolis & St. L. R. Co., 131 Minn. ——, 154 N. W. 506.

(32) See 25 Harv. L. Rev. 741.

(34) See Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053.

(35) National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

ACTIONS

1936. Election of remedies—Waiving tort and suing in assumpsit—Where timber is wrongfully cut and removed from land the owner of the land may waive the trespass to the land and sue for the value of the timber. Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494.

When an insurance policy is wrongfully canceled by the company the insured has an election to proceed as for conversion or upon the policy as if it were in full force. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

(46) Reynolds v. New York T. Co., 188 Fed. 611. See Dunnell, Minn. Pl. 2 ed. § 186.

1937. Essentials of cause of action—(57) See Gordon v. Freeman, 112 Minn. 482, 486, 128 N. W. 834, 1118.

1940. Parties plaintiff—The right of the general owner of property, and of one having a special property in it, to sue for a conversion of it, is an instance of a right at common law in two different persons to sue for the same thing. Mower County v. Smith, 22 Minn. 97, 111.

(63) Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474.

(64) United States v. Atlantic Coast Line R. Co., 206 Fed. 190 (action by United States as bailee of mail matter).

1941. Limitation of actions—An action brought March 12, 1909, for a conversion committed April 1, 1903, held not barred. Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474.

Title of converter after statute of limitations has run. Ames, Lectures on Legal History, 201.

1942. Demand and refusal—Evidence of a demand and refusal is admissible under a general allegation of conversion. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

Conversion may be established by proof of actual misappropriation, or, where plaintiff is entitled to possession, by demand and refusal. A showing that a pledgee of stock "turned it over" to a third party is not proof of misappropriation, without further proof as to the manner of its turning over. The proof must show that there was a repudiation of the pledgor's rights. A demand and refusal is evidence of conversion only when the person making the demand is entitled to possession. One to whom stock is pledged as collateral security for money advanced, to be repaid in breaking, is entitled to hold the stock until the breaking is done or the money repaid, and refusal of a demand prior thereto does not constitute conversion. Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

(79, 80) Brandenburg v. N. W. Jobbers Credit Bureau, 128 Minn. 411, 151 N. W. 134.

(86) See Mead v. Mead, 115 Minn. 524, 132 N. W. 1132.

1943. Complaint—An allegation in the alternative that one or the other of two defendants converted the goods, but which one, plaintiff is unable to determine, states no cause of action against either defendant. Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

(9) Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995; Bimel v. Boyd, 101 N. E. 657 (Ind. App.); More v. Western Grain Co., 153 N. W. 976 (N. D.)

(12) National Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290 (complaint alleged that plaintiff was the owner and entitled to the possession of the property, the wrongful taking thereof, a demand for its delivery to plaintiff, and a refusal to deliver).

(13) Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053 (complaint held not framed as one for conversion).

See Dunnell, Minn. Pl. 2 ed. § 603.

1945. General denial—Evidence admissible—Under a general denial the defendant may show that the plaintiff is estopped from asserting ownership. Feinberg v. Allen, 208 N. Y. 215, 101 N. E. 893.

See Dunnell, Minn. Pl. 2 ed. § 604.

1946. Defences—Evidence having been introduced tending to show that property conveyed by one of the defendants to the plaintiff as security had been sold and the proceeds converted to the defendants' use, the fact that the plaintiff's lien on the property, when acquired, was subject to a prior lien in favor of a third party, does not defeat the plaintiff's right to recover from the defendants for the conversion; it not having been made to appear that such third party still had and asserted his lien against the property or a right to the proceeds of the sale thereof. National Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290.

In an action for conversion of a team, if plaintiff proves title, the defendant has not made out a defence by showing merely that the team, taken under a writ of replevin from plaintiff's husband, was afterwards returned because rebonded by him. The defendant claimed title through a chattel mortgage executed by plaintiff's husband, but failed to show any authority from plaintiff, either direct or by way of estoppel, to mortgage the team. Such being the case, no prejudicial error can be asserted by defendant on the immaterial issue whether the mortgage purported by its terms to include this team. If plaintiff proved ownership, she was entitled to a verdict, regardless of what was included in her husband's unauthorized mortgage. Klein v. Frerichs, 127 Minn. 177, 149 N. W. 2.

When a bailee sues for the benefit of a bailor his right of action and extent of recovery are measured by those of the bailor and the action is open to any defence which might be made against the bailor. United States v. Atlantic Coast Line R. Co., 206 Fed. 190.

(16) Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494.

1947. Waiver—(30) See Digest, § 1931.

1948. Variance—Where the conversion is alleged in general terms it may be proved either by evidence of a demand and refusal or by evidence of a wrongful sale and disposition of the property. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

1949. Burden of proof—Action against an agent who had delivered a note and check, held by him in escrow, contrary to the terms of the escrow agreement. Held that the burden was on the agent to prove that payment could not be enforced against the maker. Barrett v. Messer, 115 Minn. 476, 132 N. W. 991.

Defendant held to have burden of proof as to good faith in ownership of a warehouse receipt. Gamble-Robinson Commission Co. v. Whitaker, 120 Minn. 521, 138 N. W. 1033.

In an action against a pledgee the plaintiff has the burden of showing a repudiation of the pledgor's rights. It is not enough to prove that the pledgee turned the property over to a third party. Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

A plaintiff who relies on demand and refusal as evidence of conversion has the burden of proving defendant's control over the article and ability to comply with the demand. De Young v. Frank A. Andrews Co., 214 Mass. 47, 100 N. E. 1080.

1950. Evidence—Admissibility—(51) Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995 (affidavit and notice of claim by third party—sale under levy by sheriff); Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494 (fact that an absolute deed was intended as a mortgage); Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357 (cost price of automobile admissible on the issue of its value —automobile experts living in Minneapolis competent witnesses as to value in Duluth).

(52) Gardner v. Northern Pacific Ry. Co., 118 Minn. 275, 136 N. W. 1028 (sale of property to two purchasers—evidence that seller kept money in the bank to pay back what the first purchaser had paid).

1951. Evidence—Sufficiency—(53) Greenberg v. Millette, 110 Minn. 161, 124 N. W. 824; Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

(54) Larson v. Slette, 125 Minn. 269, 146 N. W. 1095.

(55) Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

1951a. Law and fact—Whether there was a conversion is a question for the jury, unless the evidence is conclusive. Daly v. C. E. Falk & Co., 131 Minn. —, 154 N. W. 1081.

1952. Relief allowable—(59) National Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290.

1953. Effect of judgment in vesting title—(61) Haas v. Sackett, 40 Minn. 53, 41 N. W. 237.

DAMAGES

1956. Where plaintiff has special interest only—(67) United States v. Atlantic Coast Line R. Co., 206 Fed. 190. See 25 Harv. L. Rev. 655.

1957. When property returned—Nominal damages—(69) See Note, 49 L. R. A. (N. S.) 931; 14 Col. L. Rev. 82; 26 Harv. L. Rev. 764.

1958. Things in action—Bills, notes, stock, etc.—(70) Hawkins v. Mellis, Pirie & Co., 127 Minn. 393, 149 N. W. 663 (corporate stock). See 24 Harv. L. Rev. 62.

1959. Where property is enhanced in value by converter—(71) Evans v. Kohn, 113 Minn. 45, 128 N. W. 1006. See Woodward, Quasi Contracts, § 190; Note, 52 L. R. A. (N. S.) 91, 97 (conversion of timber); Digest, § 9694.

CORPORATIONS

IN GENERAL

1969. Definition and nature—The theory of a distinct entity will not be allowed to cloak fraud or other unlawful acts. State v. Creamery Package Mfg. Co., 110 Minn. 415, 433, 126 N. W. 126, 623; Erickson v. Revere Elevator Co., 110 Minn. 443, 126 N. W. 130; J. J. McCaskill Co. v. U. S., 216 U. S. 504. See 24 Harv. L. Rev. 672; 27 Id., 386; 12 Col. L. Rev. 496.

(96) See 24 Harv. L. Rev. 253, 347; 27 Law Quar. Rev. 219.

(99) State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

1971. Name—Change—Strict accuracy in the use of corporate names is not always required. Omissions or transposition of words in a corporate name are not always fatal. First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139.

Requisite vote for a change of name. Hamilton v. Simon, 178 Fed. 130.

1972. Seal—(9) Note, 50 Am. St. Rep. 150.

1973. Office in state—Home office—With reference to a corporation and its general office the words "home" and "residence" are synonymous. State v. District Court, 120 Minn. 99, 139 N. W. 135.

1974. By-laws—By-laws are not admissible in evidence unless duly authenticated. Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806.

Authority to enact by-laws. Note, 43 Am. St. Rep. 152.

Where no formalities are required in the adoption of by-laws they may be adopted by acts as well as by words, by a uniform course of proceedings of the corporation, as well as by an express vote manifested in writing. Lindstrom v. Tell, 131 Minn. ——, 154 N. W. 969.

(14, 15) See Digest, § 4818.

1975. Records—Stock books—Evidence—The minutes of a private corporation are at most only prima facie evidence against third persons, and are open to contradiction or explanation in an action involving transactions of which the minutes purport to be a record. Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

In an action to recover a stock subscription the books of the corporation are admissible to prove that the defendant is a stockholder and has not paid for his stock in full. Fisk v. Sampson, 118 Minn. 525, 136 N. W. 315, 761.

The books of a corporation and statements of its condition made by or under the direction of its president and general manager are competent evidence of the value of its stock. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

The account books of a corporation are admissible against it without laying the statutory foundation prescribed when they are sought to be introduced in favor of the corporation. Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459.

(20) See Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

(21) Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

(22) Fisk v. Sampson, 118 Minn. 525, 136 N. W. 315, 761; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606; Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N. W. 117; Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459.

(26) Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93. See Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

1976. Proof of corporate acts by oral evidence—Oral evidence of action of the board of directors of a corporation is properly admitted against the objection that it is not the best evidence, when it does not appear that any written evidence of such action exists. Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914.

While the record of proceedings of a board of directors, when made, is the best evidence, if no record was made secondary evidence is admissi-

ble. Denver & Rio Grande Ry. Co. v. Arizona & Colo. Ry. Co., 233 U. S. 601.

(27) Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

PROMOTERS

1977. Contracts of promoters—Adoption—Fraud—The somewhat common custom among promoters of dividing among themselves a certain portion of the shares of stock of the company promoted, upon the principle of "division and silence," is fraudulent, and the surrender of such stock for cancelation may be required unless it has passed into the hands of bona fide purchasers for value; and a very common bargain between promoters and directors, by which the former agree to give to the latter the necessary shares to qualify them to act as directors upon the condition that the directors return certain of the shares to the promoters, is gross misconduct, and the directors must answer to the corporation for the real value of the shares given them as a part of the fraudulent arrangement. De La Motte v. Northwestern Clearance Co., 126 Minn. 197, 148 N. W. 47.

A corporation held not entitled to recover secret profits of promoters of the corporation alleged to have been gained in the form of a commission on the purchase of certain land. Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65.

(28) See Note, 50 L. R. A. (N. S.) 979.

(30) De La Motte v. N. W. Clearance Co., 126 Minn. 197, 148 N. W. 47. See Iowa Mausoleum Co. v. Johnson, 123 Minn. 526, 143 N. W. 1135 (action upon a promissory note—findings that the promoter of a corporation fraudulently represented, through his agent, that money paid in for stock by the incorporators thereof should remain in the treasury as working capital; that the promoter received five-sevenths of that amount, and as part of it the note in suit, are sufficient to constitute actionable fraud—the acts of the president, after he learned of the fraud, did not constitute a ratification of the contract); 8 Col. L. Rev. 567.

1980. Liability of promoters—Jurisdiction—The courts of this state have jurisdiction in an action in equity brought by resident stockholders, who were fraudulently induced to subscribe for stock in a foreign corporation by the promoter and an officer thereof, to enjoin him from parting with stock fraudulently issued to him without consideration. Such a proceeding is not an interference with the management of the internal affairs of the corporation. Gere v. Dorr, 114 Minn. 240, 130 N. W. 1022.

(35) See Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617.

1980a. Interest of promoters in association property in case of invalid incorporation—Where several persons associate themselves to-

gether, under a definite agreement to form a corporation for the carrying on of a certain business, and in furtherance of this plan do carry on the business for a time but fail to legally incorporate, each member has an interest in the association property, and the extent of this interest is to be determined, not by the rule of implied equality of interest applicable to partners, but by regard to the proportionate amount of stock agreed upon as the share of each in the projected corporation. Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759; Tuller v. Swift, 113 Minn. 263, 129 N. W. 572, 130 N. W. 848.

CORPORATE EXISTENCE

1981. De facto corporations—Whether a de facto corporation can exercise the right of eminent domain has been questioned but not determined. Lawver v. Great Northern Ry. Co., 112 Minn. 46, 127 N. W. 431.

An officer or agent of a de facto corporation may be convicted of larceny of its funds. State v. Murphy, 113 Minn. 405, 129 N. W. 850.

(37) Healey v. Steele Center Creamery Assn., 115 Minn. 451, 133 N. W. 69; Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723; Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617. See 25 Harv. L. Rev. 623.

1983. Estoppel to deny corporate existence—(48) Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417.

INCORPORATION AND ORGANIZATION

1984. By special act—Constitutional prohibition—(52) Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417.

1987a. Fees for incorporation—R. L. 1913, § 6188, providing for incorporation fees, is inapplicable to a corporation organized without capital stock and not for pecuniary profit. State v. Schmahl, 118 Minn. 319, 136 N. W. 870.

1989. Co-operative associations—Defendant was organized in 1892 as a co-operative association. Held, that the findings of fact show an attempt to organize a corporation under chapter 29, Laws 1870, and a user as a corporation under such attempted incorporation, and therefore show that defendant was a de facto corporation under such law. Laws 1909, c. 298, changed defendant from a de facto corporation to a de jure corporation; but Laws 1870, c. 29, under which it was organized, still controls as to the powers of defendant and of its officers, directors, or managers, and as to the rights of stockholders in such corporation. The provision in chapter 29, Laws 1870, that "no person shall be allowed to become a shareholder in such association except by the consent of the managers of the same," is valid, and applies to defendant. Such provi-

sion is not repealed by R. L. 1905, § 2863. Healey v. Steele Center Creamery Assn., 115 Minn. 451, 133 N. W. 69.

1991. Consolidation—(71) Note, 32 L. R. A. (N. S.) 616.

ARTICLES OF INCORPORATION

1992. Nature—Contract—(72) See Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617.

1995. Amendment by act of corporators—(78) In re Sharood Shoe Co., 192 Fed. 945. See, as to where amended articles should be filed when there has been a change of residence by the corporation, State v. District Court, 120 Minn. 99, 139 N. W. 135.

POWERS AND FRANCHISES

1998. In general—A municipality cannot enlarge the powers of a corporation by the grant of a franchise. International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395.

(87) International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395.

1999. Power to sue—Unissued corporate stock belongs to the corporation considered as a legal person or entity, and when directors wrongfully deal therewith the corporation itself is primarily interested and the proper person to sue for relief. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

(94) See Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65.

2001. Power to assess members—(97) Slette v. Larson, 125 Minn. 263, 126 N. W. 1093. See Note, 76 Am. St. Rep. 126.

2002. Power to own and hold realty—Alien stockholders—(1) Note, 46 L. R. A. (N. S.) 72.

(99) See G. S. 1913, § 6697.

2008. Power to purchase and hold its own stock—(10) See 13 Col. L. Rev. 148.

(12) See State v. Minn. Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020; Note 44 L. R. A. (N. S.) 156; 7 Col. L. Rev. 346; 13 Id. 148; Note, 33 Am. St. Rep. 339; 27 Harv. L. Rev. 747.

2010. Negotiable paper—Accommodation paper—An officer of a corporation having general authority to execute promissory notes for it in the course of its business has no authority to execute the note of the corporation, without consideration or benefit moving to it, for the payment of his personal debt, or that of another. If the payee in such a note has notice of the purpose for which it was executed, he cannot maintain an action thereon against the corporation. The fact that the

officer executed the note of the corporation in payment of his own debt, or that of another officer of the corporation to the payee, is sufficient to charge him with notice. First Nat. Bank v. Flour City Trunk Co., 118 Minn. 151, 136 N. W. 563. See Note, 29 L. R. A. (N. S.) 359.

(14) Note, 111 Am. St. Rep. 309.

2013. Power to hold stock in other corporations—(20) Note 36 Am. St. Rep. 134.

2014. Power to transfer business to another corporation—Sale of corporate assets. Note, 103 Am. St. Rep. 548.

2016. Contracts—Formal requisites—Authority of agents and officers must appear—A contract not signed by its officers as required by its by-laws may be ratified by the corporation. Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997.

Corporations may enter into oral contracts except where a writing is expressly required by law. Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

2017. Notice of corporate powers—The modern tendency is to break away from the general rule that one dealing with a corporation is charged with notice of its corporate powers. 26 Harv. L. Rev. 540.

2019. Corporate franchises and privileges—Nature—The corporate right to exist is often called a franchise. State v. Farmers & Mechanics Sav. Bank, 114 Minn. 95, 105, 130 N. W. 445, 851.

LIABILITIES

2021. Unauthorized acts of officers and corporators—Estoppel—Where a corporation obtains a loan of money on its notes or bonds, secured by a mortgage which appears to have been executed on behalf of the corporation by its president and secretary, with authority of its board of directors, it being within the powers of the corporation to execute such a mortgage, and the proceeds of the loan being used for corporate purposes, such corporation is estopped from asserting the defence that such mortgage was not in fact authorized by its board of directors, or that the person signing as secretary was not the secretary; the mortgagee not having notice of such defects. Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 133 N. W. 91.

2022. Liability for torts—Corporations may be held liable for the wilful trespasses of its agents or servants, and subjected to treble damages therefor. Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

2022a. Liability for crimes—Corporations may be held liable for crime. State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417; State v.

People's Ice Co., 124 Minn. 307, 144 N. W. 962. See 14 Col. L. Rev. 241; 27 Harv. L. Rev. 589.

ULTRA VIRES TRANSACTIONS

2026. When enforceable—An abutting owner may challenge the right of a corporation to operate a street railway which it is not authorized by its charter to operate. International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395.

(50) Jackson v. Board of Education, 112 Minn. 167, 173, 127 N. W. 569; Davis v. National Casualty Co., 115 Minn. 125, 131 N. W. 1013; Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

(55) Jackson v. Board of Education, 112 Minn. 167, 173, 127 N. W. 569.

(58) 15 Col. L. Rev. 267.

STOCK

2029. Nature of stock certificates—Stock certificates are property and are transferable from hand to hand by mere indorsement. United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112.

Stock certificates are mere indicia of title to shares. Galbraith v. McDonald, 123 Minn. 208, 143 N. W. 353.

(66) Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 134 N. W. 510 (not negotiable paper in the sense that the title transferred by a thief to a bona fide holder cannot be questioned).

(67) Richardson v. Shaw, 209 U. S. 365 (a certificate of stock is not the property itself but the evidence of the property in the shares—one share of stock is not different in kind or quality from any other share of the same issue and company).

(68) Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777.

(69) They are property within the state for the purposes of administration proceedings. Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 103 N. E. 697; 27 Harv. L. Rev. 383.

2031a. Issued without authority—Estoppel—A corporation may be estopped from questioning the validity of stock issued by one of its officers or agents without authority. Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 217, 127 N. W. 926.

2032. Watered or bonus stock—Issued at less than par—Statute—A corporation, unless prohibited by constitutional or statutory provisions, may in good faith issue paid shares for the purchase of property or for services actually rendered; but where the stock is not paid for in full, either in money, property, or services, equity will inquire into the actual transaction, including the value of the property or services received as payment. In this case the stock issued to appellants in return for

their services as directors, and purporting to be fully paid, was in fact bonus stock, and not paid for by any services rendered. When a creditor proves the issuance of stock to a stockholder, and that he subsequently trusted the corporation, it is presumed that he relied upon the subscription, and the representation that the stock was fully paid. The evidence in this case did not show that plaintiffs did not rely upon such subscription and representation when they extended credit to the corporation. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606. See Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

Where defendants, the sole owners and officers of a newly formed corporation, issued part of its stock to themselves as fully paid in exchange for property excessively valued, and thereafter like stock was sold by the corporation to other persons at par and for face value received, the corporation held, on the facts of the case, entitled neither to recover damages from defendants nor to have their shares canceled in excess of the value of the property given therefor. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

Issues of stock to promoters for their services are voidable for fraud. The somewhat common custom among promoters of dividing among themselves a certain portion of the shares of stock of the company promoted, upon the principle of "division and silence," is fraudulent, and the surrender of such stock for cancelation may be required, unless it has passed into the hands of bona fide purchasers for value; and a very common bargain between promoters and directors, by which the former agree to give to the latter the necessary shares to qualify them to act as directors upon the condition that the directors return certain of the shares to the promoters, is gross misconduct, and the directors must answer to the corporation for the real value of the shares given them as a part of the fraudulent arrangement. De La Motte v. Northwestern Clearance Co., 126 Minn. 197, 148 N. W. 47.

(74, 75) Holman v. Thomas, 171 Fed. 219; Id., 178 Fed. 675.

See Digest, § 2083.

2038. Lien of corporation—Under R. L. 1905, § 2863 (G. S. 1913, § 6176), a corporation has a lien on its stock which may be foreclosed by an equitable action. United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112.

2039. Before issue—Ownership—Unissued stock belongs to the corporation considered as a legal person or entity. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

2040. Conversion by corporation—Irregular sale—Act of corporation in turning over stock to a creditor of a stockholder held a conversion. Daly v. C. E. Falk & Co., 131 Minn. ——, 154 N. W. 1081.

(90) See Hawkins v. Mellis, Pirie & Co., 127 Minn. 393, 149 N. W. 663 (value of stock—how ascertained).

2041. Conditional sale of stock by corporation—Option to rescind—Laches—Where the purchaser of stock in a corporation reserves the right to rescind his purchase if, upon investigating the corporation, he should elect to do so, and obtains an undertaking, executed by sureties, that in such event the amount paid for the stock shall be refunded, which undertaking contains no limitation upon the time within which he shall exercise his right to rescind, he must make his investigation and rescission within a reasonable time or the sureties will be released. A delay of more than ten months held unreasonable under the circumstances of this case. Odden v. Jamison, 129 Minn. 489, 152 N. W. 871.

2041a. Sale of entire capital stock—Effect on prior debts—The sale of its entire capital stock does not affect the antecedent debts of a corporation, and in an action by a former stockholder the corporation cannot claim an estoppel against him upon the ground that he procured the sale of his stock by representing the corporation to be free from indebtedness. Whether the purchasing stockholder might, by intervening, maintain such defence for the protection of his interest in the corporation, quære. Erickson v. Revere Elevator Co., 110 Minn. 443, 126 N. W. 130.

2042. Forfeiture for non-payment of price or assessments—Conceding that a stockholder may lose his status as such by acquiescing in the forfeiture of his stock by the corporation for non-payment of an assessment, evidence of the acquiescence must be unequivocal. Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029.

2044. Transfer on stock books—Statute—The statute gives a corporation a lien on its stock which may be enforced by an equitable action. United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112.

The statute does not repeal the provision of Laws 1870, c. 29, relating to co-operative associations, that "no person shall be allowed to become a shareholder in such association except by the consent of the managers of the same." Healey v. Steele Center Creamery Assn., 115 Minn. 451, 133 N. W. 69.

One of the objects of the statute is the protection of creditors. Hamilton v. Loeb, 186 Fed. 7.

Liability of corporation to true owner for unauthorized transfer of stock. Note, 45 L. R. A. (N. S.) 1076.

Effect of neglect of corporation to transfer stock. 28 Harv. L. Rev. 422.

(1) United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112.

(9) See Note, 48 L. R. A. (N. S.) 847.

(97) See Hamilton v. Loeb, 186 Fed. 7 (unregistered stockholder held not liable to creditors); Hamilton v. Selig, 195 Fed. 156 (effect of transfer on liability of shareholder to creditors); 24 Harv. L. Rev. 682.

See Digest, § 803.

SUBSCRIPTIONS TO STOCK

2045. Nature of subscription to stock in company to be formed—(11) See 8 Col. L. Rev. 47.

2048. Consideration—Mutuality—Failure of consideration—(16, 17) See First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

2051. Full amount of capital must be subscribed—(21) Converse v. Gardner, 174 Fed. 30.

2054. Fraud—(24) Nichols v. Atwood, 127 Minn. 425, 149 N. W. 672; Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914. See Digest, § 1188.

2055. Conditions subsequent—(25) See Odden v. Jamison, 129 Minn. 489, 152 N. W. 871 (contract to repurchase—option—release by laches).

2060. Tender of certificate before suit—(31) Wood v. Jefferson, 71 Minn. 367, 74 N. W. 149; Galbraith v. McDonald, 123 Minn. 208, 143 N. W. 353. See Note, L. R. A. 1915A, 465.

2061. Various defences to actions on subscriptions—In a suit on a promissory note, given and accepted in payment of one share of stock in the payee corporation, a defence is not made out merely by a plea and proof that no share certificate had been delivered or tendered to the purchaser of the share. Subsequent bankruptcy of the corporation does not establish failure of consideration of the note so given. Galbraith v. McDonald, 123 Minn. 208, 143 N. W. 353.

Evidence held to justify a finding that the subscription contract was made with a corporation other than plaintiff's assignor. Nichols v. Atwood, 127 Minn. 425, 149 N. W. 672.

(34, 37) See Note, L. R. A. 1915A 475.

STOCKHOLDERS

2063. Who are stockholders—There is no statute prescribing the mode in which a person may become a shareholder in a corporation. Previous to organization, it is necessarily through subscription to shares of stock to be issued; after incorporation, it may also be by subscription, or by purchase from the corporation direct, or from other owners of its stock. A promissory note embodying a statement that stock of a corporation is to be issued to the maker has been held to be a subscription contract.

Where no formalities are prescribed, any agreement by which a person shows an intention to become a shareholder upon the terms set forth in the company's charter is sufficient to constitute a contract of subscription. In respect to executory contracts of sale there is a distinction between sales of corporate stock and stock subscriptions. Where there has been an actual sale and the title to the stock has passed, there is no distinction between persons who are subscribers to stock and those who have bought it of the corporation or others. Both at some time become entitled to a certificate upon demand, both are entitled to dividends and both must bear risks as shareholders. Galbraith v. McDonald, 123 Minn. 208, 143 N. W. 353.

Where the failure of the stock books to show that a party holds the stock as collateral security is not due to the negligence or fraud of the corporation but to his own negligence, he is estopped, as against creditors, to deny his liability as a stockholder. Way v. Barney, 127 Minn. 346, 149 N. W. 462, 646.

(44) Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606; Galbraith v. McDonald, 123 Minn. 208, 143 N. W. 353.

(45) Way v. Barney, 127 Minn. 346, 149 N. W. 462, 646; Hamilton v. Levison, 198 Fed. 444. See 14 Col. L. Rev. 432.

(48) Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606. See Digest, § 1975.

(53) Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029 (finding that plaintiff was not a stockholder not justified by the evidence—forfeiture of stock for non-payment of assessments—acquiescence in forfeiture).

2066. Relation to each other not ordinarily fiduciary—(58) See Tuller v. Swift, 113 Minn. 263, 129 N. W. 572, 130 N. W. 848 (special agreement held to create fiduciary relation between majority and minority stockholders—minority stockholders held entitled to an accounting).

2069. Right to sue and defend—Stockholders may maintain an action against an officer of a corporation and those in collusion with him to cancel stock acquired in fraud of the corporation and its stockholders, if the corporation refuses to do so. If the corporation commences such an action, and collusively plans to dismiss it, stockholders may intervene and continue the action. A judgment of dismissal ends the action; but the court has jurisdiction to vacate such a judgment, in case of fraud or collusion, on the motion of a party or of strangers who bear such relation thereto or to the subject-matter that their rights may be affected. Stockholders cannot continue the action except by becoming parties to it; but they may, after judgment of dismissal, procure a vacation of the judgment and become parties. Ordinarily a plaintiff has the absolute right to

dismiss his action; but a plaintiff who acts in a fiduciary capacity has not such absolute right. If he fails to act in good faith toward those whom he serves, and acts in collusion with the defendant, the dismissal may be set aside. The board of directors of a corporation may, under ordinary circumstances, control an action brought by the corporation, and may dismiss it without consulting the stockholders, and their action is, in ordinary cases, conclusive. But the board of directors has no right to dismiss an action through collusion with defendant, and, if they do so, the dismissal may be set aside at the instance of stockholders, the action reinstated, and the stockholders permitted to become parties and to continue the action, when such course is necessary to save or protect their substantial rights. The stockholders are not obliged to resort to an independent action, when large expense has been incurred in the action commenced by the corporation, the benefit of which they can avail themselves of only by continuation of that action. A stockholder cannot ordinarily maintain an action of this sort until he has made demand of the corporation to do so and the corporation has refused; but, if it is manifest that such demand would be futile, it is not required. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

(62) Note, 51 L. R. A. (N. S.) 99, 112; 97 Am. St. Rep. 29.

(63) See Erickson v. Revere Elevator Co., 110 Minn. 443, 126 N. W. 130.

(66) 9 Col. L. Rev. 445.

2070. Right to inspect corporate books—(67) State v. Monida & Yellowstone Stage Co., 110 Minn. 193, 124 N. W. 971, 125 N. W. 676 (the use of the information for the purpose of prosecuting a claim of the stockholder against the corporation is a proper purpose—evidence held to show a proper demand for inspection though the demand was not made at the general offices of the corporation); State v. Monida & Yellowstone Stage Co., 112 Minn. 530, 127 N. W. 400, 857 (evidence held not to require a modification of a writ so as to prevent the relator from giving to a certain person any information acquired by the examination). See 12 Col. L. Rev. 274 (motive of petitioner—mandamus); 25 Harv. L. Rev. 662.

2072. Right to profits—Dividends—Statute enforcing—Action by a corporation against one of its stockholders upon an account stated. The answer asserted a counterclaim, based on an unpaid dividend. The trial court found that the financial condition of the corporation justified a dividend, that its board of directors declared a dividend of 6 per cent., payable "at such time as the finances of the corporation will in the judgment of the board warrant," and, further, that the stockholders were notified at their annual meeting that a dividend had been declared. Held, that the evidence sustains the findings of fact, that the existence of

the dividend as a debt against the corporation was not dependent on any further action of the board, and that it was payable within a reasonable time. Northwestern Marble & Tile Co. v. Carlson, 116 Minn. 438, 133 N. W. 1014.

(69) 26 Harv. L. Rev. 75 (rights of preferred stockholders); 27 Harv. L. Rev. 758 (when dividends proper—discretion of directors—right of preferred stockholders to share in extra dividend).

See Digest, § 3169.

2073. Contracting with corporation—(71) Humphrey v. Monida & Yellowstone Stage Co., 115 Minn. 18, 131 N. W. 498 (money loaned by stockholder to corporation to pay corporate debts—recovery by stockholder sustained).

(72) Roberts v. Herzog, 110 Minn. 258, 124 N. W. 997.

2074. Rights of minority stockholders—By virtue of a special agreement certain majority stockholders occupied a fiduciary relation toward certain minority stockholders. Held, that it was proper to divide stock acquired pro rata among all according to prior holdings and to require the majority stockholders to account to the minority stockholders. Tuller v. Swift, 113 Minn. 263, 129 N. W. 572, 130 N. W. 848.

In an action by a minority stockholder to compel the restoration to the corporation of property acquired by it through investments beyond and in violation of its charter powers, and subsequently unlawfully disposed of without consideration, and for the sale thereof under decree of the court for the benefit of all the stockholders, it is held that the complaint states a cause of action for at least a part of the relief demanded, and the demurrer thereto was properly overruled. Separate causes of action held not improperly united in the complaint. Venner v. Great Northern Ry. Co., 117 Minn. 447, 136 N. W. 271.

(75) Roberts v. Herzog, 110 Minn. 258, 124 N. W. 997.

(77) Venner v. Great Northern Ry. Co., 117 Minn. 447, 136 N. W. 271. See Lindstrom v. Tell, 131 Minn. ——, 154 N. W. 969.

(78) Venner v. Great Northern Ry. Co., 117 Minn. 447, 136 N. W. 271.

2075. Estoppel of minority stockholders—(83) Roberts v. Herzog, 110 Minn. 258, 124 N. W. 997.

2078. When bound by judgment against corporation—(86) Note, 97 Am. St. Rep. 463.

2079. Meetings—Meetings must be called by the proper authority, and prescribed conditions as to the time and manner of giving notice of meetings must be substantially complied with, but slight irregularities are not fatal. Whipple v. Christie, 122 Minn. 73, 141 N. W. 1107.

(99) See Note, 36 L. R. A. (N. S.) 45; 25 Harv. L. Rev. 290.

See Digest, § 2109.

LIABILITY OF STOCKHOLDERS

2080. Constitutional liability—A corporation organized for the purpose of generating electricity for distribution to the public is a manufacturing corporation within the constitutional exemption of manufacturing corporations. The fact that the corporation is a public service corporation and invested with the power of eminent domain is immaterial. Vencedor Invest. Co. v. Highland Canal & Power Co., 125 Minn. 20, 145 N. W. 611.

An unregistered stockholder held not liable. Hamilton v. Loeb, 186 Fed. 7.

(4–8) Converse v. Hamilton, 224 U. S. 243; Selig v. Hamilton, 234 U. S. 652. See 9 Col. L. Rev. 285.

(21) Vencedor Invest. Co. v. Highland Canal & Power Co., 125 Minn. 20, 145 N. W. 611.

See Digest, §§ 795–804 (liability of stockholders in banks).

2081. Enforcement in other states—(25) Converse v. Hamilton, 224 U. S. 243; Selig v. Hamilton, 234 U. S. 652.

2082. Conflict of laws—Foreign corporations—The right of creditors to recover of stockholders in a corporation unpaid stock subscriptions does not depend upon constitutional or statutory provisions imposing a liability of stockholders to the corporation, but is based upon fraud. The remedy is governed by the law of the forum, and there is no distinction between domestic and foreign corporations in respect to such right of creditors to recover. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

(27) Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

2083. Liability in equity on bonus or watered stock—(28) Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606. See 24 Harv. L. Rev. 565.

(32) Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

See Digest, § 2032.

2084. Same—Basis of liability—(34) Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

(35) See 25 Harv. L. Rev. 278.

2085. Statutory liability on watered or bonus stock—(39) See Digest, § 2032.

2086. Stock paid for in overvalued property—(41) Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

2087. Statutory liability for unpaid instalment on stock—The right of creditors to recover of stockholders in a corporation unpaid stock subscriptions does not depend upon constitutional or statutory provisions imposing a liability of stockholders to the corporation, but is based upon fraud. The remedy is governed by the law of the forum, and there is no distinction between domestic and foreign corporations in respect to such right of creditors to recover. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

(44) Randall Printing Co. v. Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

2090a. For withdrawal and refundment of stock—Intent of the parties is not a constituent element of a creditor's cause of action under R. L. 1905, § 3069, rendering corporate stockholders liable to creditors to the extent of withdrawals and refundments of amounts paid for stock. Preiss v. Zins, 122 Minn. 441, 142 N. W. 822 (complaint under statute sustained).

2093. Avoiding liability by contract—(68) See Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777.

2094. Effect of transfer of stock—(69) Hamilton v. Loeb, 186 Fed. 7; Selig v. Hamilton, 234 U. S. 652.

DIRECTORS

2096. Relation to corporation—Trustees—(75) Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029; National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818; De La Motte v. N. W. Clearance Co., 126 Minn. 197, 148 N. W. 47.

2098. Powers—In general—The board of directors is the managing body of the corporation, yet it has no absolute power of disposal over the property and rights of the corporation, but must in good faith serve the interests of the stockholders. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

The board of directors may put the corporation into bankruptcy. In re Kenwood Ice Co., 189 Fed. 525. See 25 Harv. L. Rev. 562.

See § 2749 (dismissal of action).

2099. Must act collectively—(84) Pink v. Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725. See Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 133 N. W. 91 (estoppel of corporation to question unauthorized action of part of directors).

2101. Contracting with corporation—The managing officer of a corporation is a trustee for the stockholders, and is bound to act in relation

to the corporate property with the utmost good faith. A sale of the assets of a corporation to its managing officer will be scrutinized carefully, and the evidence should be clear, to justify the conclusion that it was made in good faith. Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029.

(87) Note, 17 Am. St. Rep. 298.

2103. Liability to corporation for neglect of duty—(95) Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952. See Digest, § 2096.

2104. Ratification and estoppel—By receiving and retaining the benefits of unauthorized acts of its directors a corporation may be estopped from questioning their authority. Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 133 N. W. 91.

(96) Note, 36 L. R. A. (N. S.) 199.

2105. Compensation for unofficial services—(98) Note, 136 Am. St. Rep. 909.

2109. Meetings—Notice—Meetings must be called by the proper authority, and prescribed conditions as to the time and manner of giving notice of meetings must be substantially complied with, but slight irregularities are not fatal. Whipple v. Christie, 122 Minn. 73, 141 N. W. 1107.

(3) See, as to necessity of notice to all the directors, 12 Col. L. Rev. 75.

OFFICERS AND AGENTS

2112a. Acts of officers and agents the acts of the corporation—The acts of the officers and agents of a corporation in the course of their employment are the acts of the corporation. State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962.

2113. Fiduciary relation—Trustees—Corporation officers are trustees, and while their acts generally bind the corporation, in the event of bad faith they may be repudiated by the stockholders who are the beneficiaries of the trust. Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

If an officer or agent misappropriates the funds of a corporation for the purchase of real estate, taking the title in his own name, a constructive trust arises in favor of the corporation. Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

See Digest, §§ 2096, 2101, 2103.

2114. Powers—An officer of a corporation having general authority to execute promissory notes for it in the course of its business has no authority to execute the note of the corporation, without consideration or benefit moving to it, for the payment of his personal debt, or that of

another. If the payee in such a note has notice of the purpose for which it was executed, he cannot maintain an action thereon against the corporation. The fact that the officer executed the note of the corporation in payment of his own debt, or that of another officer of the corporation, to the payee, is sufficient to charge him with notice. First Nat. Bank v. Flour City Trunk Co., 118 Minn. 151, 136 N. W. 563.

A corporation does not direct all its activities through its board of directors or managing officers. The greater part is left to the judgment and discretion of servants and agents who are not officers. Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

A president of a corporation ordinarily has implied power to retain an attorney to defend an action brought against the corporation, especially when the attorney so retained has acted as such for the corporation in prior matters. Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914.

The power to employ a cashier and accountant, or to authorize an agent to do so, is presumably incident to the position of general manager of a commercial corporation. An agent of a corporation empowered to hire a cashier and accountant has authority to hire him for what is, under the circumstances, a reasonable length of time. Pink v. Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725.

(13) Pink v. Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725. See Digest, § 166.

(16) See Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914.

(17) See Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728.

(19) Way v. Ruff, 112 Minn. 57, 67, 127 N. W. 564, 609 (financial officer has no authority to issue a check of the company in payment of his own debt); Megaarden v. Hartman Furniture & Carpet Co., 114 Minn. 224, 130 N. W. 1027 (shipping clerk of mercantile company held unauthorized to contract to insure goods stored); Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109 (authority of manager of a bond sales department of an investment company to order the printing of circulars).

See Digest, §§ 152–172 (powers of agents in general); § 778 (cashier of bank); §§ 1123–1162 (brokers); § 3715 (factors); §§ 4698–4717 (insurance agents and brokers).

2115. Liability on contracts—Signatures—If an officer contracts on the assumption that he is pledging the credit of his corporation, when in fact he is not, he is personally liable. See Wilkinson v. Mercer, 125 Minn. 201, 146 N. W. 362.

Liability of officer or agent on ultra vires contracts of corporation unenforceable against the corporation. 26 Harv. L. Rev. 542.

(20) Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109;

First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084. See Digest, § 8770.

2116. Ratification and estoppel—By receiving and retaining the benefits of an unauthorized act of an officer or agent a corporation may be estopped from questioning his authority. Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 133 N. W. 91. See Digest, § 184.

(21) Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997; Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459. See Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914.

See Digest, §§ 176–191.

2117. Sufficiency of evidence to show authority—(24) Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109; Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914.

2118. Contracting with corporation—(25) Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029.

See Digest, §§ 776, 2101.

2119. Notice to officers or agents notice to corporation—The general rule that knowledge possessed by an officer of a corporation is by implication of law imputed to the corporation has no application, where it appears that in a particular transaction the officer acted in an adversary capacity, as the agent of a third person, and did not represent or speak for the corporation, of which agency the other officers of the corporation had full knowledge and information. First Nat. Bank v. Bailey, 127 Minn. 296, 149 N. W. 469.

(28) First Nat. Bank v. Persall, 110 Minn. 333, 125 N. W. 506; Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946; First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980; Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37.

(29) First Nat. Bank v. Bailey, 127 Minn. 296, 149 N. W. 469; American Nat. Bank v. Miller, 229 U. S. 517. See J. J. McCaskell Co. v. U. S., 216 U. S. 504.

See Digest, §§ 215, 777, 4709, 5866.

2121. Compensation—Liability of incorporators to reimburse officers—Contribution—The articles of association of a corporation expressly authorized the managing officers thereof to borrow, on their personal credit, money to equip the corporation for the transaction of its business, and obligated the members of the association jointly and severally to repay the money so advanced, if not paid by the corporation; the officers borrowed the money and it was used in the business of the company; the corporation was not legally formed, though it conducted business as such and had a de facto existence, it became insolvent, and the

officers making the loan were compelled to pay the debt thus incurred. Held: (a) That the relation between the officers, so incurring on their personal credit this indebtedness, and the members of the association, was that of principal and surety; and (b) that the members are liable either in contribution, or upon the obligation to reimburse the officers created by the articles of incorporation. Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617.

(32) Note, 136 Am. St. Rep. 909.

DISSOLUTION AND FORFEITURE OF FRANCHISE

2122. Voluntary dissolution—Statute—(34) See 25 Harv. L. Rev. 677.

2124. Judicial dissolution at instance of minority stockholders—(41) See Note, 39 L. R. A. (N. S.) 1032 (dissolution for fraud or mismanagement of officers); L. R. A. 1915 A 606.

2125. Forfeiture—Discretion of court—Foreign corporations—Under R. L. 1905, §§ 5168, 5169, providing that every foreign corporation admitted to transact business in this state, that is guilty of entering into any pool, trust agreement, combination, or understanding in restraint of trade, within this state, shall thereafter be prohibited from continuing its business therein, the court has no discretion, after the corporation is found guilty in an action begun and conducted under said sections, to grant any other or different judgment than one prohibiting the corporation from continuing its business within the state. State v. Creamery Package Mfg. Co., 115 Minn. 207, 132 N. W. 268.

2130. Procedure for forfeiture—Alternative remedies—The procedure provided by Laws 1907, c. 269, for revocation of the license of a foreign corporation, is not exclusive, and the attorney general may institute proceedings in the name of the state to have such a license declared forfeited. State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

2132. Continuance for three years—Statute—The statute is inapplicable to foreign corporations. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992. See Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 118 Minn. 273, 136 N. W. 738; Note, 134 Am. St. Rep. 309.

2133. Waiver of forfeiture by state—(59) See State v. Duluth St. Ry. Co., 128 Minn. 314, 150 N. W. 917.

SEQUESTRATION PROCEEDINGS UNDER R. L. 1905, § 3173 (G. S. 1913, § 6634)

2148. Judgment on which action based—(88) See 19 Yale Law Journal 533.

2149. Effect of other proceedings to defeat action—Bankruptcy proceedings against the corporation do not bar proceedings under the stat-

ute. Selig v. Hamilton, 234 U. S. 652. See Way v. Barney, 116 Minn. 285, 133 N. W. 801.

2151. Who may maintain action—(4) Note, 41 L. R. A. (N. S.) 981.

2154. Pleading—In an action by a judgment creditor of a corporation organized as a creamery association, on behalf of himself and other creditors who should file their claims, brought against the corporation and its members or stockholders to wind up the affairs of the corporation, sequester its property, and for judgment against its members for any deficiency, held, that no cause of action is stated to enforce the constitutional liability of the stockholders under the statute, for the reason that it is not alleged that any stock was ever issued, or that the members were entitled to have it issued to them. No cause of action is stated for the equitable relief of creating a fund out of which to pay the claims of creditors, for the reason that the liability of the members under the articles of incorporation is a joint and several liability to pay all the indebtedness incurred in building and furnishing the creamery, etc., of the corporation, and the creditors have adequate remedies at law. No cause of action is stated for a judgment in favor of plaintiff, based on such agreement of the members, for the reason that the complaint fails to show that plaintiff's judgment was for any part of the indebtedness which the members agreed to pay. Robinson v. Nashville Center Co-operative Creamery Assn., 115 Minn. 43, 131 N. W. 856.

An action in the nature of a creditors' bill under R. L. 1905, § 3173, to reach unpaid stock subscriptions by resident stockholders of a foreign corporation, may be maintained in this state. Conceding that an action under R. L. 1905, § 2865, will not lie to recover unpaid subscriptions to the stock in a foreign corporation, the complaint in this case was sufficient as a complaint under section 3173, save for a defect of parties plaintiff or defendant, and such defect, not having been objected to by demurrer or answer, was waived. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

2156. Defences—Estoppel—(30) Way v. Barney, 127 Minn. 346, 149 N. W. 462, 646. See Digest, § 2063.

(32) Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459.

2157. Appointment of receiver—(34) See Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

2158. Powers and duties of receivers—(42) Converse v. Hamilton, 224 U. S. 243. See Way v. Barney, 116 Minn. 285, 133 N. W. 801.

2159. Claims—Filing, proof and allowance—(64) Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459 (certain claims of directors for money furnished the corporation to discount its bills

held valid—a claim held a valid obligation of the corporation, though originally it was represented by excess shares of the corporation, it appearing that the original transaction was repudiated, and that the claim was thereafter a money judgment against the corporation); Elliott v. Barker, 127 Minn. 528, 149 N. W. 1070 (claim for rent under a lease to the corporation—failure to take possession under lease no defence—evidence held not to show constructive eviction).

ENFORCEMENT OF STOCKHOLDERS' LIABILITY UNDER R. L. 1905, §§ 3184–3190 (G. S. 1913, §§ 6645–6651)

2163. Statute constitutional—(82) Converse v. Hamilton, 224 U. S. 243; Selig v. Hamilton, 234 U. S. 652.

2165. Application of statute—How far exclusive—The constitutional liability of stockholders may be enforced under the statute. Way v. Barney, 116 Minn. 285, 133 N. W. 801.

2167. Parties defendant—A wife of a stockholder made a defendant to determine her interest in stock of her husband held in her name. Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

2168. Pleading—A complaint for the collection of an assessment and to recover the amount unpaid on stock when issued sustained. Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

2169. Defences in action against stockholder—A stockholder against whom an assessment is made, who holds a claim against the corporation must assert his claim in the state court in which the assessment is made, and cannot do so in an action by the receiver in a federal court on the assessment. Hamilton v. Simon, 178 Fed. 130.

(93) Converse v. Hamilton, 224 U. S. 243; Selig v. Hamilton, 234 U. S. 652 (bankruptcy proceedings against the corporation are not a defence); Hamilton v. Selig, 195 Fed. 153; Spargo v. Converse, 191 Fed. 823.

2171. Order of assessment—Conclusiveness—(97) Converse v. Hamilton, 224 U. S. 243; Selig v. Hamilton, 234 U. S. 652; Hamilton v. Selig, 195 Fed. 153; Spargo v. Converse, 191 Fed. 823; Hamilton v. Levison, 198 Fed. 444. See Finch, Van Slyck & McConville v. Le Sueur County Co-operative Creamery Co., 131 Minn. ——, 155 N. W. 754.

2173. Enforcement in other states—(2) Converse v. Hamilton, 224 U. S. 243; Selig v. Hamilton, 234 U. S. 652; Hamilton v. Simon, 178 Fed. 130.

PLEADING

2174. Unnecessary to allege incorporation—If incorporation is unnecessarily alleged it need not be proved, but may be treated as surplusage.

Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226.

(3) Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 144 N. W. 871; Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37; Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226.

2176. Necessity of naming officer or agent—(6) See Hammer v. Forde, 125 Minn. 146, 145 N. W. 810.

2177. Necessity of alleging authority to contract—In an action against a corporation on its contract it is not necessary to allege its authority to make the contract. Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

2179. Denial of corporate existence—Where the creation of a corporation is not a material issue in a cause of action, it need not be proven even if alleged. Where material and alleged, neither a denial on information and belief nor a general denial is sufficient to raise the issue of incorporation. Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226.

2180. Admissions—(12) Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37 (in an action against a corporation, the complaint need not allege defendant's corporate existence, and a denial thereof in the answer is unavailing, where it is refuted by the terms of the verification and by evidence brought out by defendant itself).

PUBLIC SERVICE CORPORATIONS

2181. Definition and nature—A corporation organized to supply electric service to the cities of the state and the inhabitants of such cities is a public service corporation, especially in view of R. L. 1905, § 2927, giving such a corporation the right to use the highways of the state for the purpose of constructing its lines, and of the fact that such service is a public service, in aid of which the power of eminent domain may be exercised. State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104.

(13) See State v. Hawk Creek Tel. Co., 120 Minn. 395, 139 N. W. 711 (query whether a rural telephone company was a public service corporation).

2182. Rates must be reasonable and uniform—Public service corporations are entitled to fix rates for their services that will give them a fair return upon the capital invested. Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728. See Des Moines Gas Co. v. Des Moines, 238 U. S. 153.

They may exact special rates proportioned to the expense of the particular service. They may exact a minimum charge. State v. Waseca, 122 Minn. 348, 142 N. W. 319.

The contract between plaintiff and the city having authorized the city council to fix fair and reasonable rates for gas, the rates fixed by the council, acting under such authority, are presumed to be fair and reasonable until the contrary is shown, and, if it be claimed by plaintiff that the rates so fixed are unfair and unreasonable, the onus is upon plaintiff to show that fact. Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728. See Des Moines Gas Co. v. Des Moines, 238 U. S. 153.

The determination of the rates to be charged by public service corporations is a legislative or administrative function and not a judicial function. Where a rate is not in excess of that fixed by law, courts will not enjoin its operation at the instance of individuals. The remedy of an individual for discrimination in rates is ordinarily an action at law for damages and not an injunction. In any event, a general allegation of discrimination is insufficient. The facts showing discrimination must be alleged. St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262. See 28 Harv. L. Rev. 110.

What constitutes the return of a public service corporation for rate making purposes. Note, 52 L. R. A. (N. S.) 15.

Returns to which a public service corporation is entitled. Note, L. R. A. 1915A, 5; L. R. A. 1915C, 261.

Valuation of public service corporations. Notes, 48 L. R. A. (N. S.) 1037, 1063, 1092, 1146, 1196; 27 Harv. L. Rev. 369, 744.

Valuation of franchise of corporation. 28 Harv. L. Rev. 501.

(14) State v. Waseca, 122 Minn. 348, 142 N. W. 319; St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262.

2182a. Equality of service and facilities—A public service corporation is bound to serve all persons in similar circumstances with equal facilities and services. Arbitrary and unreasonable discrimination is forbidden. State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104 (evidence in mandamus to compel an electric light company to furnish electric service to relator's house, held to show that the house was within a zone of service already established by the company, and was therefore prima facie entitled to the same service furnished to other houses within the same zone—duty of company to make connections with houses); State v. Hawk Creek Tel. Co., 120 Minn. 395, 139 N. W. 711 (rural telephone company—refusal to serve relators held neither arbitrary or unreasonable).

It is unreasonable discrimination for an electric light company to require an applicant for service to procure for it a right of way to his premises, when such conditions are not imposed on other applicants and patrons. State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104.

FOREIGN CORPORATIONS

2185. Jurisdiction—Visitorial powers—The courts of this state have jurisdiction in an action in equity brought by resident stockholders, who were fraudulently induced to subscribe for stock in a foreign corporation by the promoter and an officer thereof, to enjoin him from parting with stock fraudulently issued to him without consideration. Such a proceeding is not an interference with the management of the internal affairs of the corporation. Gere v. Dorr, 114 Minn. 240, 130 N. W. 1022.

(18) Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992; Van Dyke v. Railway Mail Assn., 118 Minn. 390, 137 N. W. 15.

(20) See 10 Col. L. Rev. 164.

See § 7814 (service of process on foreign corporations).

2187. Prerequisites to doing business in state—License—Statute—Compliance with the statute gives a foreign corporation a franchise to transact business in this state. State v. Standard Oil Co., 111 Minn. 85, 93, 126 N. W. 527.

Instructions as to when a foreign corporation is to be deemed doing business in the state, within the meaning of the statute, held correct. J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570.

(27) See validating act, Laws 1911, c. 158.

(29) J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570.

(30) J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570; American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014.

(31) American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014. See Hunter v. Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521.

(33) Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790; Sioux Remedy Co. v. Cope, 235 U. S. 197.

(37) State v. Murphy, 113 Minn. 405, 129 N. W. 850.

See Digest, § 7814.

2188. Rights, privileges and liabilities—The powers of a corporation are primarily determined by the laws of the state or country in which it is organized. If under such laws, it has no power to sell a particular commodity or enter into a particular class of contracts, such power

cannot be conferred by the laws of another state. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305.

A foreign corporation holds its license to do business in this state subject to the condition that it shall conduct its business in conformity to the laws of the state, whether enacted before or after the issuance of the license. State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623; State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

If foreign corporations do business in this state and our courts enforce their rights growing out of such business, comity and justice require our courts to enforce obligations of such corporations growing out of such business. Archer-Daniels Linseed Co. v. Blue Ridge Despatch, 113 Minn. 367, 129 N. W. 765.

2192. Application of foreign statutes—(47) See Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992 (dissolution of foreign corporation—rights of stockholders and creditors as respects winding up of corporation governed by laws of state of corporation—revival of cause of action upon dissolution—substitution of parties); Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 309 (plaintiff a corporation of the state of Washington—failure to pay license fee in that state—penalty not enforceable in this state—plaintiff held not dissolved in that state and entitled to sue in this state).

2193. Liability of stockholders—Enforcement in this state—Where there was nothing in a complaint by foreign receivers of a foreign corporation to recover a stock subscription to show, either expressly or by implication, that the appointing court made its adjudication under its general equity powers or without statutory authority, or that it exceeded its jurisdiction, a general demurrer founded upon the existence of such jurisdictional defects was properly overruled. The right of the receivers to sue in this state was properly sustained as against the demurrer; it appearing from the complaint that they were duly authorized by the appointing decree to sue upon claims due the corporation, and there being no showing of the existence of domestic creditors who would be prejudiced by the maintenance of the action. The rule of comity, whereby the receivers were entitled to maintain the action, held not affected by the fact that plaintiffs were appointed by a federal court. Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

2193a. Dissolution—Action in foreign state—If a corporation is dissolved by proper proceedings in its home state it cannot thereafter commence or maintain an action or exercise any corporate functions elsewhere. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305.

COSTS

IN GENERAL

2194. Definition—Attorney's fees are not allowable except as expressly authorized. State v. District Court, 129 Minn. 423, 152 N. W. 838.

2195. Statutory—(56) McKinley v. National Citizens Bank, 127 Minn. 212, 149 N. W. 295.

2198. Special proceedings—The general provisions for costs and disbursements do not apply to ditch proceedings. McLeod County v. Nutter, 111 Minn. 345, 126 N. W. 1100.

2203. Where there are several parties—Intervention—Where an intervener, claiming a lien on property for the negligent loss of which the action is brought, reiterates the allegations of the complaint in the action and becomes practically a coplaintiff, he is liable, under G. S. 1913, § 7766, jointly with plaintiff for costs, upon the setting aside of separate verdicts in their favor, including the expense of a transcript and two copies of the testimony. McKinley v. National Citizens Bank, 127 Minn. 212, 149 N. W. 295. See Thief River Co-operative Store Co. v. Skahl, 131 Minn. ——, 154 N. W. 953.

2205. Several actions tried together—Apportionment—Three independent actions were brought against three different defendants. By agreement the cases were tried together to the same jury, which returned a verdict against each defendant. It is conceded that no costs or disbursements could have been taxed against the other two defendants. Held, that the court is not required to apportion the disbursements among three parties defendant, two of whom are not liable in any event. Independent School District v. School District, 130 Minn. 19, 153 N. W. 113.

2206. Who is the prevailing party—In an action to determine adverse claim, where defendant answers claiming title absolute, the court properly allowed costs to plaintiffs, although, under authority of section 2168, G. S. 1913, a lien was decreed defendant as holder of a tax certificate. Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273.

Where the verdict is for the defendant he is the prevailing party and entitled to costs and disbursements, though he interposed a counterclaim and failed to recover thereon. Ballard Transfer & Storage Co. v. St. Paul City Ry. Co., 129 Minn. 494, 152 N. W. 868.

(72) See Kautenberger v. Johnson, 131 Minn. ——, 154 N. W. 943.

2207. Liability of state and public officers—Where quo warranto proceedings are instituted by the attorney general, as the representative of the sovereignty of the state, to redress an alleged usurpation of office

or corporate franchises, he is not liable, officially or otherwise, to the defendant for costs, if the proceedings fail. State v. Dover, 113 Minn. 452, 130 N. W. 74, 539.

In the absence of express provision to the contrary public officers, acting in their official capacity, are not personally liable for costs or disbursements. Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723.

(73) State v. Fullerton, 124 Minn. 151, 144 N. W. 755.

2207a. Persons acting in representative capacity—Liability of estate or fund—Under the express provisions of R. L. 1905, § 4349 (G. S. 1913, § 7985), a receiver, who is the losing party on appeal, cannot be charged with personal liability for the costs, unless it is shown that he is guilty of mismanagement or bad faith. Telford v. Henrickson, 122 Minn. 531, 142 N. W. 200.

When costs or disbursements are adjudged against an infant plaintiff, the guardian by whom he appears in the action is liable for them, and judgment therefor may be entered against both infant and guardian. G. S. 1913, § 7983; Winters v. Minneapolis & St. L. R. Co., 127 Minn. 532, 148 N. W. 1096.

2211. Actions by relator or petitioner in name of state—(83) See State v. Dover, 113 Minn. 452, 130 N. W. 74, 539 (quo warranto—attorney general not liable).

2212. Actions for services—Double costs—Double costs under the statute held improperly allowed where no claim therefor was made in the complaint and there was no proof of the right thereto on the trial. Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

2215. On appeal from justice court—Under R. L. 1905, § 4021 (G. S. 1913, § 7641), the district court, on appeal from a conviction before a justice, on affirmance, may impose as part of the sentence the whole or any part of the costs before the justice and in the district court. State v. McKinley, 114 Minn. 434, 131 N. W. 369.

In determining whether a more favorable recovery was had on appeal the costs taxed by the justice are to be excluded from the consideration. Sheehy v. Whipps, 122 Minn. 53, 141 N. W. 811.

DISBURSEMENTS

2216a. A matter of right—Counterclaim—The statute contemplates the allowance of disbursements to the prevailing party in every case. The court has no right to deny those necessarily paid or incurred. They follow the verdict as a matter of course. Where the verdict is for the defendant he is entitled to his disbursements necessarily incurred or paid in defeating plaintiff's claim, though he recovers nothing on his counterclaim. Ballard Transfer & Storage Co. v. St. Paul City Ry. Co., 129 Minn. 494, 152 N. W. 868.

2218. Witness fees—(9) Daly v. Curry, 128 Minn. 449, 151 N. W. 274 (objection to ex parte allowance by judge other than the one who tried the case cannot be raised for the first time on appeal).

2219. Miscellaneous disbursements—Amounts paid for a transcript of the testimony for the use of counsel during the progress of a trial are not taxable. It has been held proper to disallow expenses for maps and photographs which were convenient but not necessary. The determination of whether disbursements were "necessarily paid or incurred" involves an exercise of discretion on the part of the trial court. Salo v. Duluth & Iron Range R. Co., 124 Minn. 361, 145 N. W. 114.

Where an attorney has secured a number of clients and brings separate actions against a defendant whose one act of negligence has injured each client, and the attorney procures documentary evidence which is to be used successively in the trial of each case, and the defendant makes a settlement, which includes disbursements, with all litigants save one, that one is not entitled to tax as costs for such documentary evidence more than his proportionate share of its cost unless he shows that he has actually paid or incurred more than such share. Plaintiff failed to make such showing. Salo v. Duluth & Iron Range R. Co., 124 Minn. 361, 145 N. W. 114.

(12) McKinley v. National Citizens Bank, 127 Minn. 212, 149 N. W. 295 (transcript and two copies of the testimony).

(17, 20) Salo v. Duluth & Iron Range Railroad Co., 124 Minn. 361, 145 N. W. 114.

TAXATION

2225. Appeal to supreme court—The trial court's determination, made on conflicting affidavits, as to the number of folios charged for, will rarely be disturbed on appeal. McKinley v. National Citizens Bank. 127 Minn. 212, 149 N. W. 295.

It cannot be objected for the first time on appeal that an allowance for expert witness fees was made ex parte by a judge other than the one who tried the case. Daly v. Curry, 128 Minn. 449, 151 N. W. 274.

IN SUPREME COURT

2226. Statutory—Rule of court—The allowance of costs in the supreme court is discretionary. The matter is regulated by statute and rule of court. G. S. 1913, § 7989; Rule 21; Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 446, 136 N. W. 275; Nilson v. Canadian Northern Ry. Co., 117 Minn. 528, 136 N. W. 280.

Where several appeals from orders were heard as one only twenty-five dollars statutory costs were allowed. Rase v. Minneapolis etc. Ry. Co., 116 Minn. 414, 133 N. W. 986.

2229. **Several actions or prevailing parties**—Where several actions for distinct losses from the same fire were tried together, the same attorneys appearing in all the actions, and one paper book and brief serving for all the cases, the court made a special order limiting the costs and providing for their apportionment. Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275; Nilson v. Canadian Northern Ry. Co., 117 Minn. 528, 136 N. W. 280.

2231. **Payment of costs as condition of remittitur**—R. L. 1905, § 4354 (G. S. 1913, § 7990), providing that the losing party shall pay the costs and disbursements before he shall be entitled to a remittitur or to proceed further in the trial, unless he is unable to pay such costs in full, has no reference, as far as the proviso is concerned, to a receiver, unless it is shown that the creditors whom he represents are unable to pay the costs and disbursements. Telford v. Henrickson, 122 Minn. 531, 142 N. W. 200.

(47) Winters v. Minneapolis & St. L. R. Co., 127 Minn. 532, 148 N. W. 1096 (motion for remittitur without payment of costs denied—no showing of inability of guardian ad litem to pay).

2231a. **Failure of prevailing party to enter judgment—Rule of court**—Where a party prevailing on appeal, within twenty days after notice of the filing of the opinion, serves and files with the clerk a notice of taxation of costs and disbursements, his right to tax the same after such twenty days is preserved; and the other party is not entitled to enter judgment without costs and disbursements, under rule 26, providing that, where the prevailing party neglects to have judgment entered within twenty days after notice of the filing of the court's opinion, judgment may, without notice, be entered without inserting therein any allowance for costs and disbursements, except the clerk's fees. Twitchell v. Nelson, 126 Minn. 423, 148 N. W. 451, 601.

2232. **Appeal for delay**—(49) Nichols v. Rodgers, 112 Minn. 250, 127 N. W. 932; Connecticut Mutual Life Ins. Co. v. Schurmeier, 125 Minn. 368, 147 N. W. 246.

2238. **Cases in which costs not allowed**—Where the appeal was from an order opening a default judgment entered on an order obtained ex parte and the answer was stricken out as sham. Dennis v. Firth, 113 Minn. 235, 129 N. W. 387.

On account of the position taken by the respective parties on the trial and at the hearing on appeal. Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

Where the appellant, on an appeal from an order vacating the forfeiture of a bail, had no defence on the merits. Edwards v. Hennepin County, 116 Minn. 101, 133 N. W. 469.

Where the brief contained aspersions on the conduct and motives of the trial court. Blied v. Barnard, 116 Minn. 307, 133 N. W. 795.

Where an order granting a new trial in an action to foreclose a mechanic's lien was sustained. Northwestern Lumber & Wrecking Co. v. Parker, 118 Minn. 211, 136 N. W. 855.

Where both parties had attempted to obtain technical advantage in justice court to avoid a trial on the merits. Quacker Creamery Co. v. Carlson, 124 Minn. 147, 144 N. W. 449.

Where new trials were granted of part of the issues in an action on the bond of a public contractor, several actions being tried together. Fay v. Bankers Surety Co., 125 Minn. 211, 147 N. W. 359.

(62) Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783.

(72) Bernth v. Smith, 112 Minn. 72, 127 N. W. 427; Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

2239. Disbursements—The court has no discretion in the allowance, disallowance, or apportionment of disbursements. Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955.

Disbursements for printing brief in type contrary to rule of court disallowed. Pederson v. Reeves & Co., 115 Minn. 249, 132 N. W. 204.

Disbursements for printing brief containing aspersions on the conduct and motives of the trial court disallowed. Blied v. Barnard, 116 Minn. 307, 133 N. W. 795.

An item for copying exhibits disallowed, the order settling the case showing that a transcript of these exhibits was incorporated in the settled case, on which a motion for a new trial was made. Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

Where the same record is used in the presentation of appeals in two cases there is no provision for an apportionment of the cost of printing it. If all the record is not necessary for the presentation of one of the cases, the cost of printing the unnecessary portion should not be taxed in that case. Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955.

For the printing of paper books and briefs it is the practice to allow 60 cents per page when the printing is done in St. Paul, Minneapolis or Duluth, and 75 cents per page when the printing is done elsewhere. In no case will a larger sum be allowed, or any sum not actually incurred. Johnson v. Young, 127 Minn. 462, 149 N. W. 940.

(76) Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

(79) Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955.

(80) Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768; Raski v. Great Northern Ry. Co., 128 Minn. 129, 150 N. W. 618.

(87) Blied v. Barnard, 116 Minn. 307, 133 N. W. 795.

COUNTIES

IN GENERAL

2241. Definition and nature—(90) State v. George, 123 Minn. 59, 142 N. W. 945.

2242. Legislative control—(94–96) State v. George, 123 Minn. 59, 142 N. W. 945.

See Digest, § 6548.

ORGANIZATION

2243. What constitutes—The organization of Kenabec county did not take effect until adopted by the electors of Pine County. Evidence held not to sustain a finding that the county was duly organized prior to September, 1859. Rutherford v. Yorks, 113 Minn. 248, 129 N. W. 386.

2245. De facto counties—A single partial exercise of corporate functions does not create a de facto county. Rutherford v. Yorks, 113 Minn. 248, 129 N. W. 386.

See Digest, §§ 1981, 6528, 8665, 8825.

2245a. Boundaries—Changing—Estoppel—The question whether a new county shall or shall not be created and established, submitted to the voters under the statutes of the state, is independent and distinct from a proposition changing county lines, and not contestable under section 339, R. L. 1905 (G. S. 1913, § 532), authorizing boundary line contests. State v. District Court, 113 Minn. 298, 129 N. W. 514.

The acquiescence of the state and the counties of St. Louis and Lake in the boundary between the latter, as located and fixed by Laws 1895, c. 248, for fifteen years, precludes inquiry into the correctness of such location. State v. St. Louis County, 117 Minn. 42, 134 N. W. 299.

CHANGE OF BOUNDARIES—NEW COUNTIES

2248. Legislative power—(6) State v. District Court, 113 Minn. 298, 129 N. W. 514.

OFFICERS

2266. Vacancy—Tenure of appointee—An appointee to fill a vacancy in the county board, in a county not newly organized, or in which the number of commissioners is not increased, holds only until the next election occurring after there is sufficient time to give the notice prescribed by law, and until a successor is elected and qualified. Section 5727, G. S. 1913, governs such cases; not section 680, G. S. 1913. Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758.

COUNTY BOARD

2268. General powers—The county board, having authority to acquire land for the county, is authorized to ascertain and agree with the adjoining owners as to the boundaries of the land and for the erection and maintenance of partition fences. Houston County v. Burns, 126 Minn. 206, 148 N. W. 115.

2278a. Proceedings informal—The county board proceeds informally in its hearings. It is a popular legislative body before whom one interested may appear without the aid of counsel and without a formal petition of technical accuracy. Its orders, made within its conceded jurisdiction, should be held valid as against objections which are not clearly substantial. Sorknes v. Lac Qui Parle County, 131 Minn. ——, 154 N. W. 669.

POWERS AND LIABILITIES

2281a. Territorial limitation—The jurisdiction of counties is limited to their respective territory. In the absence of legislative authorization a county cannot assert authority over territory not within its boundaries in the organization of towns, school districts, or otherwise. Farley v. Boxville, 113 Minn. 203, 129 N. W. 381.

2282. Powers as to realty—(87) See Houston County v. Burns, 126 Minn. 206, 148 N. W. 115 (authority to buy land for a poor farm and to agree as to the boundaries of the land).

2284. Issuance of bonds—Drainage bonds issued by a county under Laws 1905, c. 230, are the direct and general obligations of the county. Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226; State v. George, 123 Minn. 59, 142 N. W. 945.

2286. Liability for torts—County officers may be liable though the county is not. Tholkes v. Decock, 125 Minn. 507, 147 N. W. 648.

See Digest, §§ 6808–6817, 8673, 9658.

2287. Liability for acts of officers—Ratification—A county is not liable where its officers act as agents of the law and not as agents of the county —where they are performing duties imposed upon them by the law.

See State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458.

2288. Ultra vires contracts—(2) Houston County v. Burns, 126 Minn. 216, 148 N. W. 115 (doctrine of ultra vires held inapplicable to an agreement as to the boundaries of land purchased for the county for a proper purpose). See Digest, § 6717.

(3) See Digest, § 6718.

(4) See Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569; White v. Chatfield, 116 Minn. 371, 133 N. W. 962.

2289. Contracts held unauthorized—(12) See White v. Chatfield, 116 Minn. 371, 133 N. W. 962.

2292. Liability for care of prisoners—Where prisoners are confined in a county jail other than in the county in which their offence was committed, under the statute in such cases provided, the county in which the offence was committed is solely liable for the cost and expense incident to such confinement. Where expense is incurred by the sheriff of the county having charge of the prisoners, not specifically fixed and provided for by section 5474, R. L. 1905 (G. S. 1913, § 9346), a claim therefor must be presented to the other county for allowance, and the sheriff cannot maintain an action against his own county therefor. Daniels v. Polk County, 117 Minn. 1, 134 N. W. 290.

PRESENTATION AND ALLOWANCE OF CLAIMS

2294. Claims must be itemized and verified—(32) See Merz v. Wright County, 114 Minn. 448, 131 N. W. 635.

2295. Allowance by county board—Finality—(35) State v. Welte, 125 Minn. 527, 147 N. W. 249 (reconsideration of claim and its disallowance held to render a further demand unnecessary). See Note, 55 Am. St. Rep. 203.

2296. Appeal from disallowance of claim—Under the present statute the remedy by appeal is perhaps exclusive. The statute has no application to the final payment due a contractor in drainage proceedings. Merz v. Wright County, 114 Minn. 448, 131 N. W. 635.

ACTIONS

2300. County may sue and be sued in its own name—(45) See Edwards v. Hennepin County, 116 Minn. 101, 133 N. W. 469 (service of process on county attorney—appearance).

COUNTY ATTORNEY

2307. Duties—(56) See Edwards v. Hennepin County, 116 Minn. 101, 133 N. W. 469 (appearance by county attorney held not to give court jurisdiction over county).

(58) See State v. Eberhart, 116 Minn. 313, 133 N. W. 857 (refusal to advise county board as ground for removal by governor).

COUNTY AUDITOR

2309. Bonds—Liability—Where an auditor failed in a ministerial duty to give a statutory notice of a tax sale, it was held that the purchaser at the sale, by reason of the doctrine of caveat emptor applicable to tax

sales, could not hold the auditor and his sureties liable on the official bond of the auditor. Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

(65) See National Surety Co. v. Arosin, 198 Fed. 605.

2314a. Liability for negligence—A county auditor held liable to an owner of property for neglecting to place on the tax lists furnished the treasurer, opposite such property, the words, "Sold for taxes." Howley v. Scott, 123 Minn. 159, 143 N. W. 257.

COUNTY TREASURER

2323. Duties—In general—(85) See Howley v. Scott, 126 Minn. 271, 148 N. W. 116 (duty as to stamping tax receipt with the words "Sold for taxes").

2325. Liability independent of bond—A county treasurer, in failing to write or stamp the words "sold for taxes" on a tax receipt, is not guilty of a breach of a statutory duty unless the tax list furnished him by the county auditor shows that the land has been "sold for taxes." Howley v. Scott, 126 Minn. 271, 148 N. W. 116.

COURT COMMISSIONERS

2331. Powers—A court commissioner is without power to vacate a judgment rendered by the district court, and an order made by him purporting to do so is a nullity. Sacramento Suburban Fruit Lands Co. v. Niles, 131 Minn. ——, 154 N. W. 748.

(15) Sacramento Suburban Fruit Lands Co. v. Niles, 131 Minn. ——, 154 N. W. 748.

2332. Appeal—(21, 22) Sacramento Suburban Fruit Lands Co. v. Niles, 131 Minn. ——, 154 N. W. 748.

COURTS

IN GENERAL

2337. Establishment—Requisite vote—(29, 31) See Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953.

2338. Courts of record—(33) State v. McDonough, 117 Minn. 173, 134 N. W. 509.

2340. Courts of superior jurisdiction—The district court is a court of superior jurisdiction even when entertaining a special statutory proceeding. Hanford v. Alden, 122 Minn. 149, 142 N. W. 15.

JURISDICTION

2345. Definition—(42) State v. Eberhart, 116 Minn. 313, 319, 133 N. W. 857.

2347. Presumptions—(48) Wilkowske v. Lynch, 124 Minn. 492, 145 N. W. 378.

See Digest, §§ 5137–5146, 7774, 7834.

2350. Concurrent—Court first acquiring jurisdiction has precedence—(58) Freick v. Hinkly, 122 Minn. 24, 141 N. W. 1096; Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66. See Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472; State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

2350a. State courts—Federal laws—The state courts apply and enforce the federal constitution and federal laws when applicable to cases over which such courts have jurisdiction. Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011. See § 6022c.

COVENANTS

COVENANT OF SEIZIN

2357. Force and effect—(66) Note, 125 Am. St. Rep. 443.

2360. Breach—There is a breach of the covenants of seizin and for quiet enjoyment in a conveyance of land, when the government asserts its title thereto by lawfully canceling an entry theretofore made thereon by the person through whom the covenantor claims title; and this, notwithstanding the fact that the covenantee is given a preference right to file on the land, and subsequently does file thereon. Efta v. Swanson, 115 Minn. 373, 132 N. W. 335.

(71) Lenz v. Hobart, 112 Minn. 8, 127 N. W. 494; Efta v. Swanson, 115 Minn. 373, 132 N. W. 335.

2361. Damages—(75) Efta v. Swanson, 115 Minn. 373, 132 N. W. 335 (cancelation of land entry—measure of damages is the consideration paid for the deed, less the value of the rights or privileges acquired by the plaintiff thereunder, and interest).

COVENANT OF WARRANTY AND QUIET ENJOYMENT

2366. Force and effect—(86) Note, 53 Am. St. Rep. 113.

2369. Title subsequently acquired—The general rule, that a conveyance with warranty estops the grantor when he afterwards becomes the owner to deny the grantee's title, does not apply to a conveyance by one non sui juris or that is contrary to public policy or statutory prohibition. Starr v. Long Jim, 227 U. S. 613.

2372. Breach—There is a breach of the covenants of seizin and for quiet enjoyment in a conveyance of land, when the government asserts its title thereto by lawfully canceling an entry theretofore made thereon by the person through whom the covenantor claims title; and this, notwithstanding the fact that the covenantee is given a preference right to file on the land, and subsequently does file thereon. Efta v. Swanson, 115 Minn. 373, 132 N. W. 335.

(94) Lenz v. Hobart, 112 Minn. 18, 127 N. W. 494; Efta v. Swanson, 115 Minn. 373, 132 N. W. 335. See Note, 122 Am. St. Rep. 852.

2373. Damages—Measure of damages upon the cancelation of a land entry. Efta v. Swanson, 115 Minn. 373, 132 N. W. 335.

(98) Note, 24 Am. St. Rep. 266.

COVENANT AGAINST INCUMBRANCES

2381. Action by assignee—(14) See 10 Col. L. Rev. 369.

2382. Breach—An easement acquired by a city for a street over a city lot, in condemnation proceedings, the street not having been opened, held an incumbrance. Smith v. Mellen, 116 Minn. 198, 133 N. W. 566.

The existence of a rural highway, extending across land conveyed by warranty deed of the form in common use, does not constitute a breach. Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878. See 27 Harv. L. Rev. 386; Note, 30 L. R. A. (N. S.) 833.

In determining whether an easement is an incumbrance the knowledge of the grantee is immaterial. Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878.

Whether taxes assessed upon land are an incumbrance is an open question. If they are assessed after the making of the covenant they are not a breach thereof. Security Bank v. Holmes, 65 Minn. 531, 68 N. W. 113; Davidson v. Franklin Ave. Investment Co., 129 Minn. 87, 151 N. W. 537.

An easement for a public sewer as an incumbrance. 13 Col. L. Rev. 655.

Effect of purchaser's knowledge of incumbrance. Note, 4 L. R. A. (N. S.) 309.

(21) See Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878; 24 Harv. L. Rev. 237.

COVENANTS RUNNING WITH THE LAND

2390. Definition—(36) Note, 82 Am. St. Rep. 664; 15 Col. L. Rev. 55.

2392. Covenants creating easements—Affirmative covenants in aid of easements. 27 Harv. L. Rev. 590; Miller v. Clary, 210 N. Y. 127, 103 N. E. 1114.

2393. Covenants enforceable in equity against grantees with notice—The complaint states a cause of action for an injunction; its allegations being sufficient to admit proof that the owners of a tract of land, platted into a large number of lots, formed a scheme to sell the lots subject to building restrictions, that pursuant to such plan all lots were sold by such owners subject to a covenant restricting the erection of buildings thereon to dwelling houses of a certain character, that the owners deeded to plaintiffs and defendant severally lots in the tract subject to this covenant, that some of plaintiffs have erected dwellings in reliance upon and in conformity to the covenant, and that defendant is erecting a structure in violation thereof. The fact that two lots out of the tract have been sold without the restrictive covenant, and that as to two more

the restriction is different, is not conclusive that the owners of the tract did not sell subject to a general plan of restriction, which inured to the benefit of every purchaser. Velie v. Richardson, 126 Minn. 334, 148 N. W. 286.

(43) See Digest, § 2676; 5 Harv. L. Rev. 274; 6 Id. 280; 17 Id. 174; 24 Id. 574; 27 Id. 493; 28 Id. 212; Note, 21 Am. St. Rep. 484; 126 Id. 348; 37 L. R. A. (N. S.) 12, 623; 12 Col. L. Rev. 158.

2397a. Who may sue on—Intermediate covenantor—The right to sue for breach of covenants which run with the land rests exclusively in the last covenantee, and an intermediate covenantor has no right of action thereon until he has indemnified such subsequent covenantee. Allis v. Foley, 126 Minn. 14, 147 N. W. 670.

CREDITORS' SUIT

2398. Definition and nature—(56) See Stephenson v. Lohn, 115 Minn. 166, 131 N. W. 1018 (action held to be one in the nature of a creditor's bill).

2399. When lies—A contract between a resident of this state and a non-resident owner of a patent, under which royalties will be payable in the future, is not property which the court may take control and disposal of in a creditor's action against the owner of the patent, when no personal service upon such owner has been made in this state. P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

(57) Note, 66 Am. St. Rep. 271.

(58) See 25 Harv. L. Rev. 171.

2400. Prior exhaustion of legal remedies—(61–63) Keith v. Keith, 112 Minn. 183, 127 N. W. 567; Bruce v. Hoidal, 119 Minn. 362, 138 N. W. 313. See Note, 66 Am. St. Rep. 271.

2404a. Parties—The court should refuse to proceed until it has before it all the parties essential to a full determination of the rights involved. P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

2405. Pleading—In an action in the nature of a creditor's bill brought to subject to the lien of a judgment lands owned by one not a judgment debtor, an answer alleging that the judgment debtor has property which is or can be made available to the payment of the judgment states a defense, and is not demurrable. Keith v. Keith, 112 Minn. 183, 127 N. W. 567.

A complaint in the nature of a creditor's bill, from which it appears that another action has been begun and is still pending to determine the liability of a resident defendant on the facts stated in the bill, such ac-

tion not having proceeded to judgment or verdict, though a writ of attachment has been issued therein, but no property sought to be reached by the present suit has been levied upon, held demurrable, for the reason that plaintiff has neither exhausted nor fully made use of the legal remedies afforded in such pending action. Bruce v. Hoidal, 119 Minn. 362, 138 N. W. 313.

CRIMINAL LAW

IN GENERAL

2406. Definition of "crime," "offence," etc.—(75) State v. McDonald, 121 Minn. 207, 141 N. W. 110. See Note, 48 L. R. A. (N. S.) 156.

2407. Legislative power—(80) Note, 78 Am. St. Rep. 235.

2409. Criminal intent—(88) State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068; State v. Sharp, 121 Minn. 381, 141 N. W. 526; State v. Minneapolis Milk Co., 124 Minn. 34, 42, 144 N. W. 417; State v. Lundgren, 124 Minn. 162, 144 N. W. 752; State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962. See Chicago etc. Ry. Co. v. U. S., 220 U. S. 559 (an act may be made criminal without reference to knowledge or due diligence).

2410. Malice—Wilful—Good faith—The words wilfully and unlawfully embody the idea of malice. When an act is wrongfully and wilfully done, and the necessary result is to injure the property of another, malice may be inferred. State v. Ward, 127 Minn. 510, 150 N. W. 209.

(91) State v. Ward, 127 Minn. 510, 150 N. W. 209.

2410a. Unforeseen injury—It is the general rule that a person who intentionally commits an unlawful act, and in doing so inflicts an unforeseen injury, is criminally liable for such injury. State v. Lehman, 131 Minn. ——, 155 N. W. 399.

2411. Same acts constituting different offences—It is no defence to a prosecution under one statute that defendant might have been prosecuted under another. State v. Seeling, 126 Minn. 386, 148 N. W. 458.

(92) Note, 31 L. R. A. (N. S.) 693.

2413a. Acts prohibited by injunction—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.

2414. Attempts to commit crime—No definite rule can be laid down, applicable to all cases, as to what constitutes an attempt to commit a crime, as each case must depend largely upon its particular facts. To constitute such an attempt, there must be an intent to commit the crime,

followed by an overt act or acts tending, but failing, to accomplish it. The overt acts need not be such, that, if not interrupted, they must result in the crime charged. They, however, must be something more than mere preparation, remote from the time and place of the intended crime; but if they are not thus remote, and are done with the specific intent to commit the crime, and directly tend to accomplish it, they are sufficient to warrant a conviction. State v. Dumas, 118 Minn. 77, 136 N. W. 311; State v. Smith, 119 Minn. 107, 137 N. W. 295; State v. Lampe, 131 Minn. —, 154 N. W. 737. See State v. Stickney, 118 Minn. 64, 136 N. W. 419; Note, 20 Am. St. Rep. 741.

The mere act of soliciting another to commit a crime, or preparation therefor is not, in the absence of some overt act looking to its actual commission, sufficient to justify a conviction. State v. Lampe, 131 —, 154 N. W. 737.

2415. Principal and accessory—It is not criminal under the laws of this state to aid or abet the doing of an act in another state, though such act would violate the laws of this state if done within its borders. State v. Gruber, 116 Minn. 221, 133 N. W. 571.

(3) State v. Briggs, 122 Minn. 493, 142 N. W. 823.

2416. Conspirators—(6) See State v. Briggs, 122 Minn. 493, 142 N. W. 823.

2418. Private prosecutor—(13) See Note, 47 L. R. A. (N. S.) 1106.

2419a. Statute of limitations—In all cases except murder indictments must be found and filed in the proper court within three years after the commission of the offence. When one is held by an examining magistrate to answer in the district court for a felony, a prosecution for felony is pending in that court. State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

JURISDICTION

2420. In general—It is not criminal under the laws of this state to aid or abet the doing of an act in another state, though such act would violate the laws of this state if done within its borders. State v. Gruber, 116 Minn. 221, 133 N. W. 571.

Where the acts of defendant, constituting the inducing, enticing, and procuring, are committed in this state, and the female as a consequence of such acts enters a house of ill fame in Wisconsin, the crime is committed in this state, and its courts have jurisdiction. Where, however, the female, though induced, enticed, and procured to enter such house, does not enter the same because of police interference, and not by reason of any acts of defendant, defendant is not guilty of the crime charged, but is guilty of an attempt to commit such crime. State v. Stickney, 118 Minn. 64, 136 N. W. 419.

2421. Waiver of objection to jurisdiction of person—(19) See Mankato v. Olger, 126 Minn. 521, 148 N. W. 471 (failure of judge to indorse on complaint an order for a warrant).

FORMER JEOPARDY—FORMER CONVICTION OR ACQUITTAL

2425. In general—The statute authorizing increased punishment upon a second conviction does not violate the constitutional provision against putting a person twice in jeopardy of punishment for the same offence. State v. Findling, 123 Minn. 413, 144 N. W. 142.

Waiver and estoppel. Note, 135 Am. St. Rep. 70.

2426. What constitutes same offence—Where one commits unlawful sexual intercourse in two counties with the same woman within a few days, the crime is not of a continuous nature so that conviction in one county is a bar to a prosecution in the other. State v. Preuss, 112 Minn. 108, 127 N. W. 438.

An acquittal upon a prosecution for a crime is not a bar to a subsequent prosecution for perjury predicated upon testimony given upon such former prosecution, unless a conviction of the charge of perjury would necessarily import a contradiction of the jury's verdict upon the former trial. State v. Smith, 119 Minn. 107, 137 N. W. 295.

(52) State v. Wondra, 114 Minn. 457, 131 N. W. 496.

See Note, 92 Am. St. Rep. 89.

2427. Plea of former acquittal—Sufficiency—A plea of former acquittal sustained against the objection that the judge who tried the case was disqualified. State v. Ledbetter, 111 Minn. 110, 126 N. W. 477.

PRELIMINARY EXAMINATION

2429. Nature and object of proceeding—A preliminary examination before an examining magistrate constitutes the commencement of a criminal prosecution. State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

2432. Complaint—The "brief statement" of the offence authorized by the criminal practice act of the municipal court of Minneapolis to be entered by the clerk in the records of the court, and to stand in the place of the complaint need not be as full and specific as a formal written complaint. Where the record states that a complaint was duly made this implies that it was verified or sworn to as required by law. State v. Olson, 115 Minn. 153, 131 N. W. 1084.

(68) See Digest, § 6804.

See Digest, § 5343.

2433. Warrant for arrest of accused—The omission of the judge to indorse on a complaint an order for a warrant, as required by law, can-

not avail defendant after plea, trial and conviction without raising the objection. Mankato v. Olger, 126 Minn. 521, 148 N. W. 471.

2434. Examination of complainant—A criminal complaint subscribed and sworn to before a magistrate and purporting to have been made after the complainant had been duly sworn is a sufficient "examination" of the complainant under the statute. State v. Nerbovig, 33 Minn. 480, 24 N. W. 321; State v. Richardson, 34 Minn. 115, 24 N. W. 354.

2437. Warrant of commitment—(78) See, as to form of warrant for contempt. State v. Langum, 125 Minn. 304, 146 N. W. 1102.

2438. Return—Filing—(79, 81) State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

ARRAIGNMENT

2439a. Necessity—A formal arraignment is not a requirement of due process of law. Objection to the want of a formal arraignment may be waived by failing to make timely objection. Garland v. Washington, 232 U. S. 642. See 27 Harv. L. Rev. 760.

PLEAS

2443. Effect in giving court jurisdiction—(90) See Mankato v. Olger, 126 Minn. 521, 148 N. W. 471 (failure of judge to indorse on complaint an order for a warrant).

2444. Withdrawal—An application to be permitted to withdraw a plea of guilty after judgment of conviction thereon is addressed to the discretion of the trial court. State v. Olson, 115 Minn. 153, 131 N. W. 1084.

VARIOUS DEFENCES

2446. Insanity—(94) Note, 76 Am. St. Rep. 83.

BURDEN AND DEGREE OF PROOF

2449. In general—Trial courts should exercise care to make the jury understand clearly that each element of a crime must be proved beyond a reasonable doubt to justify conviction—should realize that the men who compose our juries are not versed in legal terms, and often quite unable to grasp the real meaning of instructions given, unless couched in the plainest and most emphatic words. State v. McGrath, 119 Minn. 321, 138 N. W. 310.

A verdict of guilty cannot rest on mere possibility, speculation or conjecture. State v. James, 123 Minn. 487, 144 N. W. 216.

It is unnecessary for the state to prove facts negativing exceptions arising out of other statutes. State v. Seeling, 126 Minn. 386, 148 N. W. 458.

2451. Presumption of innocence—Instructions—A defendant is entitled in all cases to an instruction to the effect that he is presumed innocent until the contrary is proved. It should be given in all cases whether requested or not, but a failure to give it is not a ground for a new trial in the absence of a request. A failure to give such a charge is not rendered harmless by giving a proper charge upon proof beyond a reasonable doubt. State v. Sailor, 130 Minn. 84, 153 N. W. 271.

(24) State v. Sailor, 130 Minn. 84, 153 N. W. 271.

2452. Irresponsibility—Insanity and drunkenness—(26) Note, 44 L. R. A. (N. S.) 119.

2452a. Self-defence—In cases of homicide or assault, no burden rests on defendant to prove that his act was justifiable, because in self-defence; but the jury, to convict, must be satisfied beyond a reasonable doubt that the act was not justifiable on such ground. State v. McPherson, 114 Minn. 498, 131 N. W. 645; State v. McGrath, 119 Minn. 321, 138 N. W. 310.

2453. Corpus delicti—(29) State v. Schreiber, 111 Minn. 138, 126 N. W. 536 (homicide); State v. Smith, 119 Minn. 107, 137 N. W. 295 (arson); State v. Rusk, 123 Minn. 276, 143 N. W. 782 (on a trial for murder want of direct evidence that deceased was a human being held not fatal—evidence to show that deceased died from wounds inflicted by the accused held sufficient); State v. McLarne, 128 Minn. 163, 150 N. W. 787 (arson); State v. Jacobson, 130 Minn. 347, 153 N. W. 845 (arson); Perovich v. United States, 205 U. S. 86. See Note, 68 L. R. A. 33.

2455. Instructions as to reasonable doubt—(33) See State v. Henriksen, 116 Minn. 366, 133 N. W. 850.

(34) See State v. Ingraham, 118 Minn. 13, 136 N. W. 258 (charge held sufficient though not explicit as to what the evidence must satisfy the jury beyond a reasonable doubt); State v. O'Hagan, 124 Minn. 58, 144 N. W. 410 (charge held sufficiently favorable to the accused).

EVIDENCE

2456. Necessity of calling certain witnesses—(36, 37) See State v. James, 123 Minn. 487, 144 N. W. 216.

2457. Necessity of corroborating accomplices—A prostitute to whom liquor is unlawfully sold is not an accomplice of the seller. Whether a detective purchasing liquor for a prostitute is her accomplice is an open question. State v. Brand, 124 Minn. 408, 145 N. W. 39.

A confession may be sufficient corroboration. State v. Christianson, 131 Minn. ——, 154 N. W. 1095.

When an accomplice turns state's evidence he may be corroborated by similar statements made by him prior to the promise of immunity. People v. Katz, 209 N. Y. 311, 103 N. E. 305.

(39) State v. Roth, 117 Minn. 404, 136 N. W. 12; State v. Briggs, 122 Minn. 493, 142 N. W. 823; State v. Brand, 124 Minn. 408, 145 N. W. 39 (detective purchasing liquor for a prostitute—conceding that he was an accomplice his testimony was amply corroborated); State v. Christianson, 131 Minn. ——, 154 N. W. 1095. See Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825.

(42) Note, 138 Am. St. Rep. 272.

2458. Character of defendant—(52) Note, 103 Am. St. Rep. 888.

(55) State v. Hutchinson, 121 Minn. 405, 141 N. W. 483 (evidence of good character goes to the probabilities, and bears on the general question of guilt or innocence—an instruction that confined the consideration of such evidence to the question of the reasonableness of defendant's explanation, and to his credibility as a witness, was erroneous, but whether prejudicial is not decided). See State v. Drew, 110 Minn. 247, 253, 124 N. W. 1091.

2459. Evidence of other crimes—Evidence of another crime held admissible to show guilty intent and to identify the accused, though he had been acquitted on the trial of a charge of having committed the crime. State v. Lucken, 129 Minn. 402, 152 N. W. 769.

(62) State v. Schueller, 120 Minn. 26, 138 N. W. 937; State v. Briggs, 122 Minn. 493, 142 N. W. 823; State v. Kaufman, 125 Minn. 315, 146 N. W. 1115; State v. Roby, 128 Minn. 187, 150 N. W. 793; People v. Thompson, 212 N. Y. 249, 106 N. E. 78 (admissible when it has a natural tendency to corroborate or supplement admitted direct evidence).

(64, 66) State v. Lucken, 129 Minn. 402, 152 N. W. 769. See 24 Harv. L. Rev. 148.

(67) State v. Briggs, 122 Minn. 493, 142 N. W. 823.

2460. Acts and declarations of fellow conspirators—(72) See State v. Hunter, 131 Minn. ——, 154 N. W. 1083.

2461. Dying declarations—(75) State v. Mueller, 122 Minn. 91, 141 N. W. 1113 (abortion—dying declaration of woman held admissible—held not error to refuse to strike out as conclusions or opinions of the declarant certain statements in the dying declaration—failure to give cautionary instructions regarding dying declarations held not error in the absence of requests). See State v. Findling, 123 Minn. 413, 144 N. W. 142 (declaration of the deceased made shortly before his death in the presence of the prosecuting attorney and the accused held admissible to identify the accused); State v. Hunter, 131 Minn. ——, 154 N. W. 1083; People v. Sarzano, 212 N. Y. 231, 106 N. E. 87 (statement of

physician to deceased that recovery was impossible admissible but not conclusive); Note, 86 Am. St. Rep. 637; 56 L. R. A. 353.

(77) State v. Mueller, 122 Minn. 91, 141 N. W. 1113. See Note, 52 L. R. A. (N. S.) 152 (weight to which dying declarations are entitled).

2462. Confessions of defendant—A confession is voluntary when it is not induced by a threat of harm or a promise of favor or reward held out by a person in authority. State v. Pontoniec, 117 Minn. 80, 134 N. W. 305. See Note, 18 L. R. A. (N. S.) 768.

The failure of the state to call an available witness to whom an alleged confession was made may be considered as impairing the weight of the confession. State v. McLarne, 128 Minn. 163, 150 N. W. 787.

(81) Note, 18 L. R. A. (N. S.) 768; 50 Id. 1077.

(83) State v. McLarne, 128 Minn. 163, 150 N. W. 787.

2462a. Confessions of third parties exonerating defendant—Confessions of third parties made out of court and tending to exonerate the accused are inadmissible. Donnelly v. United States, 228 U. S. 243.

2463. Admissions of defendant—(88) See State v. McLarne, 128 Minn. 163, 150 N. W. 787.

2466. Preparatory acts—Precedent acts which render the commission of the crime charged more easy, more safe, more certain, more effective to produce the ultimate result which formed the general motive and inducement, if done with that intention and purpose, have such a connection with the crime charged as to be admissible though they are also of themselves criminal. State v. Kaufman, 125 Minn. 315, 146 N. W. 1115.

91. State v. Kaufman, 125 Minn. 315, 146 N. W. 1115.

2467. Motive—(92) State v. Roth, 117 Minn. 404, 136 N W. 12; State v. O'Hagan, 124 Minn. 58, 144 N. W. 410.

2468. Threats—(94) State v. Jacobson, 130 Minn. 347, 153 N. W. 845. See Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645; Note, 89 Am. St. Rep. 691.

2468a. Footprints—Footprints may be convincing evidence, depending on the strength of the evidence of their correspondence with the foot or footwear of the accused. State v. McLarne, 128 Minn. 163, 150 N. W. 787; State v. Jacobson, 130 Minn. 347, 153 N. W. 845.

2468b. Self-serving declarations—Self-serving declarations of the accused are not admissible in his favor, unless a part of the res gestæ, or part of a general confession, or fall within some other special rule. State v. Briggs, 122 Minn. 493, 142 N. W. 823 (certain declarations of defendant in respect to his conduct and purposes, made before the crime charged, held self-serving and inadmissible).

2468c. Attempts—Evidence of an attempt to commit the crime charged is always competent and material. State v. Smith, 119 Minn. 107, 137 N. W. 295.

2468d. Identification of the accused—Great latitude is allowed in the admission of evidence to prove the identity of the accused. State v. Findling, 123 Minn. 413, 144 N. W. 142 (charge of homicide—conversation between deceased and prosecuting attorney in presence of accused, in which the deceased pointed out the accused as the guilty party, held admissible—testimony of young girl held admissible).

2468e. Joint trial—Evidence inadmissible as to part of defendants—The evidence of one of the defendants given on the former trial was not admissible as against the other defendants on trial. It being a joint trial, the evidence was properly in the case, and the jury should have been instructed that it was not evidence as against the other defendants. There being no request or suggestion to the trial court to give such an instruction, it was not error to fail to do so. State v. Newman, 127 Minn. 445, 149 N. W. 945.

TIME OF TRIAL AND CONTINUANCE

2469. Right to a speedy trial—Dismissal for delay—Whether a trial is a speedy trial within the constitutional provision is a judicial question. State v. Le Flohic, 127 Minn. 505, 150 N. W. 171.

The statute provides for a dismissal of an indictment if the trial is not had at the next term of court in which it is triable, unless good cause is shown against a dismissal. G. S. 1913, § 8510; State v. Radoicich, 66 Minn. 294, 69 N. W. 25; State v. Le Flohic, 127 Minn. 505, 150 N. W. 171 (good cause for not dismissing shown).

(96) Note, 85 Am. St. Rep. 187.

2470. Continuance—(98) State v. Ingraham, 118 Minn. 13, 136 N. W. 258. See Digest, § 1710; Note, 122 Am. St. Rep. 745.

TRIAL

2471. Presence of defendant—If the accused is in custody a verdict cannot be received in his absence, in a prosecution for a felony. If he is out on bail and wilfully absents himself from the courtroom a verdict may be received in his absence, at least after reasonable efforts are made to secure his presence. State v. Gorman, 113 Minn. 401, 129 N. W. 589.

(6) See Diaz v. United States, 223 U. S. 442.

2474a. Election by state between two offences—Where, on the trial of a charge of rape, two offences are proved, it is not error for the court to refuse to require the state to elect upon which charge it will proceed until the close of the state's case. State v. Roby, 128 Minn. 187, 150 N. W. 793.

2478. Argument of counsel—Opening and close—In his opening address the prosecuting attorney may state what he intends to prove. Comment on the fact that the defendant refused to allow his wife to testify, and that he obtained a change of venue, held harmless under the circumstances. State v. Virgens, 128 Minn. 422, 151 N. W. 190.

See Digest, §§ 7102, 9799.

2479. Instructions—It is not commendable practice for the court to express the opinion that certain facts recited by it would justify a conviction. State v. Hutchinson, 121 Minn. 405, 141 N. W. 483.

It is proper for the court in its charge in a criminal case to review the evidence and to state clearly the claims of the respective parties; but it is not the province of the court to indulge in argument, and, if a charge is argumentative, emphasizing testimony favorable to the state, explaining away discrepancies in the state's case, and discrediting the case and the testimony of the defendant, the defendant is not given such a trial as is guaranteed by the constitution and laws of the state. State v. Almos, 122 Minn. 479, 142 N. W. 801.

If the court reviews the evidence the defendant is entitled to a charge that the jury are the exclusive judges of all questions of fact, but a failure to so charge is not a ground for a new trial in the absence of a request. A defendant is entitled in all cases to an instruction to the effect that he is presumed innocent until the contrary is proved. It should be given in all cases whether requested or not, but a failure to give it is not a ground for a new trial in the absence of a request. State v. Sailor, 130 Minn. 84, 153 N. W. 271.

(44) State v. Hendriksen, 116 Minn. 366, 133 N. W. 850; State v. Mueller, 122 Minn. 91, 141 N. W. 1113; State v. Rusk, 123 Minn. 276, 143 N. W. 782; State v. Newman, 127 Minn. 445, 149 N. W. 945; State v. Sailor, 130 Minn. 84, 153 N. W. 271. See Digest, §§ 2486, 7179.

(51) State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

(55) State v. Almos, 122 Minn. 479, 142 N. W. 801; State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417; State v. Jones, 126 Minn. 45, 147 N. W. 822. See State v. Christianson, 131 Minn. ——, 154 N. W. 1095.

See Digest, § 2486.

2479a. Objections and exceptions—Requests—In criminal cases there is the same necessity of objecting to inaccurate, incomplete or indefinite instructions as in civil cases. State v. Rusk, 123 Minn. 276, 143 N. W. 782; State v. O'Hagan, 124 Minn. 58, 144 N. W. 410; State v. Sailor, 130 Minn. 84, 153 N. W. 271. See Digest, §§ 7179, 9797, 9798.

In criminal cases it is not necessary to except to instructions or request instructions correctly stating the law. State v. Hutchinson, 121 Minn. 405, 141 N. W. 483; State v. Rusk, 123 Minn. 276, 143 N. W. 782.

Where the offence is defined by statute, and this definition is given to the jury, if defendant desires a more specific statement as to the elements necessary to constitute such offence, he should make a request therefor. State v. O'Hagan, 124 Minn. 58, 144 N. W. 410.

2482. Polling the jury—(59) State v. Gorman, 113 Minn. 401, 404, 129 N. W. 589.

2483. Verdict—Sufficiency—In determining the meaning of the verdict in a criminal case, reference may be made to the evidence and record as well as to the indictment. The accused was on trial under an indictment which declared the offence to be grand larceny in the second degree, and the jury returned a verdict that he was "guilty in manner and form as charged in the indictment." The verdict was not ambiguous, and, when considered in connection with the evidence and the record, was a conviction of grand larceny in the second degree. State v. Snyder, 113 Minn. 244, 129 N. W. 375.

(61) State v. Snyder, 113 Minn. 244, 129 N. W. 375. See Digest, § 9817.

2486. Verdict for lesser offences or lesser degrees of offences than charged—Under an indictment charging the crime of maiming the defendant may be convicted of an assault and battery. State v. Wondra, 114 Minn. 457, 131 N. W. 496.

If the act for which the accused is indicted is the same for which he is convicted, the conviction of a lesser degree is proper, though the indictment contains averments constituting the offence of the highest degree of the species of crime, and this though it omits to state the particular intent and circumstances characterizing a lower degree of the same crime. State v. Staples, 126 Minn. 396, 148 N. W. 283.

A convicted person cannot complain that the charge on which he was tried and convicted was not so grave as the facts alleged in the indictment would warrant. State v. Staples, 126 Minn. 396, 148 N. W. 283.

(70) State v. Rusk, 123 Minn. 276, 143 N. W. 782.

(71) State v. Potoniec, 117 Minn. 80, 134 N. W. 305.

(80) State v. Staples, 126 Minn. 396, 148 N. W. 283. See Note, 21 L. R. A. (N. S.) 1.

2487. Sentence or judgment—Stay—The judgment should be pronounced by the judge in open court and an entry thereof made by the clerk in the minutes. No entry or judgment other than the entry so made by the clerk is required. State v. Gieseke, 125 Minn. 497, 143 N. W. 663.

When not otherwise provided by statute, or the sentence or judgment, the date of the commencement of the term of imprisonment is that on which the sentence or judgment is pronounced. State v. Langum, 112 Minn. 121, 127 N. W. 465.

The court has statutory authority to stay sentence. G. S. 1913, § 8496; State v. Fjolander, 125 Minn. 529, 147 N. W. 273.

The court has authority independent of statute to grant a stay for a definite period after a conviction to enable the defendant to perfect an appeal or to take other legal proceedings for the protection of his rights. It has never been held that a court in this state may suspend sentence indefinitely. State v. Langum, 112 Minn. 121, 127 N. W. 465. See 25 Harv. L. Rev. 739; 27 Id. 590.

(94, 95) Note, 55 Am. St. Rep. 264.

NEW TRIAL

2490. Granted cautiously and only for substantial error—Where the supreme court entertains a grave doubt of the guilt of the accused it will grant him a new trial, though the record is free from technical error. State v. Jacobson, 130 Minn. 347, 153 N. W. 845.

The statute provides that a trial shall not be affected "by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." This statute is a salutary one and must be liberally construed and applied on motions for a new trial. G. S. 1913, § 9143; State v. Almos, 122 Minn. 479, 142 N. W. 801.

The supreme court has a natural hesitation to reverse a conviction on errors in the instructions or in the admission of evidence, where the evidence of guilt is strong. State v. Hutchinson, 121 Minn. 405, 141 N. W. 483.

Error in the admission of evidence is harmless if the defendant takes the stand and voluntarily testifies to substantially the same effect. State v. Newman, 127 Minn. 445, 149 N. W. 945.

Waiver of procedural rights. 25 Harv. L. Rev. 179; 12 Col. L. Rev. 163.

(8) State v. Brand, 124 Minn. 408, 145 N. W. 39; State v. Rusk, 123 Minn. 276, 143 N. W. 782.

(10) State v. Johnson, 114 Minn. 493, 131 N. W. 629; State v. Findling, 123 Minn. 413, 144 N. W. 142; State v. Brand, 124 Minn. 408, 145 N. W. 39; State v. Georgian, 124 Minn. 515, 145 N. W. 385 (the law cannot regard trifling and technical irregularities); State v. Trocke, 127 Minn. 485, 149 N. W. 944; State v. Roby, 128 Minn. 187, 150 N. W. 793; State v. Lucken, 129 Minn. 402, 152 N. W. 769; State v. Hunter, 131 Minn. —, 154 N. W. 1083.

(11) State v. McCoy, 112 Minn. 424, 128 N. W. 465; State v. McGrath, 119 Minn. 321, 138 N. W. 310; State v. Hutchinson, 121 Minn. 405, 141 N. W. 483; State v. Almos, 122 Minn. 479, 142 N. W. 801 (new trial

granted by supreme court for erroneous charge); State v. McLarne, 128 Minn. 163, 150 N. W. 787; State v. La Bar, 131 Minn. —, 155 N. W. 211.

(13) See Garland v. Washington, 232 U. S. 642.

2490a. Joint trial of several—Where several defendants are tried together a new trial may be granted to one or more of them. State v. Christianson, 131 Minn. —, 154 N. W. 1095.

APPEAL

2491. When lies—Waiver—The payment of a fine after a refusal of the trial court to grant a stay in order to perfect an appeal, held not a waiver of a right to appeal. State v. Chicago, G. W. R. Co., 125 Minn. 332, 147 N. W. 109.

One may waive the right to appeal by voluntarily paying a fine under circumstances clearly indicating an intention to abide the sentence of the court. State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286.

The defendant, a foreign corporation, indicted for a violation of the statute prohibiting an unlawful combination in restraint of trade, sought an opportunity to change its plea of not guilty to guilty and receive sentence. The sentence immediately imposed was a fine, which was at once paid. Six months thereafter, lacking a few days, this appeal was taken. Upon the state's motion to dismiss the appeal it is made to appear that appellant paid the fine voluntarily, with the intention to abide by and comply with the sentence of the court, and hence the appeal should be dismissed. State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286.

An appeal has been entertained though there was a long delay in bringing it on for hearing and the defendant had served fifteen months in the penitentiary. State v. McLarne, 128 Minn. 163, 150 N. W. 787.

2493. Certifying questions to supreme court—The remedy afforded by the statute is special and is not to be enlarged by construction. The statute refers to questions arising upon demurrers or special pleas to indictments. It does not apply to questions raised by objections to the sufficiency of an affidavit made the basis in the district court of contempt proceedings. State v. Smith, 116 Minn. 228, 133 N. W. 614.

The statute is not designed to afford a substitute for an appeal. Ordinarily the question whether the evidence tends to establish the guilt of the accused should not be certified. Whether the evidence tends to show or prove facts constituting the offence charged is a question of law which may be certified. State v. Dumas, 118 Minn. 77, 136 N. W. 311.

There is no warrant for certifying questions arising upon a trial in which the jury disagreed. State v. Toole, 124 Minn. 532, 144 N. W. 474.

(33) State v. Ledbeter, 111 Minn. 110, 126 N. W. 477; State v. Dumas, 118 Minn. 77, 136 N. W. 311.

2495. Stay pending appeal—The court has authority independent of statute to grant a stay for a definite period after a conviction to enable the defendant to perfect an appeal or to take other legal proceedings for the protection of his rights. It has never been held that a court in this state may suspend sentence indefinitely. State v. Langum, 112 Minn. 121, 127 N. W. 465. See 25 Harv. L. Rev. 739.

A stay may be granted to await the determination of an appeal in habeas corpus proceedings. State v. McDonald, 123 Minn. 84, 142 N. W. 1051.

(37) State v. Waterman, 112 Minn. 157, 127 N. W. 473.

2498. Assignment of errors—No assignment of errors is necessary. G. S. 1913, § 9247.

Where the guilt of the accused is clear the supreme court will not search the record for technical errors not raised by assignments of error or discussed in the briefs. State v. Lucken, 129 Minn. 402, 152 N. W. 769.

2500. Scope of review—Sufficiency of record—To raise objection on appeal to alleged misconduct of the prosecuting attorney in commenting on the failure of the defendant to take the stand the record must contain the comments to which objection is made. State v. Lucken, 129 Minn. 402, 152 N. W. 769.

(51, 53) State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

PUNISHMENT AND EXECUTION

2502. Punishment in absence of express provision—Effect of excessive sentence. Note, 51 L. R. A. (N. S.) 373.

2503a. Indeterminate sentences and paroles—Our statutes provide for indeterminate sentences in certain cases. G. S. 1913, §§ 9267–9280; State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

2503b. Sentence to reformatory—Under R. L. 1905, § 5454, authorizing the court to sentence to the reformatory any person not less than sixteen nor more than thirty years of age, etc., and who has been convicted of a crime punishable by imprisonment in the state prison, the fact that a judgment of conviction of such a crime, upon which the defendant is sentenced to the reformatory, fails to state the age of the defendant, does not render it subject to attack on habeas corpus. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

2503c. Second conviction—Increased punishment—R. L. 1905, § 4772 (G. S. 1913, § 8491), providing for increased punishment of persons convicted of certain crimes, where it appears that they had previously been

convicted of a felony, held valid, and not in violation of the twice in jeopardy clause of the state constitution. In the absence of some statute regulating the procedure, to authorize the court to impose the increased punishment, the fact of the prior conviction must be set forth in the indictment, established by proper evidence, and passed upon by the jury. Though alleged in the indictment, it is unnecessary for the state to prove that the judgment of conviction in the former prosecution has not been reversed or set aside. The judgment roll offered in evidence appearing fair upon its face, the judgment will be presumed in full force and effect until the contrary is shown. State v. Findling, 123 Minn. 413, 144 N. W. 142. See 26 Harv. L. Rev. 84; Note, 34 L. R. A. 398; 24 L. R. A. (N. S.) 432.

2503d. Commutation of sentence—Allowance for good conduct—It is well settled that a commutation of a sentence is a substitution of a less for a greater punishment. After commutation the commuted sentence is the only one in existence, and the only one to be considered. After commutation, the sentence has the same legal effect, and the status of the prisoner is the same, as though the sentence had originally been for the commuted term. A prisoner sentenced to the state prison for life, whose sentence is commuted to one for a term of years, is entitled to diminution of that sentence by reason of good conduct commencing on the day of his arrival in prison, and not from the time of commutation of his sentence. State v. Wolfer, 127 Minn. 102, 148 N. W. 896. See 28 Harv. L. Rev. 322 (criticism of decision); Note, 34 L. R. A. 510.

2503e. Transfer between state prison and reformatory—R. L. 1905, § 5455, amended by Laws 1911, c. 61 (G. S. 1913, § 9324), authorizing the board of control to transfer prisoners from the reformatory to the state prison, and vice versa, is not unconstitutional, as constituting a legislative attempt to vest administrative officers with judicial functions. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

2503f. Theory of punishment—The theory of punishment in this state is not primarily compensatory, but rather reformatory. While the convict is confined as a deterrent to others and for the safety of society, the reform of the convict is also one of the main objects of our penal system. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

CROPS

2506a. Notes—Passing of crops by deed, devise or descent. 131 Am. St. Rep. 617.

Abandonment of crops by cropper or tenant. 46 L. R. A. (N. S.) 53. See § 10046a.

CURTESY

2510. In general—(80) Note, 112 Am. St. Rep. 571; 128 Id. 474.

CUSTOMS AND USAGES

2511. Requisites of valid custom—(83–87) Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

(85) Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 134 N. W. 510.

2512a. As evidence of the law—Where neither statutes nor decisions of the courts are directly to the contrary, the courts may refer to established trade customs as evidence of what has long been understood to be the law. Dale v. Pattison, 234 U. S. 399.

2514. On whom binding—A custom of business houses to take at least ten days to investigate the credit of a new customer could not bind the defendants in the absence of proof that they had knowledge of the custom, or that it had become so general, long established and notorious that they must be presumed to have knowledge of it. S. F. Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795.

(95) Taylor v. First Nat. Bank, 119 Minn. 525, 138 N. W. 783; E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828 (custom of board of trade to resell grain on track over and over again before the same is weighed). See Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

2515. Effect on contracts—(3) E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828; Kees v. Christensen, 124 Minn. 230, 144 N. W. 766.

(6) E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828.

2518. Pleading—(11) Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104.

DAMAGES

IN GENERAL

2521. Special damages—There can be no recovery for special damages by a party who is not entitled to any general damages. See Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

2524. Interest as damages—Where the complaint properly demanded interest, and the items sued for, with interest up to the date of the trial, exceeded the amount of the verdict, it could not be held that the verdict was excessive, though such items, without interest, aggregated less than the verdict, and the charge of the court made no reference to interest. Larson v. Anderson, 122 Minn. 39, 141 N. W. 847.

(27) Note, 28 L. R. A. (N. S.) 1.

(28) Howard v. Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557; Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

(29) See Jones v. Burgess, 124 Minn. 265, 144 N. W. 954 (money obtained by fraud in sale of horse).

(31) Larson v. Anderson, 122 Minn. 39, 141 N. W. 847.

(32) See Jones v. Burgess, 124 Minn. 265, 144 N. W. 954.

2526. Mental suffering—Fright—Wounded feelings—Damages for mental suffering held recoverable in an action against a railroad company for an assault on a passenger by a drunken fellow-passenger. Jansen v. Minneapolis & St. L. R. Co., 112 Minn. 496, 128 N. W. 826.

Whether, in an action for personal injury, a recovery may be had for mental suffering resulting from a disfigurement or deformity not appearing except upon an exposure of the person, is an open question. Johnson v. Forrestal, 119 Minn. 202, 137 N. W. 1095.

Where an injury results in stammering and stuttering humiliation therefrom is a proper element of damages. Burke v. Chicago & N. W. Ry. Co., 131 Minn. ——, 154 N. W. 960.

Recovery in actions for trespass. See 27 Harv. L. Rev. 87.

(44) See Digest, § 9640; 41 Am. L. Reg. (N. S.) 141.

NATURAL AND PROXIMATE CONSEQUENCES

2528. In general—(46) Walsh v. Paine, 123 Minn. 185, 143 N. W. 718 (sequence need not be so close in actions ex delicto as in actions ex contractu); Barnett v. Minneapolis & St. L. R. Co., 130 Minn. 300, 153 N. W. 600; Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100.

PROSPECTIVE DAMAGES AND SUCCESSIVE ACTIONS

2529. Actions ex contractu—(47) See Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424; Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426.

2530. Actions ex delicto—(49) Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311. See Digest, § 9694.

2531. Successive actions—Splitting causes of action—(52) See 24 Harv. L. Rev. 492.

MITIGATION

2532. Duty of injured party to mitigate damages—Surgical operations—One is not bound to submit to a major internal surgical operation in order to mitigate damages from personal injury, even though competent physicians are of the opinion that such an operation would be successful and effect a cure or reduction of the injury. Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149; Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

(53) Rettner v. Minn. Cold Storage Co., 88 Minn. 352, 93 N. W. 120 (injury to property by bailee); Mullen v. Otter Tail Power Co., 130 Minn. 386, 153 N. W. 746 (failure to make due exertion to save property from a fire).

(54) Bassetti v. Shenango Furnace Co., 122 Minn. 335, 142 N. W. 322; Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140. See Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125 (breach of contract to furnish ice for a meat market—whether plaintiff used proper efforts to obtain ice elsewhere held a question for the jury).

UNCERTAIN, CONTINGENT AND SPECULATIVE DAMAGES

2534. General rule—(57) Johnson v. Wild Rice Boom Co., 118 Minn. 24, 136 N. W. 262; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

2535. Profits—(64) Johnson v. Wild Rice Boom Co., 118 Minn. 24, 13 N. W. 262 (breach of contract to refrain from diverting water from a stream so as to interfere with the operation of a flour mill driven by water from the stream—interruption of business); Pappas v. Stark, 123 Minn. 81, 142 N. W. 1046 (breach of contract giving plaintiff a right to maintain a boot-blacking stand and checking privileges in a hotel). See 4 Mich. L. Rev. 232.

LIQUIDATED DAMAGES

2537. When enforceable—Penalties—The rule against penalties in the form of stipulated damages is especially applicable to contracts between a necessitous borrower and a money loaner. Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

If a contract, which states the amount to be paid in case of a breach thereof, manifestly disregards the rule that the injured party is entitled to fair compensation for his actual damages and nothing more, it will be construed as naming a penalty and not as fixing the amount of the damages. A provision which would give no damages for a total breach of the contract, and large damages for an unimportant breach thereof, violates the rule, and cannot be construed as providing for liquidated damages. Schommer v. Flour City Ornamental Iron Works, 129 Minn. 244, 152 N. W. 535.

While reasonable contracts for liquidated damages for delay are not to be regarded as penalties and may be enforced between the parties, one party must not prevent the other from completing the work in time, and if he does, the original contract cannot be insisted upon and the liquidated damages are waived, even if the subsequent delay is the fault of the other party. Where both parties are responsible for delays beyond the fixed time, the obligation for liquidated damages is annulled; and, unless there was a provision substituting a new date, the recovery for subsequent delay is limited to the actual loss sustained. United States v. United Engineering and Contracting Co., 234 U. S. 236.

Waiver of stipulations making time of the essence and providing for liquidated damages. Maryland Steel Co. v. United States, 235 U. S. 451.

Effect of the use of the word "forfeiture" upon penalty or liquidated damages. Note, 50 L. R. A. (N. S.) 890.

Liquidated damages and estoppel by contract, 9 Mich. L. Rev. 588.

(67) Emmel v. Zapp, 112 Minn. 375, 127 N. W. 1134, 128 N. W. 572 (joint enterprise in purchase of land—stipulated damages held not a penalty); Blunt v. Egeland, 114 Minn. 113, 130 N. W. 249 (breach of executory contract for purchase of land—stipulation for damages held a penalty—actual damages recoverable under pleadings); Dyer v. Kistler, 118 Minn. 112, 136 N. W. 750 (breach of bond to convey realty—stipulated damages held a penalty); Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201 (breach of contract for the sale of a mercantile business—stipulation for payment of a certain sum by the seller upon a breach by him held not a penalty); Quigley v. C. S. Brackett Co., 124 Minn. 366, 145 N. W. 29 (employee hired for no definite time was required to deposit a month's wages with the employer to

guarantee that he would keep sober while at work—verdict of jury that stipulation was not a penalty sustained); Chapman v. Propp, 125 Minn. 447, 147 N. W. 442 (breach of contract to convey realty—stipulation for damages held not a penalty).

(68) Palmer v. Mutual Life Co., 114 Minn. 1, 130 N. W. 250; Bankers Surety Co. v. Elkhorn River Drainage District, 214 Fed. 342.

(69) Quigley v. C. S. Brackett Co., 124 Minn. 366, 145 N. W. 29.

(73) See Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201.

(74) See Blunt v. Egeland, 114 Minn. 113, 130 N. W. 249.

EXEMPLARY DAMAGES

2539. Definition and nature—Whatever exceeds compensation for injuries from a tort is in the nature of punitive or exemplary damages, whether fixed by statute or under the ordinary rules of law. Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

2540. When allowable—(77) Lamson v. Great Northern Ry. Co., 114 Minn. 182, 130 N. W. 945 (improper language of conductor toward passenger—no evidence to justify punitive damages); Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126 (assault and battery—plaintiff entitled to instructions that punitive damages were discretionary with the jury). See § 2592 (where there are several parties not equally liable—apportionment).

2548. Discretionary with jury—(94) Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126.

2552. Must be reasonable in amount—(98) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

2553. Who liable—Corporations—Municipalities—Principals and masters—A private corporation is liable for exemplary damages whenever a private individual would be liable for the same acts or omission. Peterson v. Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985; Berg v. St. Paul City Ry. Co., 96 Minn. 513, 105 N. W. 191; Anderson v. International Harvester Co., 104 Minn. 49, 116 N. W. 101; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Hammer v. Forde, 125 Minn. 146, 145 N. W. 810; Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

Whether a municipality is ever liable for exemplary damages is an open question in this state. Hammer v. Forde, 125 Minn. 146, 145 N. W. 810.

(99) See Note, 48 L. R. A. (N. S.) 35; 101 Am. St. Rep. 730.

2556. Evidence—Admissibility—(3) Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818. See 26 Harv. L. Rev. 270.

2557. Instructions—Harmless error—Where the evidence shows that the verdict is for an amount not larger than plaintiff is fairly entitled to as compensatory damages, it will be presumed that the jury did not allow punitive damages, and an instruction that they might is error without prejudice. Lamson v. Great Northern Ry. Co., 114 Minn. 182, 130 N. W. 945.

2558. Cases classified—Assault on passenger by train employee. Germann v. Great Northern Ry. Co., 117 Minn. 310, 135 N. W. 750.

Actions for malicious prosecution of a civil action and for unfair competition. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(10) Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126.

(15) Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818.

(17) Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT

2559. Rule of Hadley v. Baxendale—(23) Berghuis v. Schultz, 119 Minn. 86, 137 N. W. 201; East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181; Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125; Kolliner v. Western Union Tel. Co., 126 Minn. 122, 147 N. W. 961 (failure to deliver telegram); Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140. See 25 Harv. L. Rev. 127.

2561. Compensation the aim—(28) Baessetti v. Shenango Furnace Co., 122 Minn. 335, 142 N. W. 322.

2562. Damages for tort and breach of contract distinguished—(29) Walsh v. Paine, 123 Minn. 185, 143 N. W. 718 (noting distinction between actions for tort and on contract). See, for grounds for distinction, 25 Harv. L. Rev. 126.

2564. Difference between cost of performance and contract price—(32) Baessetti v. Shenango Furnace Co., 122 Minn. 335, 142 N. W. 322.

2567. Value of thing to be received—For the breach of a contract to deliver property to the value of a certain amount the amount fixed is the measure of damages. Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112.

2567a. Contract to return property in good condition—The general rule of damages applicable to the injury of property by a person in possession thereof, who is under contract obligation to return it to the owner in as good condition as when received, is the diminution in the value resulting from the injury. The contract is one of insurance. Where the injury is merely temporary and readily remedied, and the expense thereof, together with the value of the use of the property in the meantime, would be less than the diminution in value, the defendant, in miti-

gation of damages, may be entitled to show the facts, and thus reduce his liability. But in the absence of such showing the difference in the value is the test of liability. It is true that the owner of the property, where the injury is temporary, may proceed on the theory of special damages and recover, instead of the difference in value, the cost and expense of restoring the property to the condition when delivered to defendant. But he is not required to so proceed. His cause of action accrues in such case immediately upon the breach of the contract, and the breach occurs when the property is returned in a damaged condition, and he is not required to delay bringing suit, to the end that the expense of restoring the property may be ascertained. The rule awarding the difference in value applies, whether the injury to the property be temporary or permanent. Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301.

2569. Particular contracts—A contract for the hire of horses and their return in as good condition as when received. Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301.

A contract to refrain from diverting water from a stream so as not to interfere with the operation of a mill driven by the water of the stream. Johnson v. Wild Rice Boom Co., 118 Minn. 24, 136 N. W. 262; Id., 123 Minn. 523, 143 N. W. 111.

A contract to purchase "lagging" and "mining timber" to be cut from certain land. Baessetti v. Shenango Furnace Co., 122 Minn. 335, 142 N. W. 322.

A contract to compromise a claim and take a certain amount of nursery stock at a fixed valuation in settlement. Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112.

A contract for insurance. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

A contract to furnish ice for a meat market. Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125.

A contract to haul and spread manure on a farm. Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445.

A contract to furnish enameled terra cotta for the front of a building. Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140.

A contract to return certain notes in case of a breach of a warranty, the notes being given by plaintiff to defendant on a settlement. Vogel v. D. M. Osborne & Co., 34 Minn. 454, 26 N. W. 453.

MEASURE OF DAMAGES FOR TORT

2570. In general—While the sequence need not be so close as in actions on contract, it must still appear, in an appreciable sense, that the

damage flowed from the tort as the proximate and not the remote cause. Walsh v. Paine, 123 Minn. 185, 143 N. W. 718. See 25 Harv. L. Rev. 126.

Liability for diseased conditions resulting from injury. Note, 48 L. R. A. (N. S.) 93.

Duty of injured person to follow advice or instructions of physician. Note, 48 L. R. A. (N. S.) 110.

Effect of negligence or unskilfulness of attending physician. Note, 48 L. R. A. (N. S.) 116.

(64) Ominsky v. Weinhagen, 113 Minn. 422, 129 N. W. 845 (fright and nervous shock—loss of hair—recovery sustained); Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930 (injury to business).

(66) Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

2571. Person in diseased or weakened condition—One suffering from disease, or predisposition to disease, may recover for the aggravation of such condition caused by the negligence of another. Blomquist v. Minneapolis Furniture Co., 112 Minn. 143, 127 N. W. 481; Magers v. Minneapolis etc. Ry. Co., 112 Minn. 435, 128 N. W. 576. See Ludwig v. Preferred Accident Ins. Co., 113 Minn. 510, 130 N. W. 5; McCahill v. N. Y. etc. Co., 201 N. Y. 221, 94 N. E. 617; Texas & Pacific Ry. Co. v. Howell, 224 U. S. 577.

(67) Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149; Anderson v. Wood, 125 Minn. 102, 145 N. W. 791 (aggravation of hernia). See Donovan v. Tilden Produce Co., 131 Minn. ——, 155 N. W. 104. Note, 48 L. R. A. (N. S.) 119.

2572. Expenses of medical treatment and nursing—In an action for personal injury the reasonable value of nursing the plaintiff on account of his injuries is recoverable, though the nursing was done by a member of his family without expectation of payment. Where the services are rendered at an agreed price recovery may be had accordingly, unless such price is more than the reasonable value of the services. Wells v. Minneapolis Baseball & Athletic Assn., 122 Minn. 327, 142 N. W. 706.

One is not bound to submit to a major internal surgical operation in order to mitigate damages. The fact that they might be so mitigated does not affect or reduce the measure of damages for a personal injury. Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149; Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

2573. Negligent medical treatment—(69) Fields v. Mankato Electric Traction Co., 116 Minn. 218, 133 N. W. 577; Gray v. Boston El. Ry. Co., 215 Mass. 143, 102 N. E. 71. See Note, 11 L. R. A. 34.

2574. Miscarriage—(70) See 9 Col. L. Rev. 81.

2575. Injury to nervous system—(71) Kitman v. Chicago, B. & Q. R. Co., 113 Minn. 350, 129 N. W. 844; Ominsky v. Weinhagen, 113 Minn.

422, 129 N. W. 845 (loss of hair from nervous shock—recovery sustained).

2576. Loss of time and earning power—Plaintiff's pecuniary condition—(72) Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8 (loss of earning power of a singer). See Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693 (amendment on the trial inserting claim for loss of time held proper).

2576a. Loss of sexual powers—In actions for personal injuries an incidental and temporary loss of sexual powers cannot be considered as a distinct element of damage. But where there is a direct injury to the sexual organs or to the nerves or muscles which control their action, with resulting impotence, damages may be recovered therefor if the proof is satisfactory. Where the proof is opinion evidence it should be scrutinized closely. Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

2576b. Fact of marriage and dependent family—The fact that the plaintiff is married and has a family dependent upon him for support cannot be considered in assessing damages. See Bahr v. Northern Pacific Ry. Co., 101 Minn. 314, 112 N. W. 267; Kling v. Thompson-McDonald Lumber Co., 127 Minn. 468, 149 N. W. 947; Doran v. Chicago etc. Ry. Co., 128 Minn. 193, 150 N. W. 800.

2576c. Some limitation necessary—In cases of permanent and serious personal injuries there can be no adequate money compensation, yet the courts must, on grounds of public policy, place some limit, necessarily more or less arbitrary, on the amount of damages. Human activity involving accidents must go on and not be paralyzed by unlimited verdicts. Padrick v. Great Northern Ry. Co., 128 Minn. 228, 150 N. W. 807.

2577. Injury to or destruction of crops, trees, etc.—In an action based upon the destruction of standing forest timber by fire, evidence of the value of the timber itself is admissible, not as defining the measure of damages, which is the diminution of the value of the land, but as being proper to be considered by the jury in applying the true measure and ascertaining the amount of the damages suffered. Reynolds v. Great Northern Ry. Co., 119 Minn. 251, 138 N. W. 30.

(75) Note, 140 Am. St. Rep. 309.

(76) Reynolds v. Great Northern Ry. Co., 119 Minn. 251, 138 N. W. 30. See Note, 140 Am. St. Rep. 309.

2577a. Injury to animals—Where an injury to an animal is curable by treatment the owner is entitled to recover the diminished value of the animal after cure, so far as effected, the expense of treatment, and the value of the use of the animal while under treatment. If the injury is incurable the measure of damages is the difference in the value of the

animal before and immediately after the injury. Where the latter measure of damages is applied the owner is not entitled to the expense of treatment to effect a cure. No damages can be recovered for efforts to effect a cure unless they are reasonable. Raski v. Great Northern Ry. Co., 128 Minn. 129, 150 N. W. 618.

2577b. Injury to automobile—Cost of repairs—Substitute car—In an action for injury to an automobile the parties adopted as the measure of damages the reasonable cost of repairing it, plus the reasonable value of a substitute car during the period necessary for repair. W. S. Conrad Co. v. St. Paul City Ry. Co., 130 Minn. 128, 153 N. W. 256.

2578. Particular torts—For wrongful expulsion from a benefit society. Malmsted v. Minneapolis Aerie, 111 Minn. 119, 126 N. W. 486.

For wrongful cancelation of an insurance policy. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

For unfair competition and malicious prosecution of a civil action. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

For interference with the contract relation of others. Twitchell v. Nelson, 126 Minn. 423, 148 N. W. 451; Id., 131 Minn. —, 155 N. W. 621.

(82) Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301; Raski v. Great Northern Ry. Co., 128 Minn. 129, 150 N. W. 618.

2578a. Proximate cause—Law and fact—Whether an illness was due to exposure to cold in a railroad waiting room held a question for the jury. Barnett v. Minneapolis & St. L. R. Co., 130 Minn. 300, 153 N. W. 600. See §§ 2591, 2620.

PLEADING

2579. Necessity of pleading—In general—(83) Croff v. Great Northern Ry. Co., 112 Minn. 14, 127 N. W. 490 (legal inference of damages from facts alleged sufficient on demurrer).

See Dunnell, Minn. Pl. 2 ed. § 622.

2580. General damages—A general allegation of personal injury is sufficient on demurrer. If specific allegations are desired the remedy is by motion before answering. Evertson v. McKay, 124 Minn. 260, 144 N. W. 950.

(85) Ward v. Meeds, 114 Minn. 18, 130 N. W. 2 (personal injuries); Reeves & Co. v. Boyd, 114 Minn. 378, 131 N. W. 336 (action on note—counterclaim for breach of warranty); Hively v. Golnick, 123 Minn. 498, 144 N. W. 213 (breach of promise—injury to health).

See Dunnell, Minn. Pl. 2 ed. §§ 623, 627, 1250.

2581. Special damages—Where special damages are alleged plaintiff should be limited in his recovery therefor to the amount alleged. Blomquist v. Minneapolis Furniture Co., 112 Minn. 143, 127 N. W. 481.

(86) Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193 (action

for breach of warranty on sale of dredge—time lost—reasonable value per cubic feet of dredging—cost of running per day).

(88) Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422.

See Dunnell, Minn. Pl. 2 ed. § 624.

2582. Prospective damages—(89) See Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426.

2583. Profits—Loss of profits resulting directly and necessarily from the breach of a contract are recoverable under a general allegation of damages. Ennis v. Buckeye Publishing Co., 44 Minn. 105, 46 N. W. 314; Hershey Lumber Co. v. St. Paul etc. Ry. Co., 66 Minn. 449, 69 N. W. 215.

Where a loss of profits does not necessarily result from the breach of a contract the circumstances from which it ought reasonably to have been anticipated that it would result must be alleged. Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 44 N. W. 306; Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153; Singer Mfg. Co. v. Potts, 59 Minn. 240, 61 N. W. 63; Independent Brewing Assn. v. Burt, 109 Minn. 323, 123 N. W. 932; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343 (profits from sale of automobiles—allegations held sufficient after judgment).

2586. Exemplary damages—(94) Hively v. Golnick, 123 Minn. 498, 144 N. W. 213.

2587. Interest—(95) Larson v. Anderson, 122 Minn. 39, 141 N. W. 847; Jones v. Burgess, 124 Minn. 265, 144 N. W. 954.

2588. Allegations of unliquidated damages not traversable—(96) Pullen v. Wright, 34 Minn. 314, 26 N. W. 394 (damages from breach of warranty).

ASSESSMENT

2590a. When assessable to time of trial—Where there has been a breach of contract and a party to it has a cause of action for the breach, he may bring his action immediately, and the damages to be allowed are those sustained up to the time of the trial. Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424; Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426.

See Digest, § 2902 (ejectment).

2591. Proof—Apportionment—Severance—Law and fact—Damages must be proved with reasonable certainty. They cannot be based on speculation or conjecture. In order to recover damages for injury to real or personal property, there must be fair proof that such damage has occurred and of the amount thereof, and that it was caused by the wrong of defendant. In order to recover for expenditure of time there

must be proof of the necessity and value thereof. In order to recover for expenditure of money there must be proof of the necessity thereof. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

In a personal injury action the question whether the injuries claimed actually exist or were suffered is a question for the jury, unless the evidence is conclusive. Knight v. Great Northern Ry. Co., 130 Minn. 537, 153 N. W. 593. See § 2578a.

In an action for damages caused by defendant's negligence, the plaintiff must show the extent of injury and resulting damage attributable to the defendant's negligent acts. If the evidence shows only that three concurring causes produced an aggregate loss, and it appears that the defendant was not responsible for one cause producing a substantial part of the loss, the jury cannot arbitrarily apportion a part of the damages proved to the causes for which the defendant is responsible. Knowlton v. Chicago & N. W. Ry. Co., 115 Minn. 71, 131 N. W. 858.

A party not having severed certain items of damage by his pleading or proof, held not entitled to any recovery by way of recoupment for certain damages. Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993.

(8) Whitney v. Kaliske, 131 Minn. —, 154 N. W. 1100 (evidence that the dislocation of a kidney was due to a fall held sufficient). See Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322; Watre v. Great Northern Ry. Co., 127 Minn. 118, 149 N. W. 18.

2592. Action against several tortfeasors—Apportionment—When two or more persons are made defendants in an action for tort, and the evidence is such that the jury may be justified in assessing punitive damages against one and not against the others, or if such damages may be assessed against all, still there is such difference in their financial ability or in the malice which actuated them that the jury may properly fix different penalties, it is error to instruct that the verdict against all must be in the same amount. Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818.

2594. Difficulty of assessment no excuse—Where plaintiff has suffered from the wrongful act of the defendant and from other causes, mere difficulty in determining the amount of the loss due to the act of the defendant is no reason for denying plaintiff substantial damages. In such cases a reasonably accurate approximation is sufficient. Mathematical certainty is not essential. The jury must be given considerable latitude in which to exercise their best judgment. Watre v. Great Northern Ry. Co., 127 Minn. 118, 149 N. W. 18.

(12) Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518. See Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

EXCESSIVE AND INADEQUATE DAMAGES

2595. Precedents—Change in purchasing power of money—In considering precedents it is permissible to take into consideration changes in the purchasing power of money. Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

2596. Held excessive—(14) Burnside v. Minneapolis & St. L. R. Co., 110 Minn. 401, 125 N. W. 895 (shipper of stock—intense pain—passed blood from bladder for four days and from bowels for four months—right shoulder dislocated and some of the bones thereof broken—ligaments of shoulder torn—probable permanent injuries to hand and arm—no complete recovery for two or three years, if at all—verdict, $8,500—reduced by trial court to $5,500); Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389 (workman fell from bridge eighty feet and was seriously injured—verdict, $12,000—new trial granted); Schwartzbauer v. Great Northern Ry. Co., 112 Minn. 356, 128 N. W. 286 (fireman on locomotive—thrown by an explosion through side entrance of engine or in his excitement jumped—train running twenty miles an hour—unconscious for several hours—eyes injured—traumatic neurosis—ultimate recovery probable—verdict, $12,000—reduced to $8,000 on appeal); Clark v. Scandinavian-American Bank, 113 Minn. 93, 128 Minn. 1114 (woman forty-eight years old—fell to floor in stepping from a passenger elevator—verdict, $2,417—reduced to $1,500); Denchfield v. Minneapolis etc. Ry. Co., 114 Minn. 58, 130 N. W. 551 (helper in roundhouse twenty-eight years old—fracture of one of the bones of leg—seven months later at time of trial knee and ankle were stiff—recovery of use of leg probable in a few months—verdict, $4,100—reduced on appeal to $3,000); Lando v. Great Northern Ry. Co., 114 Minn. 162, 130 N. W. 553 (drummer thirty-eight years old—thrown from seat in railway wreck—shaken up and back stiff—verdict, $6,500—new trial granted on appeal); Johnson v. Finch, Van Slyck & McConville, 115 Minn. 252, 132 N. W. 276 (man twenty-five years old employed in packing and shipping merchandise—body caught in elevator and seriously injured—verdict, $10,000—reduced by trial court to $9,000); Buckman v. St. Paul City Ry. Co., 115 Minn. 488, 132 N. W. 992 (woman thrown to floor in street car—verdict, $450—reduced by trial court to $300); Brookman v. Chicago, G. W. R. Co., 116 Minn. 409, 133 N. W. 969 (brakeman—both bones of leg broken—bones failed to unite—inflammation—running fistules—further surgical operations probably necessary—amputation possibly necessary—leg permanently useless—verdict, $11,916—reduced by trial court to $8,000); Landro v. Great Northern Ry. Co., 117 Minn. 306, 135 N. W. 991 (drummer thirty-eight years old—dislocation of sacro-iliac joint—capacity to walk and do physical work impaired—verdict, $12,500—reduced on appeal to $8,000);

Wiggin v. Northwest Paper Co., 119 Minn. 273, 137 N. W. 1113 (helper to millwright—injuries severe but not permanent—great pain—special damages amounting to $200—verdict, $1,000—reduced to $750); Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115 (loss of thumb of right hand—verdict, $6,000—reduced by trial court to $4,500—supreme court evenly divided as to whether this was not excessive); Williams v. Dickson, 122 Minn. 49, 141 N. W. 849 (washwoman fifty years old—fracture of three ribs—much pain—unable to work for more than seven months—verdict for $1,000 reduced to $750); Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466 (railroad employee engaged in keeping semaphore appliances in order—loss of sight in one eye—fracture of jaw bone—permanent disfigurement of face—teeth remaining out of alignment—pain a year after accident—verdict, $11,375—reduced by trial court to $9,000); Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745 (woman jumped from carriage and sustained a compound Potts fracture of the left ankle—good recovery—leg not shortened—ankle weak—verdict, $5,000—reduced on appeal to $3,000); Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772 (locomotive engineer incapacitated for his employment—verdict, $16,500—reduced to $12,000); Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40 (farm laborer twenty-seven years old—loss of right arm and leg and several teeth—other minor injuries—full recovery of general health—verdict, $30,316.67—reduced to $25,000); Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626 (farmer forty-eight years old—injury requiring amputation of left foot—verdict, $15,000—reduced on appeal to $12,000); Mark v. Fink, 125 Minn. 401, 147 N. W. 279 (grocer—permanent rupture—earning capacity not interfered with—verdict for $5,000—reduced on appeal to $3,000); Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938 (member of dredging crew—muscles of left leg torn—necessary skin grafting—external hamstring muscle destroyed—permanent weakness of leg—partial paralysis of muscles—in hospital five months—verdict, $11,337—reduced to $8,500 on appeal); Peery v. Illinois Central R. Co., 128 Minn. 119, 150 N. W. 382 (conductor of freight train thirty-eight years old—earning $125 a month—height reduced two inches—forward curvature and stiffness of the upper portions of the spine and neck, resulting in a permanent stoop—stiffness in right shoulder joint, resulting in inability to raise arm—conditions permanent—idle for over two years at time of trial—verdict, $12,000—reduced by trial court to $9,000); Padrick v. Great Northern Ry. Co., 128 Minn. 228, 150 N. W. 807 (express messenger thirty-three years old—injury to spinal cord—permanently crippled for life and almost helpless—large part of body permanently paralyzed—severe pain—verdict, $35,000—reduced on appeal to $30,000); Quinn v. St. Paul Boiler & Mfg. Co., 128 Minn. 270, 150 N. W. 919 (common laborer forty-nine years old—neck of femur

of right leg fractured—slight fracture of shoulder joint—leg shortened about an inch—use of leg and arm somewhat impaired permanently—verdict, $9,850—reduced on appeal to $7,000); Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922 (switching foreman twenty-six years old—left leg necessarily amputated within two inches of hip joint—artificial leg impossible—several operations—nerve tumors—intense pain—further operations necessary—verdict, $35,000—reduced to $30,000); Stash v. Great Northern Ry. Co., 128 Minn. 329, 151 N. W. 124 (railroad truckman twenty-four years old—fracture of kneecap—several operations—confined to bed three months—intense pain—permanent stiffness—hospital bills amounting to $577—physician's fee, $750—verdict, $7,000—reduced by trial court to $6,000); Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177 (sectionman hit by horse thrown by passing train—verdict, $5,000—reduced by trial court to $3,500); Reick v. Great Northern Ry. Co., 129 Minn. 14, 151 N. W. 408 (driver of ice wagon—serious injury to knee—possibility of permanent stiffness—verdict, $4,225—reduced by trial court to $3,500); Brennan v. Minnesota, D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611 (boy six years old—both bones of leg broken two inches above ankle—leg slightly bowed and shortened about half an inch—bones on instep crushed or broken—ankylosis—instep permanently stiffened—foot permanently deformed—will always limp in walking—verdict, $6,225—reduced on appeal to $5,000); Knapp v. Great Northern Ry. Co., 130 Minn. 405, 153 N. W. 848 (station agent sixty years old—loss of hand—verdict reduced to $10,000 by trial court and sustained on appeal); Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267 (boiler maker thirty-one years old—injuries serious—verdict, $9,015—reduced by trial court to $7,000); Zuponcic v. Val Blatz Brewing Co., 131 Minn. ——, 154 N. W. 790 (girl nine years old—leg broken between knee and ankle—verdict, $750—reduced to $500); Donovan v. Tilden Produce Co., 131 Minn. ——, 155 N. W. 104 (woman forty-four years old—struck back of neck—neurasthenia—some of the ailments alleged afflicted her long prior to the accident—verdict, $8,871—reduced on appeal to $5,000). See § 2617.

2597. Held not excessive—(15) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987 (laborer—loss of leg—verdict, $11,000); Hawkins v. Great Northern Ry. Co., 110 Minn. 532, 126 N. W. 1134 (railway mail agent—verdict, $2,328.25); Campbell v. Duluth & N. E. R. Co., 111 Minn. 410, 127 N. W. 413 (woman thrown from seat in railway car—nervous disorders—verdict, $2,500); Blomquist v. Minneapolis Furniture Co., 112 Minn. 143, 127 N. W. 481 (feeder on a planing machine—board kicked back and struck plaintiff on the right side of his abdomen—diseased vermiform appendix—aggravation of diseased condition—hospital expenses $500—verdict, $1,900); Simpson v. Great

Northern Ry. Co., 112 Minn. 268, 127 N. W. 1124 (boilermaker—rib broken—severe strain of back disabling from manual labor—injuries practically permanent—verdict, $3,500); Hoffer v. Powers, 112 Minn. 409, 128 N. W. 299 (boy seventeen years old—thumb and index finger smashed and rendered useless—verdict for $1,500 in action by boy and for $400 in action by father); Patzke v. Minneapolis & St. L. R. Co., 113 Minn. 168, 129 N. W. 124 (woman twenty years old—injuries to arm, hip, and leg—partially paralyzed—unable to walk—helpless cripple for life—verdict, $15,000); Kitman v. Chicago, B. & Q. R. Co., 113 Minn. 350, 129 N. W. 844 (locomotive fireman—nervous disorders—permanently incapacitated for any serious work—verdict, $11,000); Ward v. Meeds, 114 Minn. 18, 130 N. W. 2 (girl seventeen years old—strong and healthy—kneecap broken and collar bone dislocated—unable to work—suffered pain all the time for six months up to time of trial—verdict, $3,000); Walker v. Duluth St. Ry. Co., 114 Minn. 238, 130 N. W. 1026 (man seventy-eight years old—simple fracture of leg near hip joint—verdict, $3,355); Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375 (brakeman—totally deaf in one ear and hearing of other ear impaired—knee stiff and swollen several months after accident—use of leg considerably impaired—tenderness in back—injury to nerves running down left arm—condition growing worse at time of trial—verdict, $7,400); Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472 (common laborer forty-eight years old earning fifty dollars a month—nine months after accident unable to work—one-half of physical efficiency lost—verdict, $4,225); Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643 (operator of slasher in saw-mill—seventeen years old—left foot so mangled that amputation was necessary—verdict, $13,750); Whitmore v. Oliver Iron Mining Co., 114 Minn. 532, 131 N. W. 1135 (fireman on locomotive—loss of leg between ankle and knee—verdict, $10,000); La Doucre v. Nickel, 115 Minn. 40, 131 N. W. 852 (riveter on structural iron work—hit by can on hip—injury to nerves of hip—probable recovery in one or two years—had been unable to work six months prior to trial—verdict, $3,000); Senro v. Chicago & N. W. Ry. Co., 115 Minn. 110, 131 N. W. 1011 (common laborer in roundhouse—burned in explosion of boiler of stationary engine—verdict, $1,999); Flygren v. Chicago etc. Ry. Co., 115 Minn. 197, 132 N. W. 10 (laborer fifty-seven years old run over by train—head cut in several places—both collar bones broken—injuries severe—verdict, $8,000); Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6 (common laborer twenty-five years old—earning $52 a month—arm torn from socket—permanently crippled—never able again to do any remunerative work—verdict, $15,000); Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 132 N. W. 333 (common laborer—caught in machinery—revolved around shaft—serious and permanent injuries

to head, spine and other parts of body—verdict, $7,000); Lamberson v. Whitcomb, 115 Minn. 495, 132 N. W. 991 (fall due to defective sidewalk—arm broken—shoulder claimed to be dislocated—verdict, $1,000); Gobershock v. McLeod County Tel. Co., 115 Minn. 529, 131 N. W. 1133 (freight conductor—injury to eye from contact with wire of telephone company—out of employment for about a year—verdict, $3,000); Murphy v. Great Northern Ry. Co., 115 Minn. 539, 132 N. W. 750 (common laborer twenty-seven years old—painful and serious injury to right testicle—improbable that he will ever recover from effects of injury—health, happiness and ability to do manual labor permanently and seriously impaired—verdict, $5,000); Gibson v. Chicago, G. W. R. Co., 117 Minn. 143, 134 N. W. 516 (brakeman thirty-nine years old—loss of leg below knee without unusual suffering—unable to pursue calling in future—verdict $12,500); McMahon v. Illinois Central R. Co., 119 Minn. 1, 148 N. W. 446 (brakeman—loss of both arms—virtual loss of a leg—verdict, $39,000); Johnson v. Forrestal, 119 Minn. 202, 137 N. W. 1095 (fireman twenty-two years old—severely scalded—injuries painful and serious—verdict, $2,900); Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693 (farmer—rib broken—serious injury to back and hip bone—severe pain—confined to bed two weeks—unable to do any work at time of trial—weakness and hardening of tissues probable—great future pain probable—verdict, $2,450); Pylaczinski v. Great Northern Ry. Co., 120 Minn. 74, 139 N. W. 147 (sectionman—loss of forefinger on right hand—verdict, $500); Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616 (girl seven years old—fracture of left thigh bone—permanent shortening of leg—curvature of spine—impairment of general health—verdict, $2,500); Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613 (miller about fifty years old—leg near hip broken and severely injured—leg shortened an inch and a quarter—wasting of muscles—tilting of pelvis—enlargement of anterior portion of thigh—great pain likely to continue—verdict, $4,158 including $750 for expenses); Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611 (collision with automobile—leg broken—taken to hospital—verdict, $1,200); McLaren v. Great Northern Ry. Co., 120 Minn. 531, 139 N. W. 621 (farmer—traumatic neurosis—recovery probable within two years—verdict, $2,000); Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300 (brakeman twenty-five years old—loss of left leg eight inches below the knee and all that part of the right foot in front of the heel—great pain—cripple for life—verdict, $24,750); Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795 (collision between street car and automobile—automobile demolished—plaintiff seriously injured—verdict, $5,835); Bartnes v. Pittsburgh Iron Ore Co., 123 Minn. 131, 143 N. W. 117 (woman twenty years old—skull fractured—face cut and bruised—permanently disfig-

ured—great pain—verdict, $7,000); Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322 (caretaker of shipment of live poultry—thirty years old—in good health—thrown to floor of car—serious complications ensued resulting in his death after verdict for $16,000 in his favor); Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149 (woman thrown from seat in passenger car to floor—internal injuries probably curable by a major surgical operation—not bound to submit to operation—verdict, $1,900); Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431 (painter forty-four years old—compound dislocation of the left ankle joint—slight fracture of the lower end of the tibia—bones of leg protruded through the skin—foot turned to inner side of leg—three operations necessary—leg and foot in cast for two months—plaintiff in bed about two months—ankle joint probably permanently stiff—bones of foot and bone of tibia fused—earning capacity as painter probably permanently impaired—verdict, $4,000); Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462 (man seventy-two years old—fracture of hip and two ribs—false joint—misplaced position of leg—leg shortened—after two years unable to walk without crutches—injuries painful—verdict, $2,500); Marfia v. Great Northern Ry. Co., 124 Minn. 466, 145 N. W. 385 (common laborer twenty-nine years old—leg broken and permanently shortened one and one quarter inches—bones of leg out of alignment—leg permanently weakened and likely to cause intermittent pain throughout life—verdict, $5,000); McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613 (brakeman—thumb permanently injured and rendered practically worthless—verdict, $1,500); Anderson v. Wood, 125 Minn. 102, 145 N. W. 791 (piano salesman and musician—pipe organist—forty-four years old—severe injuries to muscles of one leg above knee—no bones broken—power of leg permanently impaired—hernia or aggravation of existing one—neurasthenic conditions—verdict, $5,960); Weide v. St. Paul, 126 Minn. 491, 148 N. W. 304 (woman twenty-two years old injured by falling down embankment along sidewalk—nervous shock—nervous convulsions—major hysteria, epileptiform in character—dizziness, wasting of flesh, weakness—some pain—unable to work for several months—fair recovery probable—verdict, $3,000); Wendt v. Bowman, 126 Minn. 509, 148 N. W. 568 (woman twenty-six years old—injury necessitated surgical operation—operation disclosed that her bowels were floating in pus, that a fallopian tube was diseased, and that she was suffering from peritonitis—not long after phlebitis and pneumonia supervened—evidence justified verdict that these diseases resulted from the injury—verdict for $6,182); O'Brien v. Great Northern Ry. Co., 127 Minn. 87, 148 N. W. 893 (switchman twenty-nine years old—earning $105 a month—loss of two teeth—serious ankle sprain—aggravation of appendical trouble—alleged injury to back—verdict $2,050); Snyder

v. Great Northern Ry. Co., 127 Minn. 518, 148 N. W. 617 (brakeman thirty-seven years old—hernia curable only by an operation—lame back—nervous debility—dizzy spells—unable to work for several months—verdict, $1,750); Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175 (carpenter thirty-five years old—loss of little finger on left hand at knuckle joint and the next finger at the second joint—left handed—verdict, $2,000); Arveson v. Boston Coal, Coke & Wharf Co., 128 Minn. 178, 150 N. W. 810 (oiler on coal dock—compound fracture of the upper part of right thigh—bones protruded and muscles separated—comminuted fracture of leg below knee—much hemorrhage and sloughing of muscles—infection—large pieces of muscle came out—leg shortened two and one-half inches—intense suffering—never able to resume occupation or do other heavy work—leg practically useless—verdict, $11,000); Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804 (girl seventeen years old—right hand and forearm severely burned—skin grafting necessary—hand and forearm permanently useless and frightfully disfigured—verdict, $12,000); Daly v. Curry, 128 Minn. 449, 151 N. W. 274 (electrician thirty-six years old—earning $110 to $130 a month—main bone of leg fractured between ankle and knee and small one in two places—wound eight inches long on thigh—several operations and others probable—inflammation of shoulder joint—sprain in back and hip—partial loss of ankle motion and power over great toe—flat-foot—crutches necessary—hospital expenses $70—physician's fees $700 or $800—verdict, $6,000); Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894 (boy twelve years old—loss of both legs between ankle and knee—verdict, $22,500); Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117 (drummer sixty-three years old—thrown violently to floor of caboose—head injured—hearing impaired—verdict, $1,750); Genereau v. Duluth, 131 Minn. ——, 154 N. W. 664 (woman fifty-four years old—hip broken near socket—lameness permanent—crutches necessary—verdict, $3,575); Cherpeski v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 943 (section foreman—rupture—permanent injury to sacroiliac joint—hemorrhoids—verdict, $4,500); Armstrong v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1075 (brakeman—permanent disability of left arm and shoulder disabling him from following his occupation as a brakeman—verdict, $4,250). See § 2617; Note, L. R. A. 1915F, 30.

DANCE HOUSE—See Disorderly House, 2752a.

DEAD BODIES

2599. Right to possession—Autopsy—(20) See Johnson v. Banker's Mutual Casualty Co., 129 Minn. 18, 151 N. W. 413 (widow having control of body of her dead husband held the proper person on whom to make a demand for an autopsy); Note, 75 Am. St. Rep. 424; L. R. A. 1915B, 519 (who may maintain action for mutilation).

DEATH BY WRONGFUL ACT

2600. Right of action statutory—(21) Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255. See comments on the common-law rule in Pollock, Genius of the Common Law, 118. See State v. District Court, 131 Minn. ——, 154 N. W. 661 (a new cause of action—law of date of death governs). See L. R. A. 1915E, 1104.

2603. Jurisdiction—Conflict of laws—An action for damages for a death resulting from a negligent act committed in another state is based upon the statute of the state in which the cause of action arose, and the time within which such action may be brought is governed by the statutes of such state. The time at which such action is deemed as commenced and all other matters pertaining to procedure are determined and governed exclusively by the law of the forum. Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

A cause of action for death by wrongful act survives under the laws of Iowa (Code Iowa 1897, § 3443), belongs to the estate of the person killed, and the administrator of his estate may maintain an action to recover thereon. Having the right of action in that state, the administrator duly appointed under the laws thereof may maintain the action in this state. Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729. See Kellogg v. Chicago etc. Ry. Co., 126 Minn. 31, 147 N. W. 667.

(29) Vander Wegen v. Great Northern Ry. Co., 114 Minn. 118, 130 N. W. 70; Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942. See Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172.

2605. Who may be sued—A municipality may be sued under the statute. Keever v. Mankato, 113 Minn. 55, 129 N. W. 158, 775.

All persons whose wrongful act contributed to cause the death may be joined as defendants. Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796.

2606. For what cause of death action will lie—(35) Michigan Central R. Co. v. Vreeland, 227 U. S. 59.

2607. Who may maintain actions—The probate court has jurisdiction to appoint an administrator for the sole purpose of enforcing a claim under the statute. Hutchins v. St. Paul etc. Ry. Co., 44 Minn. 5, 46 N. W. 79; Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

(36) Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255; Fithian v. St. Louis etc. Ry. Co., 188 Fed. 842.

(37) Castigliano v. Great Northern Ry. Co., 129 Minn. 279, 152 N. W. 413.

2608. Who are beneficiaries—Aliens—An alien is entitled to the benefits of the federal Employer's Liability Act. Govern v. Philadelphia & Reading R. Co., 235 U. S. 389; Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385; Lundeen v. Great Northern Ry. Co., 128 Minn. 332, 150 N. W. 1088.

(41) Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

2609. Amount recovered not general asset of estate—(43) Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

2610. Distribution of funds—The commencement of an action is not necessary to confer on the district court jurisdiction for the distribution of funds received by executors and administrators for the wrongful killing of a decedent. Executors and administrators, who receive money in settlement of damages for the wrongful killing of a decedent, are officers of the court, and may be required to account for and distribute the fund in accordance with the rules of the court. State v. District Court, 114 Minn. 364, 131 N. W. 381.

(44) See McVeigh v. Minneapolis etc. Ry. Co., 110 Minn. 184, 124 N. W. 971; Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255; Note, 4 L. R. A. (N. S.) 814.

2611. Compromise and settlement—Release—The right of action given by section 4503, R. L. 1905 (G. S. 1913, § 8175), for the wrongful death of a person, creates one single, indivisible cause of action; and a recovery against, or settlement with, one of the wrongdoers, is a bar to a subsequent action against others whose wrongful conduct may have contributed to cause the death. Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796.

In an action under the statute by an administrator to recover for loss of services for negligence in causing the death of an employee, it is no defense that the defendant had settled with one of the next of kin, prior to the appointment of the administratrix, or the commencement of the action. The proper practice in such case is for the defendant to apply to the trial court and have that portion of the fund which would otherwise be distributed to the heir with whom settlement was made

applied pro tanto in satisfaction of the judgment. McVeigh v. Minneapolis etc. Ry. Co., 110 Minn. 184, 124 N. W. 971; Id., 113 Minn. 450, 129 N. W. 852.

A settlement by a special administrator appointed without any petition to the probate court held void and not binding on the next of kin. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

Evidence held not to show that a mother had authorized, acquiesced in, or ratified a settlement with her husband. McVeigh v. Minneapolis etc. Ry. Co., 113 Minn. 450, 129 N. W. 852.

Effect of a release by the decedent. 28 Harv. L. Rev. 802.

(45) Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

(46) Castigliano v. Great Northern Ry. Co., 129 Minn. 279, 152 N. W. 413 (effect of settlement on attorney's lien); Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300. See Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255 (conversion of funds procured by a settlement—surety on bond liable).

2613. Notice of claim to municipality—A notice of claim is now required by statute to be served upon a municipality before suit under the statute. G. S. 1913, § 1788. See Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 121.

(52) Senecal v. West St. Paul, 111 Minn. 253, 126 N. W. 826.

2614. Limitation of actions—(53) As to whether an action will lie under the statute if the decedent's cause of action was barred at the time of his death, see Kelliher v. New York etc. R. Co., 212 N. Y. 207, 105 N. E. 824; 14 Col. L. Rev. 609.

(54) Casey v. American Bridge Co., 116 Minn. 461, 134 N. W. 111; Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942. See 7 Col. L. Rev. 553.

2615. Pleading—In an action under a foreign statute the law of this state governs as to the sufficiency of pleadings. Vander Wegen v. Great Northern Ry. Co., 114 Minn. 118, 130 N. W. 70.

Necessity of alleging facts to show pecuniary damage to parent under federal act. Garrett v. Louisville & Nashville R. Co., 235 U. S. 308.

(56) Vander Wegen v. Great Northern Ry. Co., 114 Minn. 118, 130 N. W. 70 (action under foreign statute).

(60) Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729.

2616. Defences—Contributory negligence—Presumption of due care—Though contributory negligence on the part of the 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 one for the jury, unless the evidence shows such negligence conclusively. Hendrickson v. Great Northern Ry. Co., 49 Minn. 245, 51 N. W. 1044; Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534; Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180; Griffith v. Great Northern Ry. Co., 113 Minn. 126, 129 N. W. 152; Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856; Knudson v. Great Northern Ry. Co., 114 Minn. 244, 130 N. W. 994; Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752; Anderson v. Duluth & Iron Range R. Co., 116 Minn. 346, 133 N. W. 805; La Pray v. Lavoris Chemical Co., 117 Minn. 152, 134 N. W. 313; Simonson v. Minneapolis etc. Ry. Co., 117 Minn. 243, 135 N. W. 745; Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419; Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945; Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488; Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434; Hutchinson v. Sleepy Eye Tel. Co., 125 Minn. 362, 147 N. W. 279; Rademacher v. Pioneer Tractor Mfg. Co., 127 Minn. 172, 149 N. W. 24; Gillespie v. Great Northern Ry. Co., 127 Minn. 234, 149 N. W. 302; Uggen v. Bazille & Partridge, 127 Minn. 364, 149 N. W. 459; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539; Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137. See § 7032.

The above presumption of due care is of the same force as the ordinary presumption of right conduct, and is not conclusive. It may be overcome by direct evidence or by evidence of facts and circumstances clearly showing a failure to exercise due care. Force and effect will be given the evidence tending to overcome the presumption whether it appears from the plaintiff's case in chief or by that offered by defendant. Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419.

The following instruction is erroneous: "I instruct you upon that point that, where a person is killed by the negligence of another, it cannot be inferred that he was guilty of contributory negligence contributing to his death, unless the undisputed evidence clearly and fully rebuts the presumption that he exercised due care for himself." Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488.

In New York it is held that contributory negligence of a beneficiary does not defeat the action. McKay v. Syracuse Rapid Transit Ry. Co., 208 N. Y. 359, 101 N. E. 885. See 2 Illinois L. Rev. 487; 27 Harv. L. Rev. 87.

Parents of a boy five or six years old held not guilty of contributory negligence in allowing him to go out to play. Decker v. Itasca Paper Co., 111 Minn. 439, 127 N. W. 183.

Desertion of a husband by his wife may defeat her right to recover. See Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660.

A recovery against one of several wrongdoers is a bar to a subsequent

action against others whose wrongful act may have contributed to cause the death. Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796.

It is no defence that decedent was incurably diseased and would have died shortly independent of the accident. McCahill v. N. Y. etc. Co., 201 N. Y. 221, 94 N. E. 617.

(61) Carlson v. Duluth St. Ry. Co., 111 Minn. 244, 126 N. W. 825; Steele v. Red River Lumber Co., 117 Minn. 199, 135 N. W. 389.

2617. Damages—(66) McVeigh v. Minneapolis & Rainy River Ry. Co., 110 Minn. 184, 124 N. W. 971 (decedent left no wife or children—mother and father next of kin—verdict, $1,500—held excessive and new trial granted); Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534 (laborer—industrious—wife and several children—earning $2.50 per day—life expectancy 19 years—verdict for $5,000 sustained); Thomas v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297 (decedent an unmarried man twenty-four years old of good habits and industrious—left father and mother to whose support he contributed—verdict, $5,000—reduced to $3,250 by trial court and its action sustained); Woxland v. Northwestern Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856 (decedent strong, healthy man thirty-eight years old—oiler and watchman in mill—married—wife thirty-two years old in poor health—no children—verdict for $4,500 sustained); McVeigh v. Minneapolis & Rainy River Ry. Co., 113 Minn. 450, 129 N. W. 852 (decedent sober and industrious young man—had contributed liberally to support of parents—verdict for $3,750 sustained); Kerling v. G. W. Van Dusen & Co., 113 Minn. 501, 129 N. W. 1048 (boy seventeen years old—verdict for $5,000 reduced to $3,000); Francoeur v. Gribben Lumber Co., 115 Minn. 200, 132 N. W. 199 (decedent able-bodied workman in lumber yard—earning $2 per day—wife and children—verdict for $5,000 sustained); Healy v. Hoy, 115 Minn. 321, 132 N. W. 208 (decedent a plumber forty-three years old—beneficiary a son seventeen years old—verdict for $3,600 sustained); Erdner v. Chicago & N. W. Ry. Co., 115 Minn. 392, 132 N. W. 339 (decedent a boy sixteen years old—claim that boy's father had abandoned him—verdict for $1,000 sustained); Anderson v. Duluth & Iron Range R. Co., 116 Minn. 346, 133 N. W. 805 (decedent left only brothers and sisters as next of kin—verdict for $2,437.50 reduced by trial court to $2,000—verdict as reduced held liberal on appeal but sustained); Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302 (decedent's mother sixty-seven years old sole next of kin—verdict for $2,000 sustained); Murphy v. Gross, 118 Minn. 311, 136 N. W. 868 (decedent young man nineteen years old—only son—left parents in middle life—had contributed $15 a month to their support—verdict for $3,750 sustained); Lane v. Northern Pacific Ry. Co., 119 Minn. 258, 137 N. W. 1114 (decedent thirty-three years old—driver of automobiles—left a boy and a girl, six and eight years old, living with his di-

vorced wife—earning $75 a month—verdict for $3,750 sustained); Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945 (decedent a man twenty-one years old—unmarried—living and working a farm with parents—giving about $100 a year to his parents—verdict for $3,250 sustained); Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488 (decedent a boy sixteen years old—left a father fifty-seven years old and a mother a little younger—parents in humble circumstances—father a minister—parents liable to be dependent in old age—verdict for $3,000 sustained); Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660 (foreman of switching crew on a railroad—thirty-two years old—earning about $100 a month—left widow thirty years old—verdict $7,500—reduced to $5,000); Lundeen v. Great Northern Ry. Co., 128 Minn. 332, 150 N. W. 1088 (common laborer twenty-three years old—parents only beneficiaries—had assisted them slightly—verdict for $2,000 sustained); Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137 (laborer forty-nine years old—left a widow and child—verdict for $5,000 sustained); Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882 (farmer fifty-one years old—left a wife, a married daughter and a son twenty-two years old—verdict for $7,500 sustained); Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323 (decedent a janitor thirty-eight years old leaving a widow and infant child—verdict for $4,500 sustained).

2617a. Damages under federal act—Survival of cause of action—Under the federal Employer's Liability Act the rule of damages is the same as under our statute. Lundeen v. Great Northern Ry. Co., 128 Minn. 332, 150 N. W. 1088; Michigan Central R. Co. v. Vreeland, 227 U. S. 59. See 26 Harv. L. Rev. 551.

When a person lives an appreciable length of time after receiving an injury through a defendant's negligence, even though in a state of unconsciousness, his cause of action survives under section 9 of the federal Employer's Liability Act. Testimony that plaintiff's intestate, after the injury, moaned and breathed for ten minutes justified the court in submitting the question of the survival of his cause of action to the jury. Capital Trust Co. v. Great Northern Ry. Co., 127 Minn. 144, 149 N. W. 14 (railroad switchman—verdict for $4,462.50 sustained). Deceased was thirty-five years old, a member of a bridge crew of a railroad company, and left a widow and two children. A verdict for $18,000 was held excessive on appeal and reduced to $12,000. Nash v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 957.

The limit placed on the amount of recovery by our statute does not apply to an action under the federal Employer's Liability Act. Nash v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 957.

2619. Evidence as to damages—In an action by a wife, as administratrix of her husband's estate, to recover damages for his death, the

state of the domestic affairs between plaintiff and deceased at or preceding the time of his death, short of desertion by her or forfeiture of her right to support, cannot be inquired into for the purpose of defeating a recovery or reducing the damages. Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660.

2620. Proximate cause—(72) Coultas v. Hennepin Paper Co., 114 Minn. 309, 131 N. W. 319; Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637; Healy v. Hoy, 115 Minn. 321, 132 N. W. 208 (death eight months after accident—pulmonary tuberculosis).

(73) Buckman v. Chicago etc. Ry. Co., 110 Minn. 308, 125 N. W. 263; La Pray v. Lavoris Chemical Co., 117 Minn. 152, 134 N. W. 313.

2621. Substitution of parties—A foreign administrator who has no right to maintain an action for wrongful death in the state of his appointment, nor in the state where the injury occurred, and consequently not in this state, is not aggrieved by an order in a suit brought by him for the benefit of the next of kin, denying his motion to substitute the next of kin as party plaintiff. Kellogg v. Chicago etc. Ry. Co., 126 Minn. 31, 147 N. W. 1667.

DEATH CERTIFICATES—See Health, 4151a.

DEDICATION

BY PLATTING UNDER STATUTE

2628. Effect of platting under statute—A statutory dedication is effective without acceptance by the public. Keyes v. Excelsior, 126 Minn. 456, 148 N. W. 501.

(87) Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096. See Arms v. Owatonna, 117 Minn. 20, 134 N. W. 298; G. S. 1913, § 6855.

(89) G. S. 1913, § 6855.

2629. Fee does not pass to public—A statutory dedication to the public does not pass the fee unless so expressed. Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096; White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 641, 125 N. W. 262.

2631. Compliance with statute—(92) See Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

2632. Acknowledgment—(93) Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150 (failure of notary to attach his seal—curative act).

2635. Location of lands—Description—A plat sufficiently describes the lands if they can be located by a competent surveyor. Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

2636. Donations must be noted on plat—(97) Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096 (steamboat landing). See G. S. 1913, § 6857.

2639. Revocation—(2) See Keyes v. Excelsior, 126 Minn. 456, 148 N. W. 501.

2641. Construction of plats—(10) Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096 (dedication of levee in town plat—vacation of easement); Barrett v. Perkins, 113 Minn. 480, 130 N. W. 67 (deficiency in area of plat—shortage falls on irregular tract); Keyes v. Excelsior, 126 Minn. 456, 148 N. W. 501 (dedication of street).

2642. Vacation and correction of plats—(11) Balch v. St. Anthony Park West, 129 Minn. 305, 152 N. W. 643 (G. S. 1913, § 6863, deprives the district court of the authority to vacate or alter the public streets or alleys of St. Paul—title of act sustained). See Keyes v. Excelsior, 126 Minn. 456, 148 N. W. 501 (statute held not to prevent a second plat to operate as a dedication of land for a street through land covered by a prior plat).

AT COMMON LAW

2648. Operates by estoppel and not by grant—(38) See, to effect that dedication does not depend upon estoppel, 11 Col. L. Rev. 789.

2652. Platting and sale of lots—(42) Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

2654. Use of land by public on business with owner—(47) State v. Great Northern Ry. Co., 114 Minn. 293, 299, 131 N. W. 330.

2655. Evidence—Sufficiency—(49) Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

(50) State v. Great Northern Ry. Co., 114 Minn. 293, 131 N. W. 330; State v. Great Northern Ry. Co., 119 Minn. 541, 138 N. W. 671.

DEEDS

IN GENERAL

2657. Parties—Blanks—A deed complete and fully executed, save that a blank space for the name of the grantee is not filled out, and delivered to the grantee in this condition, is a nullity until the name of the grantee is inserted; but if the grantee, under express or implied authority from the grantor, inserts his own name in the blank space, the deed becomes operative as a conveyance, without being re-executed or re-acknowledged. Implied authority to the grantee to fill up the blank in such a case is presumed, when the grantor receives and retains the consideration, and delivers the deed to the purchaser fully executed and complete, save in respect to such blank. Such authority need not be in writing. Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095. See Note, 38 L. R. A. (N. S.) 423.

Evidence held to justify a finding that the name of a certain party was not in a deed as a grantee at the time of the delivery of the deed. Nesland v. Eddy, 131 Minn. ——, 154 N. W. 661.

(53) Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

See Digest, § 1731 (capacity of parties); Note, 37 L. R. A. (N. S.) 326.

2660. Signing—(65) See Note, 41 L. R. A. (N. S.) 805.

2661a. Description of land—A description is sufficient if the land can be located on the land by a competent surveyor. See Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

The following description is sufficient: "A portion of the waters of the Otter Tail river * * * leaving at all times in the channel of said river sufficient water for all public and domestic uses." Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198.

See Digest, §§ 1058–1084.

2661b. Mental competency of grantor—A deed, duly witnessed and acknowledged, is proof that whatever title the grantor had and purported to convey vested in the grantee upon the delivery of the deed, without any further testimony as to the mental condition of the grantor. One who seeks to set aside a deed has the burden of proving the facts justifying it. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

2661c. Forgery—Evidence held to show that a deed was a forgery. Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421. See Nesland v. Eddy, 131 Minn. ——, 154 N. W. 661.

DELIVERY AND ACCEPTANCE

2662. Necessity and effect of delivery—Delivery is of the essence of a deed. State v. Young, 23 Minn. 551, 560.

The execution of a deed ordinarily includes its delivery. Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

A deed is "made" or "given" when it is delivered. The title passes then. Underleak v. Scott, 117 Minn. 136, 134 N. W. 731.

A deed takes effect at the time of its delivery and not at the time of its date. Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720.

2663. Presumptions—(76) Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613.

2664. What constitutes delivery—Where the grantor hands a deed to the grantee in order to make delivery, the fact that the deed is thereafter returned to the grantor for safe-keeping and is not recorded until after the death of the grantor does not show conclusively that there was no delivery. Upton v. Merriam, 116 Minn. 358, 133 N. W. 977.

A return of a deed by the grantee to the grantor held not to divest the grantee of his title. Whitman v. Gorman, 126 Minn. 141, 147 N. W. 958.

(77) Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051; Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613; Ziemon v. Mertz, 128 Minn. 535, 150 N. W. 1103 (finding of delivery held not justified by the evidence); O'Rourke v. O'Rourke, 130 Minn. 292, 153 N. W. 607.

2666. Delivery to third party for grantee—(84, 85) Note, 38 L. R. A. (N. S.) 941.

2667. Delivery after death—A deed delivered by the grantor to a third person, to be delivered by him to the grantee after the death of the grantor, the latter reserving no right to control or recall the deed, is valid and vests title in the grantee upon its delivery after the death of the grantor. It is immaterial that the enjoyment of the estate granted is postponed until the death of the grantor, or that the deed expressly reserves a life estate in the grantor, or that the deed is subject to the contingency that the grantee survives the grantor, or to any other contingency, so long as it is one over which the grantor has no control. The grantor in such a deed cannot recall it. It is not testamentary in character. It cannot be invalidated by declarations of the grantor, while in possession after the delivery of the deed to the third person, to the effect that he retains the right to recall the deed. Haeg v. Haeg, 53 Minn. 33, 55 N. W. 1114; Logenfield v. Richter, 60 Minn. 49, 53, 61 N. W. 826; Wicklund v. Lindquist, 102 Minn. 321, 113 N. W. 631; Thomas v. Williams, 105 Minn. 88, 117 N. W. 155; Ekblaw v. Nelson, 124 Minn.

335, 144 N. W. 1094; Dickson v. Miller, 124 Minn. 346, 145 N. W. 112; Wortz v. Wortz, 128 Minn. 251, 150 N. W. 809; Innes v. Potter, 130 Minn. 320, 153 N. W. 604. See 14 Col. L. Rev. 403, 452.

A deed deposited with a third party for delivery to the grantee after the death of the grantor, but which the grantor reserves the right to recall at any time, conveys no title because no valid delivery has been made. Wortz v. Wortz, 128 Minn. 251, 150 N. W. 809.

2668. Recording—(89) Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613. See Note, 38 L. R. A. (N. S.) 941.

2669. Effect of return to grantor—Where a deed to certain land was executed and delivered, but not recorded, it was held that a return of the deed by the grantee to the grantor would not reinvest the grantor with the title. Green v. Hayes, 120 Minn. 201, 139 N. W. 139.

EXCEPTIONS AND RESERVATIONS

2671. Definitions and distinctions—(95) Carlson v. Minn. Land & Colonization Co., 113 Minn. 361, 129 N. W. 768.

2673. Reservations—A reservation of lands containing coal or iron and surface rights for mining purposes. Carlson v. Minn. Land & Colonization Co., 113 Minn. 361, 129 N. W. 768.

A reservation of a life estate in the land conveyed and the use of the rents and profits during the life of the grantor. Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613.

(9) Buck v. Walker, 115 Minn. 239, 132 N. W. 205. See Digest, § 6123.

2674. Construction—The proper rule for the construction of a deed of conveyance which contains an exception or reservation is to ascertain the intention of the parties by a consideration of the entire instrument, the purpose of introducing the exception or reservation, its nature, and the attending facts and circumstances surrounding the parties at the time of its execution. Carlson v. Minn. Land & Colonization Co., 113 Minn. 361, 129 N. W. 768.

CONDITIONS

2675. Conditions precedent and subsequent—There is a radical difference between a conditional delivery, which is not to become complete and effective until the happening of some condition precedent, and a complete delivery which is sought to be defeated by subsequent contingencies that may or may not arise. In the one case there is no contract until the condition has been complied with. In the other there is a binding contract notwithstanding the happening of the contingency

relied upon to defeat it. Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048. See Note, 102 Am. St. Rep. 366.

(13) Note, 79 Am. St. Rep. 747.

2676. Restrictions on use of property—Covenant against buildings other than dwelling houses held not to forbid apartment house. Minister v. Madison Ave. Building Co., 214 N. Y. 268, 108 N. E. 444.

When the object of a restrictive agreement can no longer be attained it may be terminated. Equity will remove it as a cloud on the title. McArthur v. Hood Rubber Co., 109 N. E. 162 (Mass.). See 29 Harv. L. Rev. 106.

(24) Kettle River Ry. Co. v. Eastern Ry. Co., 41 Minn. 461, 472, 43 N. W. 469 (general discussion of restrictive agreements); Sjoblom v. Mark, 103 Minn. 193, 114 N. W. 746 (covenant against sale of liquor); Velie v. Richardson, 126 Minn. 334, 148 N. W. 286 (building restrictions—dwelling houses of a certain character). See Digest, §§ 2390–2397; 5391.

2677. Conditions for support of grantor for life—(25) McKenzie v. Dunsmore, 114 Minn. 477, 131 N. W. 632; Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871 (immaterial that the grantee is dead and the probate court in administering his estate, has awarded the land to his widow for life, with remainder to their children); O'Rourke v. O'Rourke, 130 Minn. 292, 153 N. W. 607. See Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25; Note, 43 L. R. A. (N. S.) 916; 52 Id. 476.

CONSTRUCTION AND EFFECT

2681. Implied grants—Rents—If A leases property to B and thereafter conveys the same to C, without any reservation of the rents to accrue under the lease, they pass to C by operation of law. Benjamin v. N. W. Fire & Marine Ins. Co., 119 Minn. 27, 137 N. W. 183.

2684. Contract of parties—Notice of terms—No fiduciary relation—There is ordinarily no fiduciary relation between the grantor and grantee. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

2686. Construction—A deed purported to convey the portion of the grantor's land lying west of a designated county road. Its courses and distances and statement of amount conveyed would carry the grant to the east of the road. The cardinal rule of construction of contracts is to give effect to the intention of the parties. In construing a deed with inconsistent descriptions, preference is given to the part most likely to express the intention of the parties, and as to which there is least likelihood of mistake. The reference to the county road as a boundary is held to prevail over courses and distances and figures as to the quantity of land conveyed. If doubt exists as to the meaning of

the language of a deed, reference may be had to the circumstances attending its execution, the parties' practical construction of it, and the previous negotiations of the parties. The evidence as to such matters makes clear the actual intent of these parties to bound their grant by the county road. Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089.

If the description is free from ambiguity the intent of the parties must be derived from the deed itself and not from extrinsic facts. Lavis v. Wilcox, 116 Minn. 187, 133 N. W. 563.

Where there is no ambiguity in the terms of a deed, valid as made, its meaning cannot be varied by a particular purpose or intent existing in the mind of the grantor. White v. Coburn, 114 Minn. 213, 130 N. W. 1028.

The words "the north half," used in the conveyance of part of a platted block of land, mean the half of the block in area lying north of an east and west line drawn through the block, unless the context and surrounding facts require that these words be given a different meaning. Lavis v. Wilcox, 116 Minn. 187, 133 N. W. 563.

Acts of the parties subsequent to the execution of a deed held properly excluded. Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38.

Repugnant clauses. Note, 111 Am. St. Rep. 770.

(34) Carlson v. Minn. Land & Colonization Co., 113 Minn. 361, 129 N. W. 768; Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38. See Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W. 907.

(35) See Digest, §§ 1816–1841, 3397–3407.

(39) Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094.

2688. Passing of interest—Delivery—Contingency—(42) See Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094.

2689. When takes effect—(43) Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720. See Benjamin v. N. W. Fire & Marine Ins. Co., 119 Minn. 27, 137 N. W. 183 (successive leases).

2692a. Deed by life tenant—Estate conveyed—A conveyance made by a tenant for life or years, purporting to grant a greater estate than he possessed or could lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the estate which such tenant could lawfully convey. G. S. 1913, § 6830; Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

2692b. Deed of deposits or strata—The owner of land may convey any part of it. He may convey some particular deposit or stratum and retain the surface, or he may convey a part or all of the mineral strata or deposits and retain the surface. Such strata or deposits are land. Carlson v. Minn. Land & Colonization Co., 113 Minn. 361, 129 N. W. 768.

2693. Estate conveyed—Particular deeds construed—Deed held to reserve a life estate in the land conveyed and the use of the rents and profits during the life of the grantor. Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613; Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094.

A warranty deed containing the provision that the grantor shall remain in full possession and ownership of the premises conveyed during his lifetime, and that the deed should not be recorded until after his death, passed the title to the grantees, subject to an estate for life in the grantor. Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094.

An instrument held not to convey an estate of inheritance or an estate for years. Bowe v. Cole, 129 Minn. 276, 152 N. W. 534.

QUITCLAIM DEEDS

2695. Force and effect—An unrecorded quitclaim deed from plaintiff's grantor to plaintiff, construed together with a contract entered into between them at the same time, constituted plaintiff the agent or attorney of the grantor to conduct litigation, sell the property described in the deed, and divide the proceeds, and did not make plaintiff a bona fide purchaser, or give him a title that can prevail as against the subsequent estoppel of his grantor by the judgment and decision in the former suit. White v. Hewitt, 119 Minn. 340, 138 N. W. 421.

(56) Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

2697. Subsequently acquired title—(70) Note, 35 L. R. A. (N. S.) 1182.

DEGREES OF KINSHIP—See Descent and Distribution, 2722a.

DEPOSITIONS

2705a. Time of taking—Joinder of issue—In the case of an appeal from the probate court to the district court, the deposition of a witness to be used on the trial thereof in the latter court may properly be taken before issue is joined in the district court by the usual pleadings made up pursuant to an order of the court. Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

2706. Use as evidence—Objections—Objection to the admissibility of evidence in a deposition may be taken for the first time on the trial. Jarecki Mfg. Co. v. Ryan, 114 Minn. 38, 129 N. W. 1055, 130 N. W. 948.

Where the parties have stipulated that a deposition may be read in evidence on the trial it is not necessary to prove that at the time it was

taken the statutory grounds therefor existed. Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375.

It is not proper practice, in the cross-examination of a party, for the counsel of the adverse party to read questions and answers from a deposition of a witness for the latter party and ask the party cross-examined if such answers are true. Brown v. Andrews, 116 Minn. 150, 133 N. W. 568.

It has been held not error for the court to refuse to allow to go to the jury-room a letter attached to a deposition, the letter being read to the jury instead. Ruder v. National Council, 124 Minn. 431, 145 N. W. 118.

(16) See Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416.

2709. Taking under stipulation—(28) Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375 (stipulation for admission in evidence).

2715. Informalities—Motion to suppress—Conceding that the refusal of a witness to answer material questions asked on cross-examination is ground for suppressing the deposition of such witness, the motion to suppress must be made within ten days after notice of the return of the deposition, as provided by G. S. 1913, § 8393. Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416.

DEPOSITS IN COURT

2716a. Effect—Judgment—Defendants having tendered payment of the full amount called for in a written contract, and, after its refusal, having paid the full amount into court, cannot attack the judgment rendered therefor on the ground that the full amount was not then due. Moriarty v. Maloney, 121 Minn. 285, 141 N. W. 186.

2717a. Order for payment—Where money is deposited in court to abide the event of an action the successful party may obtain it by an order of court directing the clerk to pay it to him. The application for the order should be on notice. Spear v. Johnson, 111 Minn. 74, 126 N. W. 402.

DESCENT AND DISTRIBUTION

IN GENERAL

2719. Statutory—Inheritance is not a natural or absolute right, but the creature of statute, and is governed by the lex rei sitae. Jones v. Jones, 234 U. S. 615.

2720. Presumption of intestacy—(67) Barnes v. Gunter, 111 Minn. 383, 394, 127 N. W. 398.

2720a. Presumption of heirs—There is a presumption that a decedent left heirs and that his property descended to them. Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

2721a. Disinheriting children—A parent may by will entirely disinherit a child. The rights of a pretermitted child to inherit under G. S. 1913, § 7260, must be enforced in the probate court, and if not so enforced are barred by the final decree of distribution in that court. Odenbreit v. Utheim, 131 Minn. ——, 154 N. W. 741. See § 10269.

2722. When title passes—(69) Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170; Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171. See Digest, § 3567.

(71) Note, 112 Am. St. Rep. 727.

2722a. Degree of kinship—How computed—Statute—The rights of a surviving spouse as statutory heir under R. L. 1905, § 3648 (G. S. 1913, § 7238), are not affected by section 3652 (7242), relating to computation of "degrees of kindred," and excluding those not of the blood of the ancestor from inheritance where the property is ancestral. Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

2723. Contracts—Renunciation—Religious orders—A religious order may inherit by virtue of an agreement among its members to live in community and renounce for the benefit of the order individual rights of property, if liberty to withdraw from the order is retained and the community organization is authorized by statute. Order of St. Benedict v. Steinhauser, 234 U. S. 640.

2724. Inheritance by murderer—It is now settled in this state the murderer may inherit from his victim, and cannot be charged as a trustee ex maleficio. Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292. See 24 Harv. L. Rev. 227; 27 Id. 280; 28 Id. 426; 15 Col. L. Rev. 260.

2724a. Inheritance by adopted children—Section 3616, R. L. 1905 (G. S. 1913, § 7156), providing that an adopted child "shall inherit from his adopting parents or their relatives the same as though he were the legitimate child of such parents," applies to all adopted children, whether

adopted prior or subsequent to the passage of such statute. The statute regulates the heirship of adopted children, and acts prospectively upon rights accruing through the death of adoptive parents after the passage of the law. Sorenson v. Rasmussen, 114 Minn. 324, 131 N. W. 325.

A child adopted in another state by agreement held entitled to inherit from the adopting parent. Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

2724b. Advancements—The doctrine of advancements, as regulated and controlled by G. S. 1913, § 7404, applies to intestate estates only; it has no application where the property of the decedent is fully disposed of by his last will and testament. Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785.

DESCENT OF REALTY OTHER THAN HOMESTEAD

2726. To surviving spouse—(79) Johrden v. Pond, 126 Minn. 247, 148 N. W. 112. See § 4220.

2726a. Same—Non-residents—The surviving spouse of a non-resident testator may, though also a non-resident, renounce the will and claim as statutory heir. Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

DISTRIBUTION OF PERSONALTY

2731. Wearing apparel, furniture, etc. and $500 to surviving spouse—Under section 3653, R. L. 1905 (G. S. 1913, § 7243), the allowance to the widow of the personal wearing apparel and a limited amount of the household goods from the husband's estate is confined to the articles specified, and she has no right to select money or other property in lieu thereof. The widow of a non-resident decedent is entitled to the statutory allowance out of the property of her husband found in this state, where it appears that her husband left no other property whatever. Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428.

Under subdivision 1, R. L. 1905, § 3653 (G. S. 1913, § 7243), the widow is entitled to the allowance of personal property to the amount of $500 provided thereby, though she assents to her husband's will at the time of its execution and accepts its provisions in lieu of the provisions made for her by law; the subdivision cited providing that she shall receive such allowance as well when she takes the provisions made by her husband's will as when he dies intestate. Horbach v. Horbach, 127 Minn. 223, 149 N. W. 303.

The right of a surviving spouse to select personal property to the value of five hundred dollars, if not exercised by him in his lifetime, may be exercised by his administrator. Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

(99) Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

2732. Allowance to widow and children pending administration—(2) See Laws 1915, c. 331.

(4) Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498.

LIABILITY OF HEIRS

2734. Action against distributees on debts of decedent—Statute—(9) Note, 112 Am. St. Rep. 1017.

2734a. Accounting between heirs—(01) Hart v. Hart, 110 Minn. 478, 126 N. W. 133.

2734b. Implied or constructive trusts—An heir takes subject to an implied or constructive trust. Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

DICTOGRAPH—See Evidence, 3346.

DISCOVERY

2735. Inspection of documents—Statute—(24) Note, 41 Am. St. Rep. 388.

(25) Kaiser v. Chicago etc. Ry. Co., 152 Fed. 1013 (U. S. R. S. § 724, controls federal courts and they cannot order production of papers before trial); Carpenter v. Winn, 221 U. S. 533 (id.).

DISMISSAL AND NONSUIT

2741. Dismissal by plaintiff before trial—Statute—The proviso against more than one dismissal is not applicable where one of two dismissals is of an action in another state. Brennan v. Keating, 128 Minn. 49, 150 N. W. 397.

The statute applies to condemnation proceedings. Minneapolis etc. Traction Co. v. Goodspeed, 128 Minn. 66, 150 N. W. 222.

(47) Gordon v. New England Furniture & Carpet Co., 117 Minn. 525, 135 N. W. 1135.

(50) Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

2743a. On call of calendar—Submission of issue by consent—The trial judge may, upon a calendar motion, determine the validity of an instrument, executed by plaintiff, purporting to release defendant from liability and directing a dismissal of the action, if all the parties consent to the procedure and voluntarily submit to the court the issue involved. Mah-Eng-Aunce v. Anundsen, 110 Minn. 488, 126 N. W. 136.

2744. Voluntary nonsuit—(75) See Gordon v. New England Furniture & Carpet Co., 117 Minn. 525, 135 N. W. 1135.

2745. Dismissal on failure of plaintiff to appear—A judgment of dismissal entered on motion of defendant for failure of prosecution held proper. Lovell v. St. Clair, 126 Minn. 108, 147 N. W. 822.

2748a. Collusive dismissal—Vacation—Ordinarily the plaintiff has the absolute right to dismiss his action, but a plaintiff who acts in a fiduciary capacity has not such absolute right. If he fails to act in good faith toward those whom he serves, and acts in collusion with the defendant, the dismissal may be set aside. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

2749. Who may move for dismissal—The board of directors of a corporation may, under ordinary circumstances, control an action brought by the corporation, and may dismiss it without consulting the stockholders, and its action is, in ordinary cases, conclusive. But the board of directors has no right to dismiss an action through collusion with defendant, and, if it does so, the dismissal may be set aside at the instance of stockholders, the action reinstated, and the stockholders permitted to become parties and to continue the action, when such course is necessary to save or protect their substantial rights. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818. See 14 Col. L. Rev. 83.

(2) See National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

2750. Effect—A judgment of dismissal ends the action. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

DISORDERLY HOUSE

2752. Definitions—(7) See State v. McDonald, 121 Minn. 207, 141 N. W. 110; Note, 134 Am. St. Rep. 819.

2752a. Dance house—Minors—The defendants were convicted of the offence of permitting, contrary to R. L. 1905, § 4936 (G. S. 1913, § 8670), a person under the age of twenty-one years to be and remain in a dance house conducted by them. Held, that the statute is a proper exercise of the police power; that it is not class legislation; that a "dance house," as the term is used in the statute, is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation; that the complaint states a cause of action; that the trial court did not err in its instructions to the jury; and that the verdict is sustained by the evidence. State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068.

2752b. Houses of prostitution—Abatement—Laws 1913, c. 562, providing for the abatement of houses of prostitution, and for the forfeiture of property used therein, has been sustained against various constitutional objections. State v. New England Furniture & Carpet Co., 126 Minn. 78, 147 N. W. 951; State v. Ryder, 126 Minn. 95, 147 N. W. 953; State v. Stroup, 131 Minn. ——, 155 N. W. 90.

Under the act of 1913 the owner is not subject to the provision that the premises shall not be used for any purpose for a year unless he had notice of the maintenance of a nuisance on the premises. The owner is charged with the knowledge of his agent in charge of the premises. Evidence of reputation is admissible to charge the owner with knowledge. State v. Stroup, 131 Minn. ——, 155 N. W. 90.

In an action under G. S. 1913, §§ 8717–8726, evidence of the general reputation of the premises is admissible upon the question of their character and knowledge of it by defendant. The character of the premises is properly proved by showing how they are conducted. Evidence of how the occupants act and of what they say is admissible. State v. Chambers, 131 Minn. ——, 154 N. W. 1073.

Evidence held to justify a finding that a nuisance in the form of a house of prostitution was maintained upon the premises involved, and that the appellants knew of such nuisance. The court properly ordered the nuisance abated, issued an injunction and imposed a penalty as provided by the statute. State v. Chambers, 131 Minn. ——, 154 N. W. 1073.

2753. What constitutes keeping—Time is not an essential element of the offence of keeping a disorderly house, and it is not necessary to prove the commission of the offence within the time laid in the indictment. State v. Dufour, 123 Minn. 451, 143 N. W. 1126.

It is generally held that more than one act of disorderly conduct is essential. Lynch v. Brennan, 131 Minn. ——, 154 N. W. 795; Tenement House Dept. v. McDevitt, 215 N. Y. 160, 109 N. E. 88.

2756. Evidence—Sufficiency—(14) State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068; State v. LeFlohic, 127 Minn. 505, 150 N. W. 171.

DISTANCE TARIFF—See Carriers, 1205c.

DISTRICT COURT

2759. Jurisdiction—Original—The district court is a court of superior or general jurisdiction even when entertaining a special statutory proceeding. Hanford v. Alden, 122 Minn. 149, 142 N. W. 15.

It has an ancillary jurisdiction to aid the probate court in the performance of its proper function. Brown v. Strom, 113 Minn. 1, 129 N. W. 136.

It has jurisdiction to determine, as against the estate of a deceased contractor, the amount of a lien claim. Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472.

It has jurisdiction of an action for the specific performance of a contract to devise or bequeath property. Svanburg v. Fosseen, 75 Minn. 350, 74 N. W. 4. See Digest, § 10207.

(27) See Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

(28) Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812.

(33) See Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882 (action to charge heirs and devisees of a guardian's bondsmen and the devisees of the guardian for negligence of the guardian—question of jurisdiction of district court raised but not settled).

2761. Power to pass title by judgment—Under the statute the district court may pass title to realty though it has no jurisdiction over the person of the defendant. Smith v. Smith, 123 Minn. 431, 144 N. W. 138.

(35) Fiske v. Lawton, 124 Minn. 85, 90, 144 N. W. 455. See State v. Westfall, 85 Minn. 437, 89 N. W. 175; Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

2762. Jurisdiction in vacation or at chambers—(38) Sacramento Suburban Fruit Lands Co. v. Niles, 131 Minn. ——, 154 N. W. 748.

2764. Court always open for certain business—(42) Sacramento Suburban Fruit Lands Co. v. Niles, 131 Minn. ——, 154 N. W. 748.

DIVORCE

GROUNDS

2776. Desertion—In computing the period of desertion it has been held proper to reckon as part of the period the time during which an action for a limited divorce was pending. Tolzman v. Tolzman, 130 Minn. 342, 153 N. W. 745.

Evidence held to justify a finding of desertion. Trossen v. Trossen, 114 Minn. 510, 131 N. W. 1135.

(66) Note, 119 Am. St. Rep. 617; 138 Id. 810.

(72, 73) See Tolzman v. Tolzman, 130 Minn. 342, 153 N. W. 745.

2778. Cruel and inhuman treatment—(80) Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825. See Note, 18 L. R. A. (N. S.) 300; 34 Id. 360.

(81) Martinson v. Martinson, 116 Minn. 128, 133 N. W. 460.

(82) Martinson v. Martinson, 116 Minn. 128, 133 N. W. 460; Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825; Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074.

(87) Jokela v. Jokela, 111 Minn. 403, 127 N. W. 391.

(88) Martinson v. Martinson, 116 Minn. 128, 133 N. W. 460; Mandelin v. Mandelin, 120 Minn. 198, 139 N. W. 152; Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825.

(89) Jokela v. Jokela, 111 Minn. 403, 127 N. W. 391.

DEFENCES

2780. Impotency—(91) Note, 116 Am. St. Rep. 241.

2781. Collusion—Possibly a separation agreement between the parties, entered into after the desertion charged in the complaint, may be evidence of collusion. See Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666.

2782. Condonation—The law of condonation rests upon the express or implied forgiveness by the injured spouse, and the express or implied promise of proper treatment by the other. If the improper or cruel treatment continues there is no condonation. Continued cohabitation after the commission of a matrimonial offence, with knowledge of the offence, constitutes condonation. There is no hard and fast rule controlling the subject. Each case must be determined from its own facts and the character and situation of the parties. Mandelin v. Mandelin, 120 Minn. 198, 139 N. W. 152.

2783. Connivance—(96) Note, 120 Am. St. Rep. 520.

2784. Recrimination—(97) Note, 86 Am. St. Rep. 333.

2784a. Insanity—Insanity is a defence to an action for divorce on the ground of cruel and inhuman treatment, if at the time the alleged acts of cruelty were committed the defendant was laboring under such a defect of reason as not to know the nature of his acts or that they were wrong. Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387.

ACTION FOR DIVORCE

2785. Separation pending action—(98) See Mandelin v. Mandelin, 120 Minn. 198, 139 N. W. 152; Tolzman v. Tolzman, 130 Minn. 342, 153 N. W. 745.

2786. State interested—(99) Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998; McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

2788. Venue—Change—(4) State v. District Court, 110 Minn. 501, 126 N. W. 133.

2790. Summons—If the summons is served personally out of the state it is unnecessary that there should be a return of the sheriff or an affidavit of plaintiff or his attorney as required by R. L. 1905, § 4111 (G. S. 1913, § 7737). Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998.

A return on a summons in a divorce suit showed valid service. A finding that the person who made the return handed a copy of the summons and complaint, inclosed in a sealed and unaddressed envelope, to the defendant, stating that he had been directed by defendant's husband to give the same to her, coupled with a finding that on the same day the defendant ascertained the contents of the summons and complaint, does not show a defective service. McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

The importance of securing personal service of summons is recognized by the statute and the courts. Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666.

(9) Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666 (finding that there was no fraud in obtaining a service of summons by publication sustained).

2791. Complaint—(15) See McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708 (complaint sustained after judgment).

2792. Answer—Amendment—An amendment of an answer on the trial held properly denied. Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387.

In an action for a limited divorce for desertion, an amendment of an answer on the trial alleging wilful desertion by the plaintiff and asking for an absolute divorce, has been sustained, plaintiff consenting to the

amendment and the issue raised thereby being tried by consent. Tolzman v. Tolzman, 130 Minn. 342, 153 N. W. 745.

2795. **Corroboration**—Evidence held not to show that a divorce was granted on the consent of the parties. Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074.

(28) Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825.

(29) Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825; Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074.

2796. **Evidence—Admissibility**—Possibly a separation agreement between the parties, entered into after the desertion charged in the complaint, is admissible on the issue of desertion, or to show collusion. Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666.

2798. **Limited divorces**—In an action for a limited divorce, under R. L. 1905, § 3597 (G. S. 1913, § 7134), on the ground of cruel and inhuman treatment of a character to impair the health of plaintiff, though no actual violence was inflicted upon her, the evidence is held sufficient to support an order for judgment in plaintiff's favor. The court may in such actions make such further order, subsequent to judgment, respecting the alimony and property rights of the parties, as the circumstances may justify. Martinson v. Martinson, 116 Minn. 128, 133 N. W. 460.

2799. **Judgment—Conclusiveness**—The judgment may require defendant, a citizen of this state, to convey realty in another state to plaintiff. Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176.

(41) McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708. See 9 Col. L. Rev. 552; Note, 133 Am. St. Rep. 433.

(42) See Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998. See Digest, §§ 5133, 5189.

CUSTODY OF CHILDREN

2800. **Custody of minor children**—See Digest, § 7297; Note, 41 L. R. A. (N. S.) 564.

ALIMONY

2802. **Pendente lite**—The allowance should generally be made directly to the wife, but in exceptional circumstances the court may direct its payment to a third person for her benefit. Blakely v. Blakely, 117 Minn. 482, 136 N. W. 3.

2803. **Permanent**—The court is authorized to award to the wife as permanent alimony a gross sum and make it a lien on the husband's real estate, or to give her a specific part of his real and personal property, or an undivided part or interest in the whole thereof, as may be found

for the best interests of the wife under the circumstances of each case. Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387.

Speaking generally, alimony is not awarded as a penalty, but as a substitute for marital support. It is wholly statutory. It may be awarded even in face of a showing of total lack of present property or income. Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787.

The general rule, supported by the weight of authority, in respect to an award of alimony in a definite sum of money, payable in instalments at future dates, in the absence of some statute or provision in the decree to the contrary, is that the allowance terminates at the death of either party. Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074.

It is the better practice to submit to the court and have embodied in the decree any agreement of the parties respecting support. If so embodied the court may nevertheless subsequently modify the decree in a proper case. Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794; Warren v. Warren, 116 Minn. 458, 133 N. W. 1009.

(53) Clark v. Clark, 114 Minn. 22, 129 N. W. 1052 (award held insufficient on appeal and a new trial granted as to alimony); Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074 (an award of alimony held not out of proportion to what is reasonable and fair, in view of the facts presented, but that the judgment should be modified to secure the relief intended to be granted, namely, life support of the wife); Fitzpatrick v. Fitzpatrick, 129 Minn. 538, 152 N. W. 1101. See Note, 44 L. R. A. (N. S.) 998.

2804. Attorney's fees and suit money—A subsequent reconciliation of the parties held not to defeat an award of attorney's fees. Beaulieu v. Beaulieu, 114 Minn. 511, 131 N. W. 481.

An allowance to the wife, in a divorce action, for suit money and attorney's fees, must be made to her; but the court, in its discretion, may direct that it be paid to her attorney for her. Any allowance for her support should be paid directly to her, unless, in exceptional cases, the court deems it advisable, for her convenience or protection, to direct its payment to a third party for her. Allowance for attorney's fees and suit money held excessive. Blakely v. Blakely, 117 Minn. 482, 136 N. W. 6.

The rule that a party may not accept part of a judgment which is beneficial, and then attack by appeal the judgment through which he received the benefit, is not applicable in an action for divorce where the defendant's attorney accepted the fee awarded him and satisfied that part of the judgment, and then appealed from the remainder of it. Gran v. Gran, 129 Minn. 531, 152 N. W. 269.

2805. Modification of order or judgment—The court awarding a judgment for alimony, whether such alimony be payable in a gross amount or in instalments, has authority to revise or modify such judgment upon ap-

plication of either party for good cause shown. A judgment for alimony, directing the payment of an annual allowance for the support of the wife and minor children, may be modified upon proof of facts showing a substantial change in the financial circumstances of the party required to pay such allowance, or of the party receiving the same. The fact that a party was required by a judgment for alimony to give a bond to secure the required future payments does not change the rule permitting a modification of the judgment for alimony, if such modification is made equitable by a substantial change in the circumstances of the parties. An application to modify such judgment is addressed largely to the discretion of the trial court. Where the court denies an application without prejudice to the renewal thereof, the inference arises that the court did not determine the merits of the application, but denied the same upon matters of form. Haskell v. Haskell, 116 Minn. 10, 132 N. W. 1129; Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074; Id., 129 Minn. 538, 152 N. W. 1101.

While an application for the revision of a judgment for alimony, on the grounds of changed financial condition of the parties, should be entertained with great caution, nevertheless, where the change is not willfully brought about by the applicant, the motion should be disposed of under the same rules applicable upon an original application to fix the amount of alimony, and a modification of the former judgment may be made on account of the changed financial condition of either or both of the parties. Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787.

An order modifying a judgment awarding alimony to the effect that defendant and his second wife convey to plaintiff certain real estate and plaintiff deliver to defendant a certain insurance policy upon his life, and be relieved of the obligation to pay the annual premium thereon, held sustained by the facts presented in the record. The order, imposing reciprocal obligations upon the parties, must be construed as an entirety, and the several provisions thereof as dependent upon each other. If, by reason of the fact that his present wife refuses to join in a conveyance of the property, defendant is unable to comply with the order, his remedy is to present that fact to the court below, to the end that such other order in the premises may be made as may be found necessary and proper to meet the situation. The order is not necessarily void, because to comply therewith defendant must secure the assent of his present wife. Warren v. Warren, 114 Minn. 389, 131 N. W. 379.

It is within the power of the court, under section 3592, R. L. 1905 (G. S. 1913, § 7129), subsequent to the entry of a judgment for alimony in a divorce action, to make such modifications respecting the alimony awarded as the changed conditions and circumstances of the parties may require, notwithstanding the fact that the judgment was founded upon a stipulation or agreement of the parties, entered into pending the

action, fixing the award to be made in the event the court should grant the divorce. Stipulations or agreements of that kind must be deemed to have been entered into in view of the authority conferred upon the court by the statute, and are merged in the judgment, and are not so far contracts as to be controlling upon the court, or to preclude subsequent change, in a proper case, of the original judgment. Whether, in such a case, a modification should be made, upon the application of one of the parties, at all, and the terms and extent thereof, rests in the sound discretion of the trial court. Warren v. Warren, 116 Minn. 458, 133 N. W. 1009. See 26 Harv. L. Rev. 441.

In actions for limited divorce the court may make such further order, subsequent to judgment, respecting alimony and the property rights of the parties, as the circumstances may justify. The general statute probably applies to actions for limited divorce. Martinson v. Martinson, 116 Minn. 128, 133 N. W. 460.

Modification because of subsequent misconduct of former wife. Note, 45 L. R. A. (N. S.) 875.

2806. Independent of divorce—(67) Note, 38 L. R. A. (N. S.) 950.

2809. Award as a lien—An award of permanent alimony in a gross sum may be made a lien on the husband's realty. Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387. See Note, 30 L. R. A. (N. S.) 1062 (lien on personalty); 102 Am. St. Rep. 700.

2810. Pleading—Where personal service is made on the defendant the court may allow alimony, though the complaint makes no specific demand therefor and the defendant does not answer. Ecker v. Ecker, 130 Minn. 472, 153 N. W. 864.

DOMICIL

2812. Definitions—The words "residence" and "home" are sometimes, but not ordinarily, synonymous. State v. District Court, 120 Minn. 99, 139 N. W. 135.

(78) See Williamson v. Osenton, 232 U. S. 619.

(79) See State v. Probate Court, 130 Minn. 269, 153 N. W. 520; Note, 48 Am. St. Rep. 711.

2813. Infants—(81) See Notes, 49 L. R. A. (N. S.) 860, 875.

2814. Married women—In the absence of statutory provision to the contrary a woman who marries while she is a pauper changes her own legal settlement and takes that of her husband. Willmar v. Spicer, 129 Minn. 395, 152 N. W. 767.

A wife who has justifiably left her husband may acquire a different domicil from his, not only for the purpose of obtaining a divorce from

him, but also for other purposes, including that of bringing an action for damages against persons other than her husband. Williamson v. Osenton, 232 U. S. 619. See 26 Harv. L. Rev. 447; 28 Id. 196; Note, 84 Am. St. Rep. 27.

2816. Change—The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere—the absence of any present intention of not residing permanently or indefinitely in the new abode. Williamson v. Osenton, 232 U. S. 619; Gilbert v. David, 235 U. S. 561.

DRAINS

IN GENERAL

2819. Basis of right to establish—(95) See Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226.

2820. Constitutionality of statutes—Section 18, Laws 1905, c. 230, as amended by section 3, Laws 1907, c. 367, and section 7, Laws 1909, c. 469, held constitutional. Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226.

Laws 1913, c. 567, held constitutional even as to prior contracts. State v. George, 123 Minn. 59, 142 N. W. 945.

Laws 1909, c. 469, is not unconstitutional as conferring legislative and administrative powers on the courts. State v. District Court, 131 Minn. —, 154 N. W. 617.

(4) State v. McGuire, 114 Minn. 281, 130 N. W. 1103.

2821a. County legislative agent—Bonds—Contracts—Liability—In county drainage proceedings the county is a legislative agency of the state and the legislature may impose upon it financial liability for such proceedings and control the contracts entered into by it in connection therewith. State v. George, 123 Minn. 59, 142 N. W. 945.

The bonds of a county, issued in county drainage proceedings, are the direct and general obligations of the county. Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226; State v. George, 123 Minn. 59, 142 N. W. 945.

2822. Drainage of meandered lakes—Under G. S. 1913, § 5523, the county board is not authorized in drainage proceedings to drain a meandered lake unless it is incapable of beneficial public use. Mundwiler v. Bentson, 128 Minn. 69, 150 N. W. 209. See § 2836.

It is perhaps unfortunate that in drainage projects involving a meandered lake, the law does not provide, in the proceeding itself, for a division of the bed of the lake among the different shore owners. As it now is, after a person has paid an assessment on the basis of having acquired a large acreage of land from the reclaimed lake bed, he may find that,

in an action brought afterwards for partition, a great part thereof goes to other parties. Under existing provisions of the law, the assessment of benefits in drainage proceedings involving a lake bed cannot be estimated on the exact acreage which each shore owner will eventually acquire. But the aim should be to approximate what will finally be owned by each. Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

Under section 5528, G. S. 1913, the jury is required to ascertain the amount and value of the land added to a shore owner by the drainage of a meandered lake, but the jury should not include therein dry and usable land lying between the government meander line and the present ordinary high-water mark of the lake. Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

Held that the jury adopted a wrong and inequitable method as a basis for assessing the benefits to accrue to an owner from added acreage from the lake bed to be drained. Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

Held that an owner suffered no damages on account of loss of the water supply afforded by the lake to be drained. Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

2823. Obstruction — Interference — Damages — Burden of proof —A complaint in an action against a town, for wrongfully obstructing a drainage ditch, sustained on demurrer. Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182.

In an action brought by a contractor, constructing a town drain, for damages for interference with such construction, wilful or negligent interference must be proved, and also the amount in which the contractor has been damaged. In this case no damages were shown, even conceding that there was some evidence of negligence. Phillipps v. Webb, 125 Minn. 300, 146 N. W. 1100.

ESTABLISHMENT, CONSTRUCTION AND REMEDIES

2824. Nature of proceedings—(11) Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

2824a. Judicial ditch—Jurisdiction—Under Laws 1909, c. 469, a court has jurisdiction though the proposed ditch is wholly in one county and will not benefit or damage lands in an adjoining county. The court and the county board have concurrent jurisdiction in proceedings for ditches wholly within a single county. State v. District Court, 131 Minn. —, 154 N. W. 617.

2826. Petition—A petition for a judicial ditch under Laws 1905, c. 230, as amended by section 2, Laws 1909, c. 469, must set forth the necessity for the ditch and that it will be a public benefit and promote the public health. State v. Watts, 116 Minn. 326, 133 N. W. 971.

The statute provides that a petition for a town ditch shall set forth, among other things, that it will be of public benefit or promote the public health. Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

The court may entertain an amended petition though proceedings under the original petition are still technically pending. State v. District Court, 131 Minn. —, 154 N. W. 617.

(14) Martin County v. Kampert, 129 Minn. 151, 151 N. W. 897.

2827. Notice of hearing on petition—In proceedings to establish a judicial ditch, conducted under chapter 230, Laws 905, as amended by chapter 469, Laws 1909, held that the notices of the first or preliminary hearing were properly posted, and the court thereby acquired jurisdiction; it appearing from the petition and the findings of the court that the proposed ditch was wholly located in the town in which the notices were so posted. If by lateral or side drains subsequently to be recommended and provided for by the viewers and engineers the work is extended into adjoining towns, the notices of the second hearing, provided for by section 9, c. 230, Laws 1905, must be posted in such towns. State v. District Court, 114 Minn. 424, 131 N. W. 476.

A finding that the proceedings to establish a drain under chapter 230, G. L. 1905, were regular, is not impugned by another finding that certain proof of the publishing or posting of a required notice is lacking or insufficient, for the statute does not require proof of the publication, mailing, or posting of the notices therein specified to be filed or preserved in the records of the proceedings. Undoubtedly it is commendable practice to preserve proof of such publication by filing an affidavit of the printer as to the paper and issues thereof in which the notice was published, and also proof as to mailing and posting. Where the law so prescribes, it must be done. But it is to be observed that the statutes relating to these proceedings are silent on the matter. The county commissioners are required to satisfy themselves that the prerequisite notice has been given, and their order establishing the ditch is prima facie proof thereof. Geib v. Morrison County, 119 Minn. 261, 138 N. W. 24.

2828. Hearing on petition—Rehearing at special meeting—Under Laws 1905, c. 230, § 9 (G. S. 1913, § 5531), the county board may either establish or refuse to establish a ditch at a special meeting called for a rehearing of a petition and report, when the final order establishing or refusing to establish a ditch has been held void for failure to give proper notice of hearing. Morrison County v. Lejouburg, 124 Minn. 495, 145 N. W. 380.

The statute requires the petition for the ditch to set forth, among other things, "that it will be of public benefit or promote the public health." Section 5635, G. S. 1913. The statute also provides for a public hearing before the board of supervisors at which all persons interested may ap-

pear, and further provides that, if the board shall find, from the evidence adduced before them, that certain specified facts exist and also find "that said work will be of public utility or promote the public health, they shall establish said ditch." Section 5641, G. S. 1913. Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

(19) Wheeler v. Almond, 110 Minn. 503, 124 N. W. 227.

2829. Viewers—Effect of disqualification—Disqualification of the viewers does not go to the jurisdiction of the board and is not a ground for collateral attack on the determination of the board. Martin County v. Kampert, 129 Minn. 151, 151 N. W. 897.

2829a. Engineers—Bond—Liability for negligence—An engineer appointed to make a survey and report in a ditch proceeding may extend the ditch beyond the limits named in the petition, when "desirable and practicable and when necessary to the complete drainage of lands likely to be assessed for the ditch originally petitioned for." An engineer who exercises the care, skill, and ability usually exercised by the members of his profession is not liable in damages for an honest error in judgment. Appellant, the engineer in a ditch proceeding, provided in his report for extending the ditch about three miles beyond the limits named in the petition. The evidence shows that such extension was desirable, practicable, and necessary for the efficient drainage of the lands within the original assessment limits, and will not sustain a verdict to the contrary. Mille Lacs County v. Kennedy, 129 Minn. 210, 152 N. W. 406.

The drainage law permits the engineer, if the bondsmen consent thereto in writing, to substantially alter the starting points, routes, and termini of a proposed drain, and to plan for the different parts of the drain to flow in different directions, with more than one outlet, making in fact more than one ditch, when he finds that better results can be obtained thereby in carrying out the drainage project involved in the ditch petitioned for. Under this law, in a single judicial ditch proceeding, a main ditch and two disconnected subsidiary ditches may be established, if shown in the report of the engineer and found by the court, after a hearing had, to afford the most practicable means of draining an area adjacent to and reasonably capable of being drained by the main ditch and branches described in the petition. Such main and subsidiary ditches may constitute one ditch improvement. Whether they constitute one ditch improvement, or two or more independent ditch projects, is a question of fact, depending largely upon the topography of the area drained thereby. The area drained by the ditches here involved appears to be a single drainage basin, and the ditches to constitute a single drainage system. The law does not require the consent of a board of county commissioners before a judicial ditch may be established, with an outlet

into an existing ditch. State v. Watts, 116 Minn. 326, 133 N. W. 971; State v. District Court, 131 Minn. —, 154 N. W. 617.

2830. Laying out—Order—The description, as contained in the report of the engineer and order laying the same, need not be couched in such language that every layman may trace its location. It is sufficient, though described in part by technical words and recognized signs and abbreviations, if a competent civil engineer or surveyor may therefrom definitely locate the ditch upon the ground. Slingerland v. Conn., 113 Minn. 214, 129 N. W. 376.

It is the duty of the county commissioners to satisfy themselves that the prerequisite notice has been given, and their order establishing the ditch is prima facie evidence thereof. Geib v. Morrison County, 119 Minn. 261, 138 N. W. 24.

The board acts in a quasi judicial capacity and its determination, within its jurisdiction, is as conclusive as the judgment of a court. It cannot be attacked collaterally for error or irregularity not going to the jurisdiction. Martin County v. Kampert, 129 Minn. 151, 151 N. W. 897.

A decision of the trial court that the route and plan adopted were practicable and effective held justified by the evidence. State v. District Court, 131 Minn. —, 154 N. W. 617.

An order establishing a judicial ditch held not void for uncertainty. State v. District Court, 131 Minn. —, 154 N. W. 617.

In county drainage proceedings the county board is authorized to depart from the drainage system proposed in the petition by eliminating branch ditches. Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

(21, 22) See State v. Watts, 116 Minn. 326, 133 N. W. 971; Mille Lacs County v. Kennedy, 129 Minn. 210, 152 N. W. 406.

(24) Gourd v. Morrison County, 118 Minn. 294, 136 N. W. 874.

2832. Irregularities—The determination of the board cannot be collaterally attacked for mere irregularities. Disqualification of the viewers is a mere irregularity. Martin County v. Kampert, 129 Minn. 151, 151 N. W. 897.

2833. Bonds of petitioners—Liability—(28) McLeod County v. Nutter, 111 Minn. 345, 126 N. W. 1100 (petitioners for ditch who did not sign a statutory bond held not liable for the preliminary expenses incident to the petition—there was a failure to establish the ditch); Clay County v. Olson, 123 Minn. 437, 143 N. W. 970 (presumption that engineer gave bond as required by law—fixing compensation of auditor—allowance of his bill was equivalent to fixing it—reasonableness of compensation—directed verdict on issue sustained); Morrison County v. Lejouburg, 124 Minn. 495, 145 N. W. 380 (petitioners who execute a bond in a ditch proceeding under Laws 1905, c. 230, conditioned to

pay the preliminary expense if the ditch is not established, are liable thereon to a county which in good faith proceeds with the petition, though the description of the route and termini of the ditch in the petition is so defective as to render the proceeding invalid on jurisdictional grounds—the evidence justifies the finding of the court as to the amount of the preliminary expense); Martin County v. Kampert, 129 Minn. 151, 151 N. W. 897 (the objection that viewers appointed in proceedings to establish a county ditch are disqualified by reason of interest in land which may be affected, cannot be raised for the first time as a defence to an action on a bond to pay expenses, if the proceedings are otherwise according to law—the sureties on such a bond contract to pay in the event the county board shall fail to establish the ditch—when that event happens they must respond—the determination of the county board is not open to collateral attack, except on the ground of fraud or collusion or want of jurisdiction—no fraud or collusion is claimed in this case, and the objection to the qualification of the viewers does not go to the jurisdiction of the board—a proper petition duly filed and proper notices is all that is required to vest the board with full jurisdiction).

2834. Bonds of contractors—Liability—(29) Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423 (injunction to avoid multiplicity of suits denied on application of contractors); Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359 (bonds in issue held to be valid statutory obligations to the extent of the fair import of the language used in their conditions, but no further—evidence held sufficient to connect the items sued for with the ditches covered by the bonds—axes, hack-saw blades, horse feed, and provisions, held not "materials" furnished in the execution of the contract, within the meaning of the bonds—items of coal and wood consumed in generating power used in the ditching work, and for labor as cook for the workmen, held within the terms of the bonds—issue of non-compliance with G. S. 1913, § 3858, requiring notice of assignments of wages to be given to the employer, held sufficiently raised by defendant's general denial of assignments sued on); Rosman v. Bankers Surety Co., 126 Minn. 435, 148 N. W. 454 (work in dismantling a ditching dredge and reassembling the parts and putting the dredge in condition to perform a drainage contract, performed by an employee of the drainage contractor, is a necessary part of the work incident to the performance of the contract, and a proper liability against the surety on the contractor's bond—G. S. 1913, § 8249, requiring notice to be served prior to the commencement of an action on a building contractor's bond, has no application to the bond of a ditch contractor—the provisions of the drainage statute classifying the contractor's bond as an official bond, and declaring the contractor a pub-

lic officer, places the contractor's bond, in respect to actions thereon, in the same position as other bonds of public officers); Northern Minnesota Drainage Co. v. Mageau, 131 Minn. ——, 154 N. W. 1092 (third party taking over contract—release of surety).

2834a. Bonds of engineers—A complaint on the statutory bond of the engineer in the construction of a judicial ditch, held sufficient as against a general demurrer. Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

A statutory bond containing the statutory conditions and also other conditions will be so construed as to give effect to the statutory conditions, unless the language of the bond precludes such construction. Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

2835. Contracts—Bids—Powers of county surveyor and county board —Certificate of engineer—In an action by a contractor to reform a contract, held that the estimate of the engineer was not the basis of a bid, and the 30 per cent. limitation of the estimated cost of construction, as provided by section 14, Laws 1905, c. 230, had no application. Mulgrew-Boyce Co. v. Freeborn County, 112 Minn. 5, 127 N. W. 396.

The certificate of the engineer issued in drainage proceedings under the provisions of section 17, c. 230, Laws 1905, is not final and conclusive that the contract has been fully performed. It is subject to approval or disapproval by the board of county commissioners, an approval of which is a condition precedent to the authority of the county auditor to issue warrants in payment of the amount due for the work. The question whether the certificate should or should not be approved is one addressed to the judgment and discretion of the county board, the exercise of which cannot be controlled by mandamus. Upon a refusal to approve, the contractor may bring suit upon the contract, and have the merits of the controversy litigated in an action at law. State v. Clarke, 112 Minn. 516, 128 N. W. 1008; Merz v. Wright County, 114 Minn. 448, 131 N. W. 635. See State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458.

Requirements of Laws 1905, c. 230, § 14, as to the filing of a certified check for 10 per cent. of the amount of the bid with a bid for the construction of a drainage ditch, held sufficiently complied with. In awarding a contract under this statute, the county auditor, in determining who is the "lowest responsible bidder," is not limited to an inquiry as to financial responsibility, but may, in the exercise of the discretion vested in him, inquire also as to the fitness and ability of the bidders to do and perform the particular work. The contract awarded in this case, though not given to the lowest bidder, was not invalid as in violation of the statute; the reasons assigned by the auditor for such award being sufficient to justify his action. The fact that the bid was

reduced after the award had been made and before the contract had been executed did not affect the validity of the award or the contract executed pursuant thereto. Kelling v. Edwards, 116 Minn. 484, 134 N. W. 221.

R. L. 1905, § 620, providing for an appeal from the disallowance of a claim by the county board, is not applicable to the final payment due a contractor in drainage proceedings. The certificate of final completion of the contract issued by the engineer, and which the board may approve or disapprove, is not a "claim" within the meaning of that statute. Merz v. Wright County, 114 Minn. 448, 131 N. W. 635.

(30) See State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458.

2835a. Enlargement of ditches—Repairs—In proceedings to recover of a landowner the amount of assessments levied for repairing and deepening a ditch, a finding that the ditch was deepened held justified by the evidence. State v. McGuire, 114 Minn. 281, 130 N. W. 1103.

2835b. Town ditch—Liability of petitioners for cost—Town not liable—Action for contract price—Chapter 127, Laws of 1909 (G. S. 1913, §§ 5634–5671), providing for the construction of town ditches, requires the petitioners for the ditch to bear the entire expense of establishing and constructing it, and does not impose any liability upon the town. If the statutory prerequisites have been complied with, the contract price for constructing such ditch may be recovered from the petitioners, but cannot be recovered from the town. The town officers, in performing the duties imposed upon them by this law, act as agents of the law, and not as representatives of the town. By the terms of the statute the contract price is not payable until the ditch has been inspected and the inspectors have filed a certificate that it has been completed in accordance with the order establishing it. A complaint which does not show that such certificate was made, nor that the facts were such that the inspectors ought to have made it and refused to do so, fails to state a cause of action. State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458.

2835c. Remedies of landowners—Under chapter 258, Laws 1901, as amended by chapter 38, Laws 1902, one whose lands are included in proceedings to establish a county ditch may (1) appeal upon the statutory grounds; (2) by certiorari bring up for review any order affecting a substantial right; (3) resist the application for judgment upon any ground allowed by section 919, R. L. 1905. State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

2836. Appeal to district court—Scope of review—Trial de novo—A failure of the county auditor to file a lien statement under Laws 1905, c. 230, § 19, held not to affect a right of appeal. State v. Johnson, 111 Minn. 10, 126 N. W. 479.

A landowner is given a right of appeal to the district court by Laws 1901, c. 258, as amended by Laws 1902, c. 38. State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

Section 70, c. 230, Laws 1905, giving the right of appeal in drainage proceedings to persons claiming damages, or whose lands are assessed for benefits, is limited to such persons, and does not extend the same right to the petitioners for the ditch. State v. Nelson, 116 Minn. 424, 133 N. W. 1010.

Where a trial of an appeal from the assessment of benefits to lands in drainage proceedings is had in the district court of a county, other than that in which the proceeding was instituted, under the provisions of section 6, c. 384, Laws 1911, the verdict of the jury or order of the court rendered in such trial is the final determination of the proceeding in that court, and no judgment thereon is necessary. The verdict or order is, in such case, certified to the court having jurisdiction of the proceeding, and there acted upon as though rendered by that court. State v. Nelson, 116 Minn. 424, 133 N. W. 1010.

On an appeal from the assessment of damages or benefits in drainage proceedings, the landowner who appeals has the burden of proof to overcome the report and assessment from which the appeal was taken. State v. Nelson, 116 Minn. 424, 133 N. W. 1010.

In proceedings to drain certain meandered lakes, under section 1, c. 230, Laws 1905, held that the findings of the trial court to the effect that the lakes are not normally grassy and of a marshy character, or no longer of sufficient depth to be of any beneficial public use, are supported by the evidence. On an appeal from an order of the county board ordering the construction of a public ditch for the purpose of draining a meandered lake, no particular force or effect is to be given to findings of the board as respects the character of the lake. The appeal brings the question to the district court for trial de novo, and should be there determined as though originally at issue in that court. Madsen v. Larson, 117 Minn. 369, 135 N. W. 1003.

An appeal of this character brings to the district court, for trial de novo, the issue of benefits or damages, as the case may be, and should be there determined without reference to the conclusion reached by the viewers. The object of the law in granting the right of appeal is to afford the appellant the right to the independent judgment of a jury, uninfluenced by the result from which the appeal was taken. If in any such case the jury, by the charge of the court or otherwise, is led to the conclusion that consideration and respect should be given the assessment made by the viewers, the appellant is deprived of his right to the separate opinion of the jury, and his appeal becomes fruitless. On the trial of an appeal from the report of the viewers in drainage proceedings, the instructions of the trial court are construed, and held to have

in effect laid before the jury for consideration the determination of the viewers in the matter of the assessment of benefits, and, as so construed, the instructions were prejudicial to appellants. Dodge v. Martin County, 119 Minn. 392, 138 N. W. 675; Cunningham v. Big Stone County, 122 Minn. 392, 142 N. W. 802.

It is necessary for the viewers, and the jury on appeal, to make a separate award of damages, where they are sustained, and it is not proper to deduct the damages from the benefits and assess the balance. Cunningham v. Big Stone County, 122 Minn. 392, 142 N. W. 802.

In a county ditch proceeding the question of the propriety of diverting the waters of a meandered lake may be determined upon appeal to the district court; but upon such appeal the district court is without jurisdiction to determine the propriety, in any other respect, of the order of the county board establishing the ditch. Upon the reversal of the order of the county board, because it provided for the draining of a meandered lake not properly subject to drainage, it may proceed with the drainage project except in so far as it affects the meandered lake. Mundwiler v. Bentson, 128 Minn. 69, 150 N. W. 209.

Care should be taken to keep from the jury the findings of the viewers as to damages and benefits. Rooney v. Stearns County, 130 Minn. 176, 153 N. W. 858.

The court has no power to enlarge the time fixed by the statute for making a demand for a review by a jury of the order of the court fixing the amount of damages or benefits in a judicial ditch proceeding. In re Judicial Ditch No. 52, Norman and Polk Counties, 131 Minn. ——, 155 N. W. 626.

2837. Appeal to supreme court—No appeal lies from a judgment establishing a county ditch. Aspelin v. Murray County, 115 Minn. 440, 132 N. W. 749.

2838. Certiorari—A contractor is entitled to sue the county to recover a final payment on his contract and is not required to resort to certiorari to review the refusal of the county board to approve the final certificate of the engineer. Merz v. Wright County, 114 Minn. 448, 131 N. W. 635.

(38) State v. Johnson, 111 Minn. 255, 126 N. W. 1074; State v. Nelson, 116 Minn. 424, 133 N. W. 1010; Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

2839. Injunction—Where a landowner is a party to the proceedings by which a town ditch is established, and can bring all matters in controversy before the court by writ of certiorari, he cannot maintain an action to enjoin the construction of such ditch. Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

(39) Bilsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16, 299.

(40) State v. Johnson, 111 Minn. 255, 126 N. W. 1074; Slingerland v. Conn, 113 Minn. 214, 129 N. W. 376; Kelling v. Edwards, 116 Minn. 484, 134 N. W. 221; Dalberg v. Lundgren, 118 Minn. 219, 136 N. W. 742; Webb v. Lucas, 125 Minn. 403, 147 N. W. 273. See Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094; Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

2839a. Collateral attack—Estoppel—Drainage proceedings are not subject to collateral attack for errors and irregularities. As to all parties to the proceedings the order establishing the ditch is final and conclusive except on direct attack in the same proceedings. The parties cannot maintain an equitable action for that purpose. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; Slingerland v. Conn, 113 Minn. 214, 129 N. W. 376; Geib v. Morrison County, 119 Minn. 261, 138 N. W. 24; State v. Lindberg, 120 Minn. 147, 139 N. W. 286. See Dalberg v. Lundgren, 118 Minn. 219, 136 N. W. 742.

It is settled law in this state that a person who stands by and permits the improvement of his land by the construction of such a ditch, raising no objection to the regularity or sufficiency of the proceedings, and knowing that the cost of construction must be paid by assessment against benefited lands, cannot be heard subsequently to call in question the validity of the proceedings by means of which his property received the benefit of drainage. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; State v. Tuck, 112 Minn. 493, 128 N. W. 823; Geib v. Morrison County, 119 Minn. 261, 138 N. W. 24; State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

ASSESSMENTS

2840. Constitutionality—(42) Gourd v. Morrison County, 118 Minn. 294, 136 N. W. 874.

2841a. Damages—Separate award—Where damages are sustained there must be a separate award therefor by the viewers or jury on appeal. It is not proper to deduct the damages from the benefits and assess the balance. Cunningham v. Big Stone County, 122 Minn. 392, 122 N. W. 802.

2842. Exemptions—Prior to the act of Congress of May 20, 1908 (35 Stat. 169, c. 181 [U. S. Comp. St. Supp. 1909, p. 642]), land of the United States entered as a homestead, but not finally proved as such, was not subject to the lien of a drainage assessment. State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

2844. Lien for assessment—When attaches—Under Laws 1901, c. 258, §§ 18, 19, the recording of an assessment list in the office of the register of deeds is essential to the creation of a lien. Meeker County v. Schultz, 110 Minn. 405, 125 N. W. 901.

(01) State v. Johnson, 111 Minn. 10, 126 N. W. 479.

2844a. Application for judgment—What defences available—Objection may be made that no assessment list and statement was ever recorded in the office of the register of deeds, as required by Laws 1901, c. 258, §§ 18, 19. Meeker County v. Schultz, 110 Minn. 405, 125 N. W. 901.

The insufficiency of the order for the improvement is not a defence. State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

A change by the engineer in the starting point of a ditch is not a defence. State v. Tuck, 112 Minn. 493, 128 N. W. 823.

Jurisdictional defects in the prior proceedings may be interposed as a defence. Lindberg v. Morrison County, 116 Minn. 504, 134 N. W. 126.

Objections to the utility of the ditch or to the benefits conferred thereby cannot be raised, at least in the absence of fraud or demonstrable mistake of fact. Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

On application for judgment a party to drainage proceedings, or one in privity with him, cannot raise objections which he ought to have raised at an earlier stage of the proceedings. A party to such proceedings cannot stand by and permit improvements to be made on his land without objecting to the proceedings, and subsequently, on application for judgment raise objections to the regularity of the prior proceedings. When the application for judgment is made under the general tax law he is limited to the defences authorized under that law. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; State v. Tuck, 112 Minn. 493, 128 N. W. 823; Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419; State v. Lindberg, 120 Minn. 147, 139 N. W. 286. See Lindberg v. Morrison County, 116 Minn. 504, 134 N. W. 126.

2845. Judgment—Res judicata—Cloud on title—Where, in proceedings to enforce taxes delinquent on real estate, a defence is made to an instalment included therein for a lien assessed as benefits against such real estate for the construction of a drainage ditch, on the ground that the proceedings in establishing the ditch are void, and a judgment is entered therein discharging the land from the tax extended for such instalment, such judgment is res judicata as to the unenforceableness of subsequent instalments. In such a case an action will lie by the landowner against the county to remove the cloud cast upon his title by the apparent lien of the whole ditch assessment. Lindberg v. Morrison County, 116 Minn. 504, 134 N. W. 126.

DRUGGISTS

2847a. Illegal sale of poison—Indictment—An indictment under R. L. 1905, § 2340, for permitting the sale of poison without the supervision of a registered pharmacist or assistant, sustained. State v. Mayo, 118 Minn. 336, 136 N. W. 849.

DUEBILL—See Bills and Notes, 1036.

DURESS

2848. Definition and nature—(55) See State v. Daniels, 118 Minn. 155, 36 N. W. 584 (coercion defined); Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070 (duress in obtaining a release of a claim for breach of promise of marriage).

EASEMENTS

2851. Definition and nature—A perpetual easement for a railroad right of way is an incumbrance on the land and an interest therein. Delisha v. Minneapolis etc. Ry. Co., 110 Minn. 518, 126 N. W. 276.

2853. Acquisition—Grant of easements by implication. Note, 122 Am. St. Rep. 206.

Creation and conveyance of easements appurtenant. Note, 136 Am. St. Rep. 680.

(73) See Digest, § 121.

(75) Dryer v. Kistler, 118 Minn. 112, 136 N. W. 750.

2855. Abandonment—Where an easement is acquired for a public use and that use ceases or is abandoned the easement ends. Simons v. Munch, 115 Minn. 360, 132 N. W. 321.

(78) Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W. 907. See Digest, § 2; 13 Col. L. Rev. 409 (extinguishment by impossibility of user).

PRIVATE WAYS

2857. Acquisition—Deeds construed—(81) Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955 (a right of way was reserved by deed to the owner of part of lot 6—the owner of this lot then erected a building covering this part of lot 6 and also part of lots 4 and 5, adjoining—after this, the right of way was confirmed by a later contract —held an intent was manifested that the right of way should serve the

building as erected at the time the contract was made; the practical construction of the parties being in accord with this construction); Riley v. Pearson, 120 Minn. 210, 139 N. W. 361 (a deed of real estate construed, and held to convey to the grantee an easement of a passageway over the land of the grantor, and that such easement was permanent, and not limited to the life of the building on the premises).

See Note, 95 Am. St. Rep. 318; 26 L. R. A. (N. S.) 315.

2858. Appurtenant or in gross—(82) Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955.

2859. Of necessity—(85) Note, 122 Am. St. Rep. 206; 8 L. R. A. (N. S.) 327.

2862a. Use—Limitations—Maintenance—A right of way appurtenant to one lot cannot be used by the owner thereof as a right of way to another separate tract. But the extent of the tract to be served in connection with the dominant tenement is a question of intention of the parties, and the intent will be determined by the relation of the easement to the land to which it is appurtenant and other surrounding transactions, including the practical construction of the contract by the parties. The owner of the fee of land, over which a right of way, not exclusive, is granted, may himself use the land which is subject to the easement, if by so doing he does not unreasonably interfere with the special use for which the easement was created. The way should be maintained at a level reasonably calculated to serve the owner of the fee and the owner of the easement. A grant of a right of way to and from an opera house does not limit the use of the way to such time as the property is used as an opera house, but it is available in connection with any proper use of the property. Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955.

2862b. Modification and extinguishment—Subsequent deeds—Parol agreement—Where a right of way exists over one tract of land as appurtenant to another, the owners of the two tracts may modify the location and extent of the way at their pleasure. A recital in a deed reserving a right of way that the grantor is the owner of the dominant tenement is proof of the fact of such ownership. A reservation of a right of way in a deed made in 1881 held to supersede a right of way different in extent created in a deed made in 1866. Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955.

An easement may be extinguished or modified by a parol agreement fully executed, and an oral agreement that the fee owner may erect a permanent building over part of one side of the way and extend the way a like distance on the other side, when executed, extinguishes the old easement to the extent of the obstruction, and gives a right to use the new way as a substitute for the old, at least as long as the obstruc-

tion continues. Though the new way is narrower than agreed, the owner of the way cannot, after acquiescing in its construction, require that the building be undermined to enlarge the way according to the terms of the oral agreement. Davidson v. Kretz, 127 Minn. 313, 149 N. W. 652.

EJECTMENT

IN GENERAL

2865. Nature of action—(92) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022 (title involved); Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287 (a possessory action).

2867. For what action will lie—Ejectment will lie to recover possession of lands though the right of possession is subject to a dominant easement, especially is this true against an intruder who asserts a right outside of the easement. Ejectment will lie by a riparian owner on a navigable stream to recover possession from an adverse claimant on an island formed by accretion in front of his shore line, though the naked legal title to the bed of the stream where it was formed is in the state, and plaintiff's right of possession is subject to any proper exercise of the sovereign power of the state in aid of navigation. Hall v. Hobart, 186 Fed. 426.

(95) Note, 116 Am. St. Rep. 568.

(97) Tew v. Webster, 118 Minn. 375, 136 N. W. 1098. See 5 Mich. L. Rev. 585.

PARTIES

2870. Who may maintain action—A purchaser from the state of school lands may maintain ejectment against a railroad company occupying them for a right of way. Lawver v. Great Northern Ry. Co., 112 Minn. 46, 127 N. W. 431.

The legal title to land carries with it the right of possession and is sufficient to maintain ejectment though the holder has not been in possession within fifteen years. Norton v. Frederick, 107 Minn. 36, 119 N. W. 492; Morris v. Svor, 118 Minn. 344, 136 N. W. 852.

An owner of land who has agreed to convey it may maintain ejectment for its recovery, if he still retains the legal title and right of possession. Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287.

An owner who had conferred upon another the right to conduct mining operations on land held entitled to maintain ejectment against a third party. Howell v. Cuyuna Northern Ry. Co., 127 Minn. 480, 149 N. W. 942.

(4) Note, 6 L. R. A. (N. S.) 710.

(9) See Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096.

(18) See Howell v. Cuyuna Northern Ry. Co., 127 Minn. 480, 127 N. W. 480.

COMPLAINT

2874. In general—A complaint alleging, among other things, that a certain conveyance was an absolute conveyance in fee, held to state a course of action in ejectment. Howard v. Erbes, 112 Minn. 479, 128 N. W. 674.

See Dunnell, Minn. Pl. 2 ed. §§ 643–652.

2876. Equitable title—(38) See Maior v. Owen, 126 Minn. 1, 147 N. W. 662.

ANSWER

2885. Particular answers construed—(55) Edwards v. Smith, 124 Minn. 538, 144 N. W. 1090 (answer admitted that plaintiff was the owner of the land, but that defendants were rightfully in possession under a lease from plaintiff's grantor—supplemental answer alleged that, after the original answer plaintiff took and was in the actual possession of the premises and prayed for a dismissal of the action—plaintiff held entitled to judgment on the pleadings); Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125 (question of an executed parol gift of land held properly at issue under the pleadings).

DEFENCES

2886. Title in third party—(56) McGuire v. Blount, 119 U. S. 142.

2887. Equitable defences—(58) Howard v. Erbes, 112 Minn. 479, 128 N. W. 674; Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287.

2890. Miscellaneous defences—The defence of title by a parol gift, accepted and executed, may be pleaded and litigated in an action of ejectment. Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125.

PROOF

2893. Prima facie case—(71, 72) Note, 46 L. R. A. (N. S.) 487.

(73) Note, 47 Am. St. Rep. 75.

2897a. Evidence—Sufficiency—Evidence held to justify a finding that plaintiff's intestate died seized of the land claimed by plaintiff as administrator. Gaston v. May, 120 Minn. 154, 138 N. W. 1025.

Evidence in an action to recover a strip of land, over which a public highway ran, held to justify a finding that plaintiff had not proved title. Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38.

VERDICT AND JUDGMENT

2905a. Findings—A finding of the ultimate fact of ownership and right to possession is sufficient. Hayes v. Hayes, 119 Minn. 1, 137 N. W. 162.

2906. Judgment—At common law the judgment in ejectment is for the plaintiff, or defendant; for the former, that he recover his term in the tenements demised, with or without damages and costs. Upton v. Merriman, 122 Minn. 158, 142 N. W. 150.

ELECTION OF REMEDIES

2910. Definition—(5) Bierce v. Hutchins, 205 U. S. 340; Zimmerman v. Harding, 227 U. S. 489.

See Dunnell, Minn. Pl. 2 ed. §§ 170–194.

2914. Finality of election—Bringing an action to rescind an executory contract for fraudulent misrepresentations as to the quality of the land, and thereafter voluntarily dismissing such action because the right to rescind has been lost by laches, is not such an election of remedies as will debar plaintiff from subsequently bringing an action to enforce specific performance of such contract. International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

A person may have two courses open to him to redress a single wrong, but he can never have double redress. The two courses may be so inconsistent that the choice of one is an irrevocable waiver of the other as soon as the choice is made, as, where property is taken in proceedings instituted without jurisdiction, the owner may repudiate the proceeding or appear in it and assert his rights. The latter course waives beyond recall the right to question jurisdiction. In order that the commencement of an action which is not prosecuted to judgment and which results in no benefit to plaintiff or detriment to defendant, shall have the effect to bar any other remedy the plaintiff may have, the remedies must proceed from opposite and irreconcilable claims of right, and must be so opposite or inconsistent that a party cannot logically assume to follow one without renouncing the other. But a party may have alternative remedies which are not so inconsistent. An example of this is the alternative right to bring action for damages for breach of contract or demand full or specific performance. These remedies are both predicated on the existence of the contract, and the mere commencement of one will not be a bar to the other. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

Where inconsistent courses are open to an injured party and it is doubtful which ultimately may lead to full relief, he may follow one even

to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound, so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril. Corbett v. Boston & Maine Railroad, 107 N. E. 60 (Mass.).

An action for damages on an unreformed contract which is dismissed is not a bar to a subsequent action for reformation. Baird v. Erie Railroad Co., 210 N. Y. 225, 104 N. E. 614.

(9) C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164.

(10) Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895; Mohler v. Chamber of Commerce, 130 Minn. 288, 153 N. W. 617; Bierce v. Hutchins, 205 U. S. 340.

(11) Zimmerman v. Harding, 227 U. S. 489. See Note, 34 L. R. A. (N. S.) 309.

2914a. Cannot be controlled by court—Where a party has an election of remedies and selects one of them the court cannot select another for him and force him to accept it. Cisewski v. Cisewski, 129 Minn. 284, 152 N. W. 642.

ELECTIONS

IN GENERAL

2915. Construction of statutes—(13) Clayton v. Prince, 129 Minn. 118, 151 N. W. 911. See McEwen v. Prince, 125 Minn. 417, 147 N. W. 275.

(14) Nelson v. McBride, 117 Minn. 387, 135 N. W. 1002; Silberstein v. Prince, 127 Minn. 411, 149 N. W. 653.

(15) Silberstein v. Prince, 127 Minn. 411, 149 N. W. 653.

RIGHT TO VOTE

2919. Constitutional rights—Neither the legislature nor any other legislative authority can restrict or extend the right of suffrage or impose conditions which shall in any substantial manner impede its exercise, but it may be regulated. State v. Erickson, 119 Minn. 152, 137 N. W. 385; Farrell v. Hicken, 125 Minn. 407, 147 N. W. 815.

A provision of a municipal charter providing for a preferential ballot and requiring the voter to mark as many first choices as there are commissioners to be elected, held not unconstitutional. Farrell v. Hicken, 125 Minn. 407, 147 N. W. 815.

(24, 25) See Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

2920. Legislative control—The legislature cannot restrict the constitutional right of a citizen to vote, or to hold office, nor can it impose conditions which shall, in any substantial manner, impede the exercise of those rights. State v. Erickson, 119 Minn. 152, 137 N. W. 385; State v. Bates, 102 Minn. 103, 112 N. W. 1026; Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

The legislature may regulate elections so as to prevent fraudulent practices therein. Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

2922. Women—The commission charter of St. Paul, adopted in 1912, does not violate the constitutional right of women to vote, though in effect it deprives them of the right to vote on matters relating to the city library and schools. State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

(30) See Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949 (the term "legal voters," as used in the proviso of Laws 1907, c. 188, defining who may petition in certain cases for an enlargement of a school district, must be taken in its ordinary and usual sense, and hence does not include women); Digest, § 2256.

2922a. Registration—Affidavit of qualification—Under the Duluth charter unregistered voters may vote at the municipal election upon presenting corroborated affidavits showing that they are qualified voters. Where a duly qualified voter presented such affidavit and was permitted to vote, and no taint of fraud or bad faith appears, his vote is not invalid because one of his corroborating witnesses, who believed and testified that he was a freeholder, in point of law was not such, nor because the judge of election, who in fact administered the oath and received and retained the affidavit, neglected to sign the jurat thereto. Where the voter signs such affidavit in a blank space left for the insertion of his name, it is sufficient, although he fails to sign at the end thereof. McEwen v. Prince, 125 Minn. 417, 147 N. W. 275.

The provisions of section 38 of the Duluth city charter requiring an unregistered voter desiring to vote at a municipal election to deliver an affidavit of his qualifications to the judges of election is directory; and a failure to observe such requirement does not avoid the election. Clayton v. Prince, 129 Minn. 118, 151 N. W. 911.

NOMINATION OF CANDIDATES

2927a. Under municipal charters—A candidate for nomination for judge of the municipal court of St. Paul need not file an affidavit of his candidacy with the county auditor; the manner of nominating elective officers provided by the city charter applying to the nomination of candidates for such office. Kirby v. Ries, 125 Minn. 521, 145 N. W. 746.

2929. By direct vote—Primary election—In the contest of a primary election, on the ground of violations of the Corrupt Practices Act (Laws

Sp. Sess. 1912, c. 3), it is proper to make the defeated candidate a party; but the inquiry into his conduct is material only if the contestee is found guilty, and then not to palliate the guilt, but to determine whether the defeated candidate is entitled to be declared the nominee. Harrison v. Nimocks, 119 Minn. 535, 137 N. W. 972.

Laws 1913, c. 389, amending the various provisions of the primary election statutes, has been held constitutional against various objections. State v. Erickson, 125 Minn. 238, 146 N. W. 364.

Where at the expiration of the time for filing nominations for the office of district judge, to be selected at the June, 1914, primary, there were but two vacancies, but subsequent to that date another vacancy was created by resignation, which it was the duty of the electors to fill at the November general election, as provided by art. 6, § 10, of the constitution it was the duty of the county auditor to prepare the primary election ballot so as to indicate that there were three vacancies to be filled at the November election. Fish v. Erickson, 126 Minn. 525, 147 N. W. 426.

Certain affidavits of candidates for representative held to have been filed in time. Error in designating the class as A and B instead of 1 and 2 held not fatal. Cashman v. Schmahl, 119 Minn. 159, 141 N. W. 100; Winship v. Schmahl, 119 Minn. 161, 141 N. W. 100.

Effect of fraudulent or improper assumption of party allegiance and right to appear on primary ballot under party name. 26 Harv. L. Rev. 351.

(01) State v. Scott, 110 Minn. 461, 126 N. W. 70.

(44) State v. Scott, 110 Minn. 461, 126 N. W. 70; State v. Erickson, 119 Minn. 152, 137 N. W. 385 (classification of municipalities and candidates held not unconstitutional). See 22 L. R. A. (N. S.) 1136; 24 Harv. L. Rev. 659.

(49) Hunt v. Hoffman, 125 Minn. 249, 146 N. W. 733 (a proceeding may be maintained under the statute to compel a city canvassing board to correct a palpable mistake of fact or of law in canvassing returns—the fact that the common council has completed its canvass, and, as a canvassing board, has adjourned, does not defeat relief under the statute—the provision of the statute conferring original jurisdiction on the supreme court is constitutional)

2930. By party convention—Under the existing statutes candidates for state offices cannot be nominated by a party convention. Johnson v. Schmahl, 119 Minn. 179, 137 N. W. 741.

(52) Johnson v. Schmahl, 119 Minn. 179, 137 N. W. 741.

(54) See 26 Harv. L. Rev. 351.

BALLOTS

2934. Constitutional mode of election—(61) Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953.

2934a. Preferential voting—Validity—The preferential system of voting provided by the Duluth charter, whereby first choice, second choice and additional choice votes are permitted, and are counted in a manner therein provided, is unconstitutional as in contravention of article 7, section 1, and section 6, of the constitution. Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953; State v. Prince, 131 Minn. —, 155 N. W. 628. See § 2938; 29 Harv. L. Rev. 213.

2938. Form—Rotation of names—Preferential—Section 180, R. L. 1905 (G. S. 1913, § 334), does not require a rotation on the general election ballot of the names of the two candidates for one office chosen at the primary election under chapter 2, Laws 1912. The court cannot read into the primary election law of 1912 (Laws 1912, c. 2) a requirement that a rotation on the general election ballot be made of the names of the two candidates for one office chosen at the primary; and the failure to make a rotation is not so violative of the purpose and intent of the primary law as to invalidate an election at which there is no rotation. Heilman v. Olsen, 121 Minn. 463, 141 N. W. 791.

The charter of the city of Duluth, adopted by the electors December 3, 1912, provides for a preferential ballot, with the right of the voter to indicate first, second, and additional choices. It contains the provision that no vote shall be counted on the election of commissioners unless the voter marks as many first choices as there are commissioners to be elected. This provision is not in conflict with the section of the state constitution which gives to very male person belonging to certain classes the right to vote "for all officers that now are or hereafter may be elected by the people." The Duluth charter does not abrogate the provision of the general election law, which confers upon the voter the right to vote for persons other than the regularly nominated candidates whose names are printed thereon. Farrell v. Hicken, 125 Minn. 407, 147 N. W. 815. See § 2934a.

The form of ballot for submitting a constitutional amendment must conform to the act for its submission. Goodspeed v. Schmahl, 127 Minn. 521, 149 N. W. 1069 (form of ballot for so-called "Seven Senator Amendment").

2939. Blank spaces—(68) See Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758.

2946. Aid for incompetents in marking—(78) McEwen v. Prince, 125 Minn. 417, 147 N. W. 275 (oath mandatory—ballot without oath void).

2947. Intention of voter controls—Statutory rules—In determining the voter's intention, the court may examine the entire ballot, and if such intention can be clearly ascertained, the ballot should be counted. Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758.

(80) Erickson v. Paulson, 111 Minn. 336, 126 N. W. 1097 (statutory rules not exclusive); Schultz v. Shelp, 131 Minn. —, 155 N. W. 97.

(81) Nelson v. McBride, 117 Minn. 387, 135 N. W. 1002; Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758

2949. Indefinite and conflicting markings—Where the ballot on an election for the mayor of a city contained the names of two candidates printed on lines one above the other, and also a third line, in the same order, on which was printed the words "For Mayor," but which contained no name, a cross-mark in the square at the end of such third line was insufficient to indicate an intention to vote for either one of the candidates named. Nelson v. McBride, 117 Minn. 387, 135 N. W. 1002.

In a city election to determine whether license to sell intoxicating liquors shall be granted, ballots on which the voters had written the word "No" opposite the words "In Favor of License," instead of putting a cross opposite the words "Against License," sufficiently express the intention to vote against license, and were properly counted as votes against license. Krassin v. Waseca, 119 Minn. 137, 137 N. W. 191.

Where the ballot is headed "License Ballot," with the words "For License" and "Against License" in two separate parallel lines underneath, with no column at the right for a cross-mark, though there is sufficient space, and there are no instructions as to voting, a ballot marked with a cross-mark at the right of "For License," and with an irregular pencil line commencing at the right of the words "For license," and close to the cross-mark, and running through the top of the words, then curving down and returning to the right through the lower part of them to near the cross-mark, is not a vote for license. Hanford v. Alden, 122 Minn. 149, 142 N. W. 15. See Peterson v. Taylors Falls, 112 Minn. 407, 128 N. W. 470.

Ballots containing no X mark in the space to the right of a candidate's name, and containing no name in the blank space below, but having an X mark opposite the blank line, should not be counted. Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758.

(85) Erickson v. Paulson, 111 Minn. 336, 126 N. W. 1097; Peterson v. Taylors Falls, 112 Minn. 407, 128 N. W. 470; Nelson v. McBride, 117 Minn. 387, 135 N. W. 1002; Krassin v. Waseca, 119 Minn. 137, 137 N. W. 191; Hanford v. Alden, 122 Minn. 149, 142 N. W. 15; McLaughlin v. Rush City, 122 Minn. 428, 142 N. W. 713; McEwen v. Prince, 125 Minn. 417, 147 N. W. 275; Johnson v. Slapp, 127 Minn.

33, 148 N. W. 593; Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758; Schultz v. Shelp, 131 Minn. —, 155 N. W. 97.

2950. Excess of names—(86) See Johnson v. Slapp, 127 Minn. 33, 148 N. W. 593 (statute inapplicable to town elections).

2951. Misnomer—Idem sonans—If there is but one person of a given name running for an office, the ballot for the given name only should be counted for that person, and, if to designate the person voted for, letters are used which do not properly spell the name, but spell a name which is idem sonans, such a ballot should be counted, since it designates with reasonable certainty the person intended to be voted for. Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758.

2952. Writing names of persons voted for—(88) See Farrell v. Hicken, 125 Minn. 407, 147 N. W. 815 (charter of Duluth, adopted December 3, 1912, does not deprive the voter of this right); Note, 91 Am. St. Rep. 682.

2955. Pasters—Where the printed ballot at a city election contains the name of one candidate and a blank space under it, a voter may substitute the name of another by pasting a sticker over the printed name, and vote for the party so substituted by properly marking the ballot. The placing of a paster containing the name of a person voted for for alderman on a ballot over the name of the candidate printed on the ballot, so that the paster covered the last three letters of the words "for Alderman 2-years," held not a mutilation of the ballot. Erickson v. Paulson, 111 Minn. 336, 126 N. W. 1097.

The use of a sticker or paster may take the place of writing. Where a paster is used and there is nothing to show an intention of the voter to vote for any candidate other than the person named on the paster, the ballot should be counted for that candidate, even though the X mark does not follow the name. This, however, is not conclusive, for the use of the paster might be merely perfunctory. Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758.

2956. Marking to identify voter—(96) Note, 49 Am. St. Rep. 240.

2958. Improper numbering by judges—(99) See Note, 32 L. R. A. (N. S.) 730.

CONDUCT OF ELECTION

2960. Irregularities—Effect—In general—(4) Backus v. Virginia, 123 Minn. 48, 142 N. W. 1042; Hunt v. Hoffman, 125 Minn. 249, 146 N. W. 733; McEwen v. Prince, 125 Minn. 417, 147 N. W. 275; Clayton v. Prince, 129 Minn. 118, 151 N. W. 911; State v. Prince, 131 Minn. —, 155 N. W. 628. See Digest, § 6726; Note, 90 Am. St. Rep. 46.

2960a. Notice of election—A notice for a special election must be posted for twenty days. G. S. 1913, § 403; Backus v. Virginia, 123 Minn. 48, 142 N. W. 1042.

2961. Posting list of electors and notice of election—Where the last day for posting notices of an election was on Monday and notices were posted on the preceding Sunday, it was held that this was sufficient, the presumption being that they remain posted on Monday. Thoreson v. Susens, 127 Minn. 84, 148 N. W. 891.

2964. Sealing ballot boxes—Officers to whom election returns are required to be made should insist on their being sealed before accepting them, and they should keep them under seal. G. S. 1913, § 511; Hunt v. Hoffman, 125 Minn. 249, 146 N. W. 733.

COUNT OF VOTE, RETURNS AND CANVASS

2966. Disqualification of candidate having plurality of votes—(11). Note, 124 Am. St. Rep. 211; 24 Harv. L. Rev. 393.

2967a. Failure to vote for requisite number—Failure to vote for the requisite number of commissioners, as required by the Duluth charter, establishing a commission form of government, does not vitiate a ballot to such extent that it cannot be counted in canvassing the votes for mayor. Silberstein v. Prince, 127 Minn. 411, 149 N. W. 653.

2972. Returns—The official returns are evidence of the votes cast. The presumption is that they correctly state the result of an accurate count of the ballots. Moon v. Harris, 122 Minn. 138, 142 N. W. 12.

2973a. Majority vote—What constitutes—Where a majority vote is required it is generally necessary that there should be a majority of all the votes cast at the election, and not merely a majority of all the votes cast on the proposition. In determining the total number of votes cast at the election defectively marked ballots must be counted, but not ballots cast by persons not qualified to vote. Eikmeier v. Pipestone County, 131 Minn. ——, 155 N. W. 92. See § 4906.

2974a. Judicial review—The decisions of election officers and canvassing boards are not conclusive. The final decision rests with the courts, unless the statute prescribes otherwise. McConaughy v. Secretary of State, 106 Minn. 392, 119 N. W. 408; Scow v. Gutches, 129 Minn. 301, 152 N. W. 639.

2976. State canvassing board—(24) Scow v. Gutches, 129 Minn. 301, 152 N. W. 639.

2977. Municipal canvassing board—Collateral attack—The result of a village election, as returned by the election officers, cannot be collaterally attacked. State v. Osakis, 112 Minn. 365, 128 N. W. 295.

A proceeding may be maintained under G. S. 1913, § 357, to compel a city canvassing board to correct a palpable mistake of fact or of law in canvassing returns. Such mistake was made in this case in excluding proper returns from their consideration. The city clerk of St. Paul should require all returns to be sealed before he receives them, and he should keep them under seal; but the canvassing board cannot wholly reject such returns because presented to them unsealed, if they are fair, complete, and plain on their face, and free from suspicion of tampering, and where the duplicate returns filed with the county auditor are ambiguous and contradictory. The rule which forbids collateral attack of the determination of a judicial or quasi judicial tribunal has no application to this case. Plaintiff has no other adequate remedy. The fact that the common council has completed its canvass, and, as a canvassing board, has adjourned, does not defeat plaintiff's right to relief under this statute. Hunt v. Hoffman, 125 Minn. 249, 146 N. W. 733.

The ballot, in accordance with a charter requirement, provided for preferential voting and for three classes of votes, arranged in separate columns, and designated "first choice," "second choice" and "additional choices." The charter requires the votes of each class to be counted and canvassed separately, and no votes in one class can be counted in another class. McEwen v. Prince, 125 Minn. 417, 147 N. W. 275.

2978. Certificate of election by county auditor—(34) See State v. Osakis, 112 Minn. 365, 128 N. W. 295.

CONTESTS

2980. Application of statutes—County offices—Tie vote—Section 529, G. S. 1913, authorizes an election contest although neither of the two opposing candidates for a county office could be declared elected by the canvassing board because the returns indicated the same number of votes cast for each. Scow v. Gutches, 129 Minn. 301, 152 N. W. 639.

Sections 336 and 339, R. L. 1905, both provide for the contest of elections upon a "question submitted to popular vote," but section 336 embodies a later expression of the legislature and prevails over section 339, in so far as it involves contests of that nature. State v. District Court, 113 Minn. 298, 129 N. W. 514.

2981. Statutory modes of contest exclusive—Contests must be exercised under the conditions and according to the procedure prescribed by statute. It was intended that the statutory procedure should be so broad and elastic that common-law remedies would be needless. The statute should be liberally construed. Scow v. Gutches, 129 Minn. 301, 152 N. W. 639.

2982. Who may contest—(40) Moon v. Harris, 122 Minn. 138, 142 N. W. 12.

2983. Notice of appeal—Service—The filing of a notice of appeal in proceedings to contest an election, pursuant to the provisions of chapter 59, Laws 1911, vests in the court jurisdiction of the contest, and the service of the notice upon the contestee, as well as the service of all other notices subsequent to filing the notice with the court, is subject to regulation and control, as to time and manner of service, by the court. Upon filing the notice of contest, the court may, upon application promptly made, make such order in reference to the service of the notice upon contestee, and the service of other notices, as the circumstances presented justify, having regard to the command of the statute that the contest be brought to a speedy trial and termination. Whittier v. Farmington, 115 Minn. 182, 131 N. W. 1079 (statute not retroactive).

The court, by virtue of Laws 1911, c. 59, acquires jurisdiction to hear and determine an election contest by the filing of notice of contest and appeal with the clerk of the court within 10 days after the canvass of the votes. Service of the notice must be made on the contestee before the court can proceed to hear and determine the matter, but the statute does not limit the time in which this must be done. It is, however, the duty of the contestant, after the court has acquired jurisdiction of the contest, to apply promptly for an order fixing the manner and the time within which the notice must be served. If he fails so to do, and to serve the notice within a reasonable time, the court may, and should on motion, dismiss the contest for inexcusable delay in prosecuting it, but, until so dismissed, the court retains jurisdiction of the subject-matter of the contest, and it may, in its discretion, make such reasonable order as to the service of the notice as it deems just. The notice herein was duly filed and personally served on the contestee within 10 days after the canvass, but before any order was made by the court as to such service. The contestee specially appeared at the time fixed for hearing the contest, and moved the court to dismiss all the proceedings for the reason that the court had no jurisdiction over him. The court confirmed the service of notice, and ordered that it stand as the service ordered by the court, and informed the contestee that the hearing would be continued to enable him to prepare for trial, if he so desired. Held, that it was not error to deny the motion. Walden v. Calef, 119 Minn. 165, 137 N. W. 738.

In a contest as to the result of an election in a village upon the question of licensing the sale of intoxicating liquors, held, that the filing and service of the notice of contest gives the district court jurisdiction of the proceeding; and it does not lose jurisdiction by a failure to appoint a term of court for the hearing of the contest within thirty days after the canvass as the statute requires. Hanford v. Alden, 122 Minn. 149, 142 N. W. 15.

A notice of appeal in an election contest for the office of register of deeds, which states that the ballots cast for the contestant were errone-

ously counted and returned for the contestee in all of the precincts of the county, and that if correctly counted and returned they would have given contestant a plurality, sufficiently specifies "the points upon which the contest will be made," within R. L. 1905, § 336, amended by Laws 1911, c. 59 (G. S. 1913, § 529). Moon v. Harris, 122 Minn. 138, 142 N. W. 12.

In an election contest, jurisdiction is conferred on the court by the filing of a proper notice under section 529, G. S. 1913. The irregularity, if any, in the court signing the order directing the manner and time of service of the notice upon the contestees prior to the filing thereof is not fatal. Service of the notice by one of the contestants was valid service. While it is necessary for the notice of contest to show the contestant to be a voter having the right to vote on the question submitted at the election, his qualification may be tacitly admitted or proof thereof waived by the contestee proceeding, without objection on that ground, to try the contest on the merits. Hanson v. Adrian, 126 Minn. 298, 148 N. W. 276.

(43) Moon v. Harris, 122 Minn. 138, 142 N. W. 12.

2984. Amendment of notice and points—(47) Moon v. Harris, 122 Minn. 138, 142 N. W. 12.

2985. Time and place of trial—Change of venue—It is the purpose of the statute to speed the hearing in an election contest, but the court does not lose jurisdiction by a failure to appoint a term to convene within thirty days after the canvass. A contestant's appeal may be dismissed for laches. Hanford v. Alden, 122 Minn. 149, 142 N. W. 15.

In contests for state, county or municipal offices the statute provides for a change of venue as in ordinary civil actions. G. S. 1913, § 529; State v. District Court, 126 Minn. 404, 150 N. W. 625.

2985a. Dismissal—A contestant may dismiss his contest where the answer of the contestee claims no affirmative relief and is substantially a general denial. State v. Waseca, 116 Minn. 40, 133 N. W. 67.

2987. Reference to ballots—In the 65 precincts of the county which were recounted, the contestee was given by the recount a majority of 15, against a majority of 23 upon the official returns. In the 2 precincts not recounted the contestant relied upon the official returns, which gave him a majority of 18. The court found the contestant elected by a majority of 3. Held, that the contestant properly relied upon the official returns of the precincts not counted, and the recount of the precincts recounted, and was not required to make a recount of all the precincts in the county, or of more than sufficient to give, with the official returns, a result in his favor; and, if the ballots and returns were kept with sufficient integrity to permit their use in evidence, the court was correct

in its finding. Whether the ballots and returns are so kept as to justify their use in evidence for the purpose of overturning the official canvass is a question of fact for the trial court; and upon an examination of the evidence it is held that the trial court properly received the ballots and returns in evidence. The trial court was justified in holding that the contestant, who, as deputy auditor, had access to and was substantially in charge of the ballots, was not precluded because thereof from taking advantage of errors in the count. Moon v. Harris, 122 Minn. 138, 142 N. W. 12. See Schultz v. Shelp, 131 Minn. ——, 155 N. W. 97.

(54) Schultz v. Shelp, 131 Minn. ——, 155 N. W. 97.

2990. Burden and degree of proof—(57) Moon v. Harris, 122 Minn. 138, 142 N. W. 12.

2991. Evidence—Admissibility—(59) Hanson v. Adrian, 126 Minn. 298, 148 N. W. 276 (contest on the ground that the contestees voted without right—having proved that they voted without right it is proper to prove by competent evidence how they voted in order to purge the election of the illegal vote).

2991a. Evidence—Sufficiency—Evidence held to justify findings that the contestees were not resident electors of the village, that each voted unlawfully, and that each cast a vote in favor of license. Hanson v. Adrian, 126 Minn. 298, 148 N. W. 276.

2993a. Scope of review on appeal—On appeal from a judgment in a contested election proceeding, the respondent, having prevailed in the trial court, is permitted in the appellate court to urge any fact appearing in the record which will support the judgment of the court below. Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758.

CORRUPT PRACTICES ACT

2993b. Validity of act—The legislature has the power under the constitution of the state to pass an act prohibiting corrupt practices in elections, and prohibiting any candidate from employing corrupt means to obtain an office, and providing that the practice of corruption by a candidate in securing an office shall bar him from entering into the possession thereof. Chapter 3, Laws of 1912 (G. S. 1913, §§ 567–609), prohibits practices corrupt and immoral and violative of the purity of elections, and provides that they shall be a ground for contest of the election. These provisions are valid. The act provides that in event any part thereof shall be held invalid, the remainder shall not be invalidated, but shall remain in full force and effect. Under such a provision the rule is that, if part of a statute is unconstitutional, the remaining portions must nevertheless be sustained if enough is left to constitute an enforceable law. The provisions of this act which are unquestionably valid con-

stitute an enforceable law, and are not affected by the validity or invalidity of other provisions of the act. Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

2994. **Campaign expenses—Affidavits**—A finding as to an excessive expenditure of money sustained. Harrison v. Nimocks, 119 Minn. 535, 137 N. W. 972.

2994a. **Filing names of campaign committee**—The failure of a candidate for the legislature to file the names of his campaign committee is not a violation of law, where the evidence fails to show that the committee expended money. Harrison v. Nimocks, 119 Minn. 535, 137 N. W. 972.

2994b. **Campaign literature**—Assuming that an intent to deceive the voters into the belief that a certain publication was a sheet from a certain newspaper would be a violation of the corrupt practice act, a finding of a want of any such intent held justified by the evidence. Harrison v. Nimocks, 119 Minn. 535, 137 N. W. 972.

Publishing and distributing a circular to influence voting which falsely accuses a candidate of trickery and deceit in his campaign, and falsely imputes to him disreputable private and official conduct, is a violation of the corrupt practices act, which cannot be disregarded as immaterial or trifling. If the language used would naturally tend to induce a belief that the candidate had been guilty of disreputable conduct or practices, the law cannot be evaded by framing the statement so as to avoid a direct assertion to that effect. If the successful candidate has published and distributed such circulars, the defeated candidate may maintain a contest to oust him from office. The false statements and insinuations concerning contestant published and circulated by contestee were "deliberate, serious and material" within the meaning of the law, and disable him from holding the office to which he was elected. Olsen v. Billberg, 129 Minn. 160, 151 N. W. 550.

2994c. **Penalties—Ouster—Contest**—Chapter 3, Laws 1912 (G. S. 1913, §§ 567–609), known as the "Corrupt Practices Act," provides two remedies for violation of its terms, one by criminal prosecution and conviction and a supplemental judgment of ouster, and the other by a contest of the election carried on according to the law regulating election contests in general. Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

ELECTRICITY

2996. Electric companies—Liability for negligence—An electric power company held 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., 130 Minn. 386, 153 N. W. 746.

Liability for contact of wires carrying electric current. Note, 52 L. R. A. (N. S.) 586.

(64) See Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577 (heavily charged electric wire on bridge over Mississippi at Winona—workman on bridge killed by "brush" or "disruptive discharge"—liability of city).

(66) San Juan etc. Co. v. Requena, 224 U. S. 89. See Note, 32 L. R. A. (N. S.) 848.

2996a. Municipal electric plants—Rights and duties—A city, which undertakes to furnish electric light and power to the public, is subject to the same duties and obligations, and possesses the same rights and privileges, as private persons or corporations doing the same class of service. Such a city is obliged to furnish power to all applicants who pay its proper and reasonable charges therefor. It cannot dictate to consumers what selection of appliances they shall make, as between those in common practical use. In this case relator found it necessary or advantageous in his business to use three-phase motors. Such motors are in common practical use. The city could not furnish current for three-phase motors without the use of transformers costing about eighty dollars. With such transformers it could do so. It refused to furnish power at all, unless relator would discard his three-phase motors and install one-phase motors, to which the city system was adapted. Held, the court should require it to do so. It does not follow that the city must bear the burden of the expense of such transformers. If a particular consumer desires service, which the city can supply only by the installation of transformers at an expense which is substantial, and which is not entailed in furnishing power to others, then the consumer who occasions such special expense should bear the burden thereof. The one essential is that, whatever the charge, it must apply to all persons similarly situated, to the end that there shall be no discrimination. As to the method of adjustment of such expense, whether by an installation charge, a rental, or an increased rate, the city has a large discretion. Its regulation, if fair and reasonable and free from discrimination, is binding on the applicant for service. State v. Waseca, 122 Minn. 348, 142 N. W. 319.

2996b. Discrimination in service—Duty to make connections—Electric companies which are public service corporations are bound to serve all alike under similar conditions. This duty may be enforced by mandamus. State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104 (electric light company required to make connections—it is an unreasonable discrimination for such a company to require an applicant for service to procure for it a right of way to his premises, when such condition is not imposed upon other applicants and patrons).

2996c. Rates—The city council of the city of St. Paul is vested with authority to fix a maximum price which may be charged by defendant, a public service corporation, having the franchise to supply electric current within the city. The remedy of consumers for discrimination in rates by a public service corporation is ordinarily an action at law for damages and not by injunction. St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262. See § 2182.

2996d. Contracts—A contract for the sale and delivery of electric current, providing for the delivery of certain volume thereof at the storage plant or substation of the generating company at certain specified prices, construed, and held to obligate the purchaser to pay for such volume of current as should actually be delivered to him, and that whatever loss results from the transmission of the electricity to and the passage through the transformers at the substation must fall upon the seller. Wherland Electric Co. v. Burmeister, 122 Minn. 110, 141 N. W. 1117.

EMBEZZLEMENT

2997. Nature—In general—(70) Note, 87 Am. St. Rep. 19.

2998. By officer, agent, clerk, servant or bailee—An officer or agent of a corporation may be convicted for embezzlement of its funds though it is defectively organized and is a mere de facto corporation. State v. Murphy, 113 Minn. 405, 129 N. W. 450.

3005. How proved—Prima facie case—Burden of proof—Demand—Where an officer of a society feloniously appropriated its funds to his own use it was held unnecessary to prove a demand. State v. Murphy, 113 Minn. 405, 129 N. W. 850.

Where the indictment charges that defendant was the agent of B., and as such agent had money in his possession belonging to B. which he feloniously appropriated to his own use, it is incumbent upon the prosecution to prove that he was such agent and that the money was the property of his principal. State v. Lawrence, 130 Minn. 10, 153 N. W. 123.

3008. Evidence—Sufficiency—Evidence held sufficient to justify the conviction of an officer of a religious society. State v. Murphy, 113 Minn. 405, 129 N. W. 850.

(30) State v. Lawrence, 130 Minn. 10, 153 N. W. 123.

EMINENT DOMAIN

IN GENERAL

3013. Nature—Power of eminent domain and police power distinguished. 27 Harv. L. Rev. 664.

(36) School District v. Bolstad, 121 Minn. 376, 141 N. W. 801; State v. Reed, 125 Minn. 194, 145 N. W. 967.

3014. Legislative discretion—There is no vested right to acquire property by condemnation under a general law. The law may be modified in the discretion of the legislature. Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18.

The power of eminent domain rests exclusively in the legislature and can be exercised only as authorized by the legislature. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

(42) School District v. Bolstad, 121 Minn. 376, 141 N. W. 801; Chicago etc. Ry. Co. v. Le Roy, 124 Minn. 107, 144 N. W. 464; State v. Reed, 125 Minn. 194, 145 N. W. 967; Webb v. Lucas, 125 Minn. 403, 147 N. W. 273; Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

(43) See Digest, § 3080.

3014a. Refusal of owner to sell—The refusal of the owner to sell the property is not a prerequisite to the exercise of the power of eminent domain. School District v. Bolstad, 121 Minn. 376, 141 N. W. 801.

3017. What constitutes a taking—What constitutes an additional servitude in streets and roads. Note, 106 Am. St. Rep. 232.

(54) See Digest, § 9008.

WHO MAY EXERCISE

3018. In general—De facto corporations—Whether a de facto corporation may exercise the right of eminent domain is an open question in this state. Lawver v. Great Northern Ry. Co., 112 Minn. 46, 127 N. W. 431. See Note, 50 L. R. A. (N. S.) 236.

(72) School District v. Bolstad, 121 Minn. 376, 141 N. W. 801; Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561

3020. Public service corporations—In general—Under the statutes relating to public service corporations, it is the duty of the court to determine, in each particular case, whether the taking of the designated property is necessary for the purposes of the proposed enterprise, and whether such property may lawfully be taken for such purposes. Such corporations cannot divert water from the navigable streams of one drainage basin into those of another drainage basin, if such diversion will impair the navigability of the streams from which the water is proposed to be taken. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

3021. Railroad companies—(81) See Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211 (spur tracks).

3022. Municipalities—Municipalities, including cities, villages, towns, counties and school districts, have no inherent power of eminent domain, but can exercise it only under an express or implied legislative grant. In this state they have express legislative authority. Independent School District v. State, 124 Minn. 271, 144 N. W. 960.

(88) Independent School District v. State, 124 Minn. 271, 144 N. W. 960.

3022a. School districts—School districts are authorized by statute to exercise the right of eminent domain for educational purposes. Independent School District v. State, 124 Minn. 271, 144 N. W. 960.

If the effect of R. L. 1905, § 1324 (G. S. 1913, § 2756), is to prevent the acquisition of a school site unless the funds to pay for it are appropriated, levied, or on hand, the failure to so provide funds is defensive matter. Under section 1320 a school district may condemn without first making an unsuccessful attempt to purchase. In condemnation the question of necessity is a legislative one; and when a school district selects a site, in the manner authorized by the statute, its action is final, and the question of the necessity of its taking is not open to judicial review. School District v. Bolstad, 121 Minn. 376, 141 N. W. 801.

THE PUBLIC USE

3024. What constitutes—In general—Land may be taken for public schools and other governmental agencies. School District v. Bolstad, 121 Minn. 376, 141 N. W. 801; Independent School District v. State, 124 Minn. 271, 144 N. W. 960; State v. Reed, 125 Minn. 194, 145 N. W. 967. See Note, 48 L. R. A. (N. S.) 485 (school purposes).

The fact that a proposed public cartway is solely for the purpose of furnishing ingress to and egress from the premises of a single landowner, and is to be located entirely over and upon the premises of another, is not so conclusive of the private and against the public character of such way as necessarily to render the taking of the property

necessary for such way a taking of private property for private use. Mueller v. Courtland, 117 Minn. 290, 135 N. W. 996.

Private property can be condemned only when it can be made to subserve some public use. If the purpose for which it is sought to take private property cannot be accomplished, such taking will not subserve public purposes, is not necessary within the meaning of the statute, and is unauthorized. The burden of showing that such purpose can be accomplished is upon the petitioner. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

(94) See 27 Harv. L. Rev. 571.

(95) Mueller v. Courtland, 117 Minn. 290, 135 N. W. 996.

3025. Held a public use—Use of public highway for fence to protect a municipal water supply from polution. Board of Water Commissioners v. Belland, 113 Minn. 292, 129 N. W. 389.

Use of land for an artificial watercourse between two lakes in a city. Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169, affirmed, 232 U. S. 430. See 27 Harv. L. Rev. 665.

A public cartway designed to furnish access to premises of a single owner and located on the premises of another. Mueller v. Courtland, 117 Minn. 290, 135 N. W. 996.

A railroad for the use of the University of Minnesota. State v. Reed, 125 Minn. 194, 145 N. W. 967.

(3) State v. Chicago etc. Ry. Co., 115 Minn. 51, 131 N. W. 859.

(7) See Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

(8) Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198.

3026. Held not a public use—The diversion of waters from the navigable streams of one drainage basin into those of another drainage basin, if such diversion will impair the navigability of the streams from which the water is proposed to be taken. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

(11) See Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

See Note, 102 Am. St. Rep. 809.

3027. Province of courts and legislature—Although in all cases the propriety and expediency of condemning private property for public use is a purely legislative question, yet, under our statutes, it becomes the duty of the court to determine, in each particular case, whether the taking of the designated property is necessary for the purposes of the proposed enterprise, and whether such property may lawfully be taken for such purposes. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

Whether the purpose for which private property is to be taken be a public purpose is a judicial question which the owner has the right, at some time and in some manner, to present to and have determined by

the courts before his property is actually appropriated. The question need not be submitted to the courts in the first instance, and, if an opportunity is afforded the owner, by appeal or otherwise, to bring the question before the courts in the proceeding itself, he must pursue the remedy so given him. Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

(12) State v. Reed, 125 Minn. 194, 145 N. W. 967; Webb v. Lucas, 125 Minn. 403, 147 N. W. 273. See Note, 22 L. R. A. (N. S.) 1; 88 Am. St. Rep. 926.

(13) Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

3029. Streets, etc.—The taking of land for a public cartway has been sustained. Mueller v. Courtland, 117 Minn. 290, 135 N. W. 996.

WHAT MAY BE TAKEN

3030. State land—State lands are not subject to appropriation in condemnation proceedings except when the right to so acquire them is expressly or by necessary implication granted by the legislature. Chapter 53, Gen. Laws 1872 (section 2606, Gen. St. 1894), construed, and held to grant, by necessary implication, the right to acquire such lands for other public purposes, and the right so granted was carried forward in the statutory revision of 1905, and thereby in effect extended to all corporations entitled to exercise the right of eminent domain, including school districts. Under chapter 258, Laws 1913 (G. S. 1913, §§ 2748, 2749), a duly organized school district of the state may thus acquire an interest in and to a tract of state school land for the educational purposes, namely, experimentation and instruction in agriculture, provided for by that statute. Rights acquired in such condemnation proceedings are equivalent to and answer every purpose of a public sale, and the statutes, which, by implication, grant the right, are not in violation of article 8, § 2, of the constitution. Independent School District v. State, 124 Minn. 271, 144 N. W. 960.

3032. Land already devoted to a public use—(21) Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169. See Note, 37 L. R. A. (N. S.) 101; 25 Harv. L. Rev. 563.

3033. Streets across railways—See Digest, § 6621.

3034. Railways across streets—A railway company, organized under title 1, c. 34, G. S. 1878, whether organized before or since 1893, is not authorized by the laws of this state, special reference being had to sections 2841 and 2916, R. L. 1905 (G. S. 1913, §§ 6136, 6236), to acquire by condemnation proceedings the public easement in any portion of a street within a city or village to construct, maintain, or operate a railway of any kind along such street. A franchise must first be obtained from the city or village before such railway company can acquire such right to

construct, maintain, or operate a railway along a street therein. Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18.

Conceding that under section 2916 a railroad company may and must acquire the right to cross a street in a city or village by condemnation proceedings, equity will not enjoin such crossing before such proceedings are begun; it appearing conclusively that the necessity exists, and that such city or village has at all times an absolute right to compel the railroad company to make the crossing safe for public use. International Falls v. Minn. D. & W. Ry. Co., 117 Minn. 14, 134 N. W. 302.

See Digest, § 8106.

3037. Easements—A private right of way is an easement and is land and its destruction for public purposes is a taking for which the owner of the dominant estate to which it is attached is entitled to compensation. United States v. Welch, 217 U. S. 333.

3038a. Property of riparian owners—A public service corporation, authorized to condemn private property, cannot interfere with the navigable capacity of any navigable stream, unless authorized by statute; but it may take the private rights of property of the riparian owner upon compliance with the constitution and laws of the state, and upon making just compensation, whether the stream be navigable or not. Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198.

RIGHTS ACQUIRED

3039. Legislative discretion—(38) See 27 Harv. L. Rev. 388.

3040. Limited to necessities of purpose—Construction of grants of power—(39) Smith v. Minneapolis, 112 Minn. 446, 128 N. W. 819. See 14 Col. L. Rev. 170; 27 Harv. L. Rev. 388.

3041. In streets—(40) See Digest, § 6618.

3042. Railways—(46) Note, 32 L. R. A. (N. S.) 155.

(50) 27 Harv. L. Rev. 388.

COMPENSATION

3046. Necessity—In general—A municipality has no proprietary interest in its streets and is not entitled to compensation when a railroad crosses them. International Falls v. Minn. D. & W. Ry. Co., 117 Minn. 14, 134 N. W. 302.

Effect of changing use of land. 26 Harv. L. Rev. 439.

3048. Provision for compensation—Security—Action—(63) School District v. Bolstad, 121 Minn. 376, 141 N. W. 801.

(64) Kafka v. District Court, 128 Minn. 432, 151 N. W. 144.

(69) Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738.

3049. What constitutes a damage—A private injury from railroad shops, roundhouses and switchyards may be a "damage" within the amended constitution. Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353.

Damaging private property abutting on a highway by constructing an embankment in the highway is a damage within the meaning of the constitution requiring compensation. Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738.

(73) Note, 109 Am. St. Rep. 904.

See Digest, §§ 6646, 6650.

3050. What is compensation—Market value—The inquiry is not what the land is worth to the condemnor. The necessities of the condemnor are not a measure of market value. Stinson v. Chicago etc. Ry. Co., 27 Minn. 284, 6 N. W. 784; Union Depot etc. Co. v. Brunswick, 31 Minn. 297, 17 N. W. 626. See Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53; New York v. Sage, 239 U. S. 57.

(80) Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53.

(81) It must be borne in mind that the material consideration is, not the benefit to be derived by the petitioner, but the damages sustained by the landowner. It is the damage caused by imposing the easement on the land which the owner is entitled to receive. Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198.

3053. What constitutes a single tract—(87) See 25 Harv. L. Rev. 389.

3054. Elements of value—One whose land is taken by the government for a particular purpose is entitled to have the fact that the land is peculiarly available for such purpose considered in the appraisal. United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53.

It has been held proper to take into consideration the fact that land was specially adapted for a dock. Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161.

3055. Benefits from improvements—(8) United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53.

3057. Elements of damage—A deed conveying to a railway company a strip of land across a farm in terms released all claims for damages to the balance of the land occasioned by locating and constructing a railway over the strip conveyed. The railway company thereby acquired the right to make a solid fill beneath its tracks, and any resulting damages to the remainder of the farm through the loss of view from one side of the track to the other was released. Such damages, therefore, cannot

be assessed in a subsequent condemnation proceeding instituted by the railway company to acquire additional width of right of way for slopes for such fill. Chicago etc. Ry. Co. v. Rehnke, 113 Minn. 390, 129 N. W. 771.

(22, 26) See 10 Col. L. Rev. 170.

3060. Valuation as of what date—Anticipatory improvements—Effect of anticipatory improvements made in bad faith. See Sherwood v. St. Paul etc. Ry. Co., 21 Minn. 122, 126; 10 Col. L. Rev. 171.

(36) See Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161.

3069. Evidence of value—In general—A wide discretion is allowed the trial court in regard to admission of evidence of value. McGovern v. New York, 229 U. S. 363.

3071. Sales of similar land—(53) See 14 Col. L. Rev. 171.

3073. Competency of witnesses—The determination of the trial court as to the competency of witnesses will not be reversed on appeal except for a clear abuse of discretion. Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161. See Digest, § 3335.

3076. To whom payable—Since, under our statutes, an executor has the right to the possession of his testator's lands, without regard to the sufficiency of the personal assets to pay debts, and since the damages in condemnation proceedings stand in the place of the land, where the damages upon the condemnation of certain property were paid into court, an executor, claiming that the property belonged to his testator's estate at the time of its taking, had the right to sue, as for money had and received, a party who had obtained such money out of court, and this without regard to the financial status of the estate. Where it appeared from the petition in condemnation proceedings that the title to the land was in doubt, and it did not appear from the order appointing commissioners to assess damages that such doubt had been settled thereby, and thereafter the damages assessed, the same being in gross and purporting to cover any and all interests in the property taken, were paid into court pursuant to G. S. 1894, § 2649, and no judgment such as that prescribed by section 2615 was ever entered upon the assessment, the condemnation proceedings did not, under the doctrine of res judicata, preclude the real owner of the land from asserting his ownership of the fund so deposited, as against a party who had obtained the same out of court, though the report of the commissioners undertook to award the damages to such party. Nor did a subsequent order, made upon an application under G. S. 1894, § 2650, and based solely upon ex parte affidavits, and of which the plaintiff, who made no appearance thereto, had no notice, directing the fund to be paid over to

the defendant, bar the plaintiff's claim of ownership thereof. There was no merit in the defendant's contention that the plaintiff's only remedy was by an action against the condemning corporation for his damages. The defendant's claim, made for the first time in this court, that the plaintiff was estopped by reason of delay in the assertion of the title to the land, and that the plaintiff was also barred by laches, held not sustained by the evidence. Refusal of the trial court to allow the defendant's claim for improvements, made prior to the condemnation proceedings, as an offset against the plaintiff's recovery, sustained for lack of evidence upon which a severance of the benefits conferred upon the entire property taken could be made, as between the portion of the property to which the defendant succeeded in establishing title by adverse possession and the part thereof as to which its claim of title failed. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

(67) Kafka v. District Court, 128 Minn. 432, 151 N. W. 144.

(71) Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

3077. By whom payable—The obligation to pay compensation rests on the municipality, or other political subdivision of the state, that takes or damages the property, in the absence of express legislative provision to the contrary. A county held liable to pay compensation for damage to abutting property from an embankment connected with a bridge constructed by the county within the limits of a village. Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738.

3078. Waiver—It not appearing from the answer that the grade was established before plaintiff petitioned the defendant to grade the street, he cannot be held to have waived damages to his property resulting from the grade established, and it is unnecessary to determine whether, by petitioning after the grade is established, the property owner waives damages. Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 269.

PROCEDURE IN GENERAL

3079. Nature—The statutes do not contemplate a trial and determination of the rights of conflicting claimants to the land, as between themselves. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

(82) Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

3080. Legislative discretion—(83) School District v. Bolstad, 121 Minn. 376, 141 N. W. 801.

3081. Construction of statutes—The statutes regulating procedure in eminent domain proceedings are not to be construed as granting the right of eminent domain. Independent School District v. State, 124 Minn. 271, 144 N. W. 960.

3091. Discontinuance or abandonment—(16) See Nixon v. Marr, 190 Fed. 913.

PROCEDURE BEFORE COMMISSIONERS UNDER GENERAL STATUTES

3093. Petition—The description of the premises sought must be specific and definite. The test is not what would be a sufficient description in a deed. It is not necessary that the petition of a corporation in condemnation proceedings should allege that the proceeding was authorized by its board of directors. A description of the right to be taken as "a portion of the waters of the Otter Tail river, * * * leaving at all times in the channel of said river sufficient water for all public and domestic uses," is a sufficiently definite description. Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198.

(27) Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198.

3094. Hearing and order on petition—(34) Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561. See Digest, § 3027.

(39) Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

(42) Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 906. See Digest, § 3097.

3096. Qualifications of commissioners—See Note, 47 L. R. A. (N. S.) 151.

3097. Proceedings and authority of commissioners—In general—(54) Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 906. See Digest, § 3094.

3099. Assessment and award of damages—Several owners—Apportionment—Where several persons have separate estates or interests in a single tract or parcel of land taken in condemnation proceedings, the proper mode of reaching a fair valuation of the property, and of ascertaining the damages of those interested, is to treat the property as though the entire estate and all interests therein were in a single person, and to find the value and damage in gross, leaving the apportionment of the award to be thereafter made according to the previous interests of the parties in the property. Neither a separate assessment of damages to the several interests in the property nor a subsequent apportionment of the gross award is essential to the validity of the assessment, unless such is required by statute. Section 247 of the charter of St. Paul, in force in 1913, providing that "if the lands and buildings belong to different persons, or if the land be subject to lease, the damages done to such persons, respectively, may be awarded to them by the board of public works, less the benefits resulting to them, respectively, from the improvement," held not to require the board either to make a separate assessment of relator's interest in the property as lessee, or subsequently

to apportion to him his share of the gross award. State v. District Court, 128 Minn. 432, 151 N. W. 144.

3101. Conclusiveness of award—The award is not ordinarily conclusive as to the rights of conflicting claimants to the land, as between themselves. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

(66) See Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

3105. Judgment—(77) Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

PROCEDURE IN DISTRICT COURT

3107. Appeal to district court—An appeal is governed by the rules of procedure of an ordinary civil action. King v. Board of Education, 116 Minn. 433, 133 N. W. 1018; Minneapolis etc. Traction Co. v. Goodspeed, 128 Minn. 66, 150 N. W. 222.

Conditions imposed on the condemnor by the award are not nullified by an appeal. Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 906.

3108. Dismissal—The appeal may be dismissed by the appellant, without the consent of the respondent, in the manner provided by G. S. 1913, § 7825, at least when the appeal is limited to the issue of damages. Minneapolis etc. Traction Co. v. Goodspeed, 128 Minn. 66, 150 N. W. 222.

3110. Issues—The statute does not contemplate that there should be a trial and determination of the rights of conflicting claimants to the land, as between themselves. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

The appeal may be limited to the issue of damages. Minneapolis etc. Traction Co. v. Goodspeed, 128 Minn. 66, 150 N. W. 222.

(98) Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 906.

3111. Trial—Venue—The trial is governed by the rules of procedure of an ordinary civil action. The appellant occupies the position of a plaintiff. King v. Board of Education, 116 Minn. 433, 133 N. W. 1018; Minneapolis etc. Traction Co. v. Goodspeed, 128 Minn. 66, 150 N. W. 222.

Qualification of jurors. Note, 47 L. R. A. (N. S.) 151.

(4) Minneapolis etc. Traction Co. v. Goodspeed, 128 Minn. 66, 150 N. W. 222.

3112. Evidence—Admissibility—The admission of evidence that premises were valuable for rental purposes because a profitable business was being conducted thereon held harmless in view of the instructions. King v. Board of Education, 116 Minn. 433, 133 N. W. 1018.

(6) See Dodge v. Martin County, 119 Minn. 392, 138 N. W. 675.

3117. Judgment—The judgment does not ordinarily determine the rights of conflicting claimants to the land, as between themselves. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

The judgment must include any conditions of the award not set aside on appeal, and this may be done by amendment even after the judgment as to damages has been paid and discharged. Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 906.

(27) See Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

(29) Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 906.

3120. New trial—Excessive or inadequate damages—Damages held not so inadequate as to require the granting a new trial or any disturbance of the verdict. Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198.

(35) Dorffi v. Duluth, W. & P. R. Co., 117 Minn. 276, 135 N. W. 529.

(36) Minneapolis etc. Traction Co. v. Enggren, 111 Minn. 373, 127 N. W. 391 (damages held not excessive); Minneapolis etc. Traction Co. v. Fahey, 114 Minn. 54, 129 N. W. 1051 (an award sustained by the trial court will not be set aside on appeal unless it is palpably against the evidence or clearly given under the influence of passion or prejudice); King v. Board of Education, 116 Minn. 433, 133 N. W. 1018 (award held not excessive).

PROCEDURE UNDER MUNICIPAL CHARTERS

3122. In general—(39) Kafka v. District Court, 128 Minn. 432, 151 N. W. 144 (assessment of damages—separate interests in property—provision of charter for compensation sufficient—apportionment of award—lessee—payment of award to fee owner).

(40) Noodleman v. Minneapolis, 128 Minn. 531, 150 N. W. 398 (notice of protest against award of damages by commissioners held sufficient, under Laws 1913, c. 345, to permit an appeal to the district court, and it was error to dismiss the appeal); Bernstein v. Minneapolis, 128 Minn. 532, 150 N. W. 398.

REMEDIES OF LANDOWNER

3125. Ejectment against railway company—Statute—(47, 49, 50) Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161 (damages held excessive on appeal and reduced—weight to be given to opinion of trial judge and jury on appeal).

3126. Injunction—Conceding that under section 2916, R. L. 1905, a railroad company may and must acquire the right to cross a street in a city or village by condemnation proceedings, equity will not enjoin such

crossing before such proceedings are begun; it appearing conclusively that the necessity exists, and that such city or village has at all times an absolute right to compel the railroad company to make the crossing safe for public use. International Falls v. Minn. D. & W. Ry. Co., 117 Minn. 14, 134 N. W. 302.

Where a landowner is a party to the proceedings by which a town ditch is established, and can bring all matters in controversy before the court by writ of certiorari, he cannot maintain an action to enjoin the construction of such ditch. Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

APPEAL TO SUPREME COURT

3129. When lies—An order granting a new trial, after trial of the question of damages on an appeal in the district court from the award of commissioners, is appealable. King v. Board of Education, 116 Minn. 433, 133 N. W. 1018.

EMPLOYERS' LIABILITY ACT (Federal)—See Abatement and Revival, 14; Death by Wrongful Act, 2608, 2615, 2617a; Master and Servant, 6022a–6022n.

EQUITABLE CONVERSION

3132. Definition and nature—(89) See Young Men's Christian Assn. v. Horn, 120 Minn. 404, 421, 139 N. W. 805; Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372 (doctrine held inapplicable to insurance money); 13 Col. L. Rev. 369 (equitable conversion by contract).

3132a. Not allowed to evade statute—The doctrine of equitable conversion cannot be invoked to evade a statute. Young Men's Christian Assn. v. Horn, 120 Minn. 404, 421, 139 N. W. 805.

3133. Power or order of sale in will—The doctrine of equitable conversion has been applied in a multitude of cases, but not frequently in Minnesota. There is no doubt that an express direction by the testator to sell real estate and devote the proceeds to the payment of bequests or to other purposes amounts to an equitable conversion of the real estate into personalty. And where the time at which the land is directed to be sold is indefinite, it is universally held that the conversion takes place, not when the sale actually takes place, but when the will goes into effect, on the death of the testator. A testator by his will devised and bequeathed to his wife his real estate and personal property, and, "after her death and within two years thereafter," gave and bequeathed

to each of his children a specific sum of money, the total bequests to such children amounting to the sum of $5,200, approximately equal to the total value of his real and personal property, which personal property was worth $800 at the time the will was made, and $300 at the time the testator died. After the testator's death, and before the death of his widow, a creditor of a son of the testator obtained a judgment, levied an execution on the son's interest in the real estate, and purchased such interest at the execution sale. After the death of the widow, the real estate was sold under a license of the probate court to pay debts and legacies, and this action was brought by the creditor to recover of the administrator the son's interest in the proceeds of such sale. Held, that though there is no express direction in a will to sell the real estate of testator and convert it into personalty, where it appears that the testator must have contemplated that it would be necessary to sell the real estate in order to carry out the provisions of the will, the direction is implied, and there is an equitable conversion of the realty into personalty. When the sale is directed, expressly or by implication, at a specified time in the future, in this case after the death of the life tenant, the conversion takes place in equity as of the date of the testator's death. Between that time and the actual sale, the legatees of the testator had no interest in the land that could be levied upon or sold on execution. Greenman v. McVey, 126 Minn. 21, 147 N. W. 812.

A testator devised a life estate in all his property, real and personal, to his wife. The will provided that after her death the property should be converted into money and specific sums should go to three daughters named, and the balance to a fourth daughter named. The fourth daughter outlived her father, was married after his death, and predeceased her mother, leaving no issue. Her husband survived her. Held, that the provision in the will for a sale and division of the property amounted to an equitable conversion as of the date of the testator's death. Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

3133a. Applications—When justice requires it a court of equity will treat the money derived from property as it would the property itself. This principle is frequently applied where property on which there is a lien is sold under a paramount lien, under judicial process, or under a testamentary power paramount to the lien. It is not generally applicable to insurance money derived from the loss of a building upon which there are liens. Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

EQUITY

3134a. Jurisdiction—Extension—Legislative control—The legislature may extend the bounds of equity jurisdiction and regulate its procedure. State v. Ryder, 126 Minn. 95, 147 N. W. 953.

3135. Nature—The rise of equity was due to the paucity and rigidity of remedies at the common law. Corey v. Corey, 120 Minn. 304, 139 N. W. 509.

3136. Equity acts in personam—(96) Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176; Smith v. Smith, 122 Minn. 431, 144 N. W. 138. See 26 Harv. L. Rev. 292.

3137. Adequate remedy at law—In general—One reason why a court of equity should refrain from taking jurisdiction except in a clear case, where plaintiff has a legal cause of action or defence, is that the defendant is thereby deprived of his right to a jury trial. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

The right to trial by jury should not be interfered with by an assertion of doubtful equity jurisdiction, but where there is an equitable cause of action and an equity court once takes jurisdiction it will determine and adjust all the rights of the parties connected with the subject-matter of the action, though some of the parties may have a right to a jury trial as to some of the issues. Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423.

Where a plaintiff seeks equitable relief to protect a legal right, though equity has jurisdiction because of the nature of the relief demanded, it will not take cognizance of the case or grant the relief where it appears that plaintiff has a plain, speedy and adequate remedy at law. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735; National Council v. Weisler, 131 Minn. —, 155 N. W. 396.

If the plaintiff has no adequate remedy at law when the action is brought the fact that he thereafter has one will not abate the action. National Council v. Weisler, 131 Minn. —, 155 N. W. 396.

The statutory remedies of interpleader, intervention, consolidation of actions, or bringing in parties, may afford an adequate remedy at law, so as to defeat a resort to equity. Davis v. Forrestal, 124 Minn. 10, 16, 144 N. W. 423.

Where it is obvious that there is a remedy at law it is the duty of a federal court to interpose that objection sua sponte to a suit in equity. Singer Sewing Machine Co. v. Benedict, 229 U. S. 481.

(4) Camp v. Boyd, 229 U. S. 530.

(99) Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787.

See Digest, §§ 1182, 2839, 4472, 4476, 8342, 8776.

3138. Equity grants full relief—Where the plaintiff has an equitable cause of action, and the jurisdiction of equity attaches as a matter of right, the claims of all proper parties will be adjusted, though such claims are of a legal nature triable by jury. Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423.

A court of equity will mould its relief so as to determine the rights of all the parties, and it will not allow the pleadings to prevent it from getting at the heart of the controversy and seeing that a right result is reached. O'Rourke v. O'Rourke, 130 Minn. 292, 153 N. W. 607.

Limitations on rule that equity grants full relief. Note, 116 Am. St. Rep. 877.

3140. Conflict between legal and equitable rules—(10) Hillsdale Distillery Co. v. Briant, 129 Minn. 223, 152 N. W. 265. See Gregory Co. v. Cale, 115 Minn. 508, 513, 133 N. W. 75.

3141. Force of precedents—New rules—(11) See Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 416, 128 N. W. 455.

(12) Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 416, 128 N. W. 455.

3142. Equitable maxims—The vision of equity is not circumscribed by the narrow bounds of the interests immediately involved. Shearer v. Barnes, 118 Minn. 179, 198, 136 N. W. 861.

(13) Mason v. Fichner, 120 Minn. 185, 139 N. W. 485; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952; Madler v. Twin City Box Factory, 125 Minn. 207, 145 N. W. 1072.

(15) Devlin v. Quigg, 44 Minn. 534, 47 N. W. 258; Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Mason v. Fichner, 120 Minn. 185, 139 N. W. 485; Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066 (rule applies even against a wrongdoer); Weegham v. Killefer, 215 Fed. 168, 289. See Curtin v. Benson, 222 U. S. 78 (burden of showing improper object of suit); 8 Col. L. Rev. 40.

(17) Way v. Barney, 116 Minn. 285, 133 N. W. 801.

(18) Meier v. Northwest Thresher Co., 119 Minn. 289, 293, 138 N. W. 36; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455; Camp v. Boyd, 229 U. S. 530.

(19) Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871; Holien v. Slee, 120 Minn. 261, 139 N. W. 493 ("equity's vision is not circumscribed by formal instruments, but extends through matters of form to the heart of the transaction"); Wilkinson v. McKimmie, 229 U. S. 590.

(21) Kettle River Ry. Co. v. Eastern Ry. Co., 41 Minn. 461, 475, 43 N. W. 469.

ESCROWS

3146. The depositary—(29) Van Valkenburg v. Allen, 111 Minn. 333, 126 N. W. 1092 (the statement in the syllabus of this case that an agent of the grantor cannot act as the depositary is erroneous). See 14 Col. L. Rev. 392.

3149. When title passes—Death of party—Delivery—See Digest, § 2667.

3153. Wrongful delivery—Conversion—Where the depositary wrongfully delivers a deed without requiring performance of the conditions of the escrow agreement the deed may possibly convey a good title to the grantee, or a purchaser under him, acting in good faith. Murray v. Foskett, 114 Minn. 44, 130 N. W. 14.

One holding in escrow an agreement and money to be paid to one of two parties according to the terms of the agreement, acts at his peril in dealing with either party without the consent of the other; and if the party to whom he pays the amount deposited is not entitled thereto he is liable to the other party. Citizens Nat. Bank v. Davisson, 229 U. S. 212.

A real estate agent negotiated a contract for the exchange of real estate between two of his clients, and received from one of them a check and promissory note payable to the order of the other, to be held in escrow, and not to be delivered until the maker should receive a report on the lands he was purchasing. The agent delivered the note and check contrary to the terms of the escrow agreement. Held, the agent was liable, in conversion, for the amount of the face of the note and check, with interest, and the burden was upon him to prove that payment could not be enforced against the maker. Barrett v. Messer, 115 Minn. 476, 132 N. W. 991.

ESTATES

IN GENERAL

3159. Estates in possession and in expectancy—In this state expectant estates or interests in personalty are recognized. State v. Probate Court, 102 Minn. 268, 113 N. W. 888; Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

(47) See Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

3162. Rule in Shelley's Case abolished—(51) See Vogt v. Graff, 222 U. S. 404; Note, 29 L. R. A. (N. S.) 963.

3163a. Equitable estates—An equitable title is a right possessed by a person to have the legal title to property transferred to him upon the performance of specified conditions. Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440.

3163b. When vest—Conditions precedent—A right or interest in land which depends upon a condition precedent does not vest until or unless the condition is performed, although it is or becomes for any reason impossible of performance. Hobart v. Kehoe, 110 Minn. 490, 126 N. W. 66.

LIFE ESTATES

3165. Creation—(56) Note, 6 L. R. A. (N. S.) 1186.

3166. In personalty—(57) Johrden v. Pond, 126 Minn. 247, 148 N. W. 112. See Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

3167. Purchase of lien or adverse title by life tenant—(58) Upton v. Merriman, 116 Minn. 358, 365, 133 N. W. 977.

3169. Right to income—Dividends—(60) See Note, 118 Am. St. Rep. 162; 12 L. R. A. (N. S.) 768; 50 Id. 510; 26 Harv. L. Rev. 77.

3170. Duties of life tenant—A life tenant in possession of property subject to a mortgage must pay accruing interest. Upton v. Merriman, 116 Minn. 358, 365, 133 N. W. 977.

(61) Baldwin v. Zien, 117 Minn. 178, 186, 134 N. W. 498; Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876. See Digest, § 9253.

See Note, 137 Am. St. Rep. 651; 33 L. R. A. (N. S.) 669.

3170a. Conveyance by life tenant—Estate conveyed—Devise—It is provided by statute that a conveyance by a tenant for life, purporting to convey a greater estate than he possesses, shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such tenant could convey. A will executed in a foreign state contained a devise of real estate in Minnesota to a tenant for life, with the fol-

lowing provision: "And as I intend this bequest as a provision for the support of my son and family, I direct that his said life interest in the said farm shall not be subject to be sold by him, and that upon any sale of it by him, or by any other person on account of his liabilities or engagements, or otherwise, the said bequest to the remainder of his children shall immediately take effect as in case of his death, saving the rights and claims of any child or children who may be thereafterwards born." The testator died in 1865. The life tenant conveyed the entire estate by warranty deed in 1872, and the subsequent grantees, from that time, have been in the actual, open, and exclusive possession. Held, the life tenancy ceased upon the conveyance of the premises by the life tenant, the remainderman became entitled to immediate possession, and the grantee and his successors became owners in fee by adverse possession. Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

3170b. Actions by life tenant for injuries to estate—A life tenant may recover for injury by negligence of a stranger, not only to the life estate, but to the remainder, not on the theory of waste, but of trusteeship. Rogers v. Atlantic, G. & P. Co., 213 N. Y. 246, 107 N. E. 661.

REMAINDERS

3171a. In personalty—An estate in remainder may be created in personalty as well as in realty. Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

3172. Vested remainders—(63) Johrden v. Pond, 126 Minn. 247, 148 N. W. 112. See Digest, § 10287.

3173. Contingent remainders—(64) See Digest, § 10287.

ESTOPPEL

ESTOPPEL BY DEED

3176. In general—The general rule, that a conveyance with warranty estops the grantor when he afterwards becomes the owner to deny the grantee's title, does not apply to a conveyance by one non sui juris or that is contrary to public policy or statutory prohibition. Starr v. Long Jim, 227 U. S. 613.

(68) See Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

3177. Clothing another with apparent title—(70) See Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 418, 131 N. W. 494.

3178. Recitals—A gave a mortgage to B, the record owner of the land. No deed from B to A was ever recorded and there was no evi-

dence that such a deed was ever given. Recitals in the mortgage of ownership by A held not to estop B or his grantees from denying title in A or his grantees. Crowley v. Norton, 131 Minn. ——, 154 N. W. 743.

(71) Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N. W. 648, 955. See Digest, §§ 1055, 1730a.

(74) See Seary v. Noble, 236 U. S. 135.

3179. Who bound—An owner of land who conveys it by a warranty deed, as an attorney in fact of the former owner, may be estopped from claiming title in himself. North Star Land Co. v. Taylor, 129 Minn. 438, 152 N. W. 837.

(79) See, contra, North Star Land Co. v. Taylor, 129 Minn. 438, 152 N. W. 837.

3180. Grantee—A grantee in a deed held not estopped from denying liability under a clause in the deed for the assumption of a mortgage, the clause being fraudulently inserted by the grantor. Demaris v. Rodgers, 110 Minn. 49, 124 N. W. 457.

EQUITABLE ESTOPPEL

3185. Definition—(93) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899.

3186. Nature—Estoppel in pais is often an application of the principle that where one of two innocent persons must suffer from the act of another he must bear the loss who made such act possible. National Safe Deposit etc. Co. v. Hibbs, 229 U. S. 391. See Digest, § 6029.

(94) Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899.

3187. When arises—General rule—(8) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

3190. Fraudulent intent not necessary—While actual fraudulent intent is not an essential element of estoppel, yet in all cases where the doctrine is applied it would be fraudulent for the party to repudiate his conduct and assert a right or claim in contravention thereof. Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754.

(14) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754.

3191. Reliance on act or representation—Negligence—Estoppel can be invoked only by the innocent. Negligence may deprive one of its protection. Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

(19) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001; Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094; Purcell v. Thornton, 128

Minn. 255, 150 N. W. 899; Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

3193. Knowledge of facts by party to be estopped—Knowledge by the party estopped is sufficiently shown if the circumstances are such that knowledge of the truth is necessarily imputed to him. Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

(25) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

3195. Fraud of party claiming estoppel—Estoppel can be invoked only by the innocent. Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

(28) See Demaris v. Rodgers, 110 Minn. 49, 52, 124 N. W. 457.

3196. Silence where duty to speak—(29) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001 (owner of land not in possession and without title being recorded remaining silent while land is sold and improved); Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714 (standing by and participating in a sale of land by another); Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899 (failure to object to a void foreclosure).

(32) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

3199. Leaving blanks to be filled—(35) See Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

3200. Failure to assert title to property—(36) Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714. See Digest, § 3196; Note, 48 L. R. A. (N. S.) 745.

3201. Pointing out boundary lines—(37) See Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60 (evidence held not to show an estoppel); 25 Harv. L. Rev. 559.

3203. Inducing one to do his legal duty—The payment of a valid and undisputed past-due debt is not a sufficient basis for an estoppel. Chicago etc. Ry. Co. v. Kelm, 121 Minn. 343, 141 N. W. 295.

3204. Clothing another with the indicia of ownership—(40) Freeman v. Kraemer, 63 Minn. 242, 65 N. W. 455; Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971; See National Safe Deposit etc. Co. v. Hibbs, 229 U. S. 391 (fraudulent sale of corporate stock by agent of corporation); Digest, §§ 3177, 8594–8603; Note, 25 L. R. A. (N. S.) 760.

3204a. Accepting benefits of transaction—The estoppel arising from accepting the benefits of a contract applies only when the party may accept or reject without serious inconvenience. Orr v. Sutton, 127 Minn. 37, 59, 148 N. W. 1066.

3206. Unlawful and wrongful acts—The fact that plaintiff did not object to the building of a small fire on his land held not to estop him from recovering for damages resulting from a spread of the fire. McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434.

3208. In legal actions—(44) Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

3209. Application to realty—One who is in possession of land, or who has recorded his title, is ordinarily under no obligation to speak or take any action concerning a defect in his title. But if one not in possession has an interest in land which does not appear on record, fails to disclose it, and stands by and suffers the estate to be sold and improved with knowledge that the title had been mistaken, he will not be allowed to assert his claim against the purchaser. Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001.

An owner of land who conveys the same by a warranty deed, as an attorney in fact of the former owner, may be estopped from claiming title in himself. North Star Land Co. v. Taylor, 129 Minn. 438, 152 N. W. 837.

(45) North Star Land Co. v. Taylor, 129 Minn. 438, 152 N. W. 837.

(47) Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714; Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899; Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421. See Digest, §§ 3196, 3200, 3201, 9685; Note, 48 L. R. A. (N. S.) 745.

(48) See Digest, § 9685.

3210. Who may invoke doctrine—In general—Right of patrons of a commercial agency to rely on representations made to it. Irish-American Bank v. Ludlum, 49 Minn. 344, 51 N. W. 1046; In re Kyte, 174 Fed. 867.

3211. Against state and municipalities—Estoppel cannot be invoked against the state in support of unauthorized acts of its officers or agents. People v. Santa Clara Lumber Co., 213 N. Y. 61, 106 N. E. 927.

Estoppel of municipalities to contest illegal claims or expenditures. Note, 137 Am. St. Rep. 354.

(52) See State v. Bell, 111 Minn. 295, 126 N. W. 901 (state or municipality not estopped by information or advice given by an assessor to an owner that an assessment made against him had been canceled by the city board of equalization); Orr v. Sutton, 119 Minn. 193, 137 N. W. 973 (indorsement of county auditor on a mortgage that it was not subject to a registration tax held not to conclude state). See State v. Lindberg, 120 Minn. 147, 139 N. W. 286 (an admission of a county attorney of the validity of a judgment in drainage proceedings held not to estop the state or county); Houston v. Burns, 126 Minn. 206, 148 N. W. 115 (county estopped by agreement of county board as to boundary lines).

3213. Estoppel against estoppel—(56) Mann v. Employers Liability Assur. Corp., 123 Minn. 305, 143 N. W. 794.

3214. Pleading—(57) Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622; Feinberg v. Allen, 103 N. Y. S. 339, 208 N. Y. 215, 101 N. E. 893. See 9 Mich. L. Rev. 484, 576; Note, 27 Am. St. Rep. 344.

3217. Miscellaneous cases—(61) Hempstead v. Leland, 111 Minn. 224, 126 N. W. 736 (action to set aside fraudulent conveyances—creditor estopped); Davidson v. Kretz, 127 Minn. 313, 149 N. W. 652 (change of location of right of way—acquiescence in narrowing of way).

(62) Chicago etc. Ry. Co. v. Kelm, 121 Minn. 343, 141 N. W. 295 (railroad company not estopped to deny authority of station agent to agree to pay for a loss by receiving and retaining freight charges); Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518 (wrongful cancelation of insurance policy—action on policy); Green & DeLaittre Co. v. Fasbender & Son, 122 Minn. 17, 141 N. W. 789 (action for goods sold and delivered—defendant held not estopped from denying that he purchased the goods); Devaney v. Ancient Order, 122 Minn. 221, 142 N. W. 316 (heirs of an insured person not estopped to demand fund due on a benefit certificate).

INCONSISTENT POSITIONS

3218. In legal proceedings—Where the defendant in an action for injury to an automobile had acted virtually as appraiser between the plaintiff, an insurance company, and the owner of the machine, and the plaintiff had paid the owner the amount of the loss fixed by such appraisement, the defendant was estopped to introduce evidence as to the value of the machine. Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703.

Even a defrauded party cannot take successively inconsistent positions. Wagner v. Magee, 130 Minn. 162, 153 N. W. 313.

(63) Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339; Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105; State v. Municipal Court, 123 Minn. 377, 143 N. W. 978.

EVIDENCE

IN GENERAL

3219. Definition—The word "testimony" more properly refers to oral evidence than documentary. Ensign v. Pennsylvania, 227 U. S. 592.

3220. Legislative control—The legislature may make certain facts prima facie evidence of other facts, thereby raising rebuttable presumptions. State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951; Meeker v. Lehigh Valley R. Co., 236 U. S. 412.

(70, 71) State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951. See Mobile etc. Ry. Co. v. Turnipseed, 219 U. S. 35; Bailey v. Alabama, 219 U. S. 219.

3222. Rules largely based on practical convenience and good policy—A question of evidence, to some extent, is a question of sound policy in the administration of the law. Sometimes it is necessary to weigh the probative force of evidence offered, compare it with the practical inconvenience of enforcing a rule to admit it, and decide whether, as a matter of good policy, it should be admitted. Zucker v. Whitridge, 205 N. Y. 50, 98 N. E. 209.

(74) See 21 Yale Law Journal 105.

3223. Rules of evidence means not ends—(76) See 21 Yale Law Journal, 108, 113.

3226. Prima facie evidence—Where certain evidence makes out a prima facie case of negligence it is error to charge that it raises a "strong" presumption. Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

(81) Mobile etc. Ry. Co. v. Turnipseed, 219 U. S. 35; Bailey v. Alabama, 219 U. S. 219.

3227a. Incompetent evidence unobjected to—As a general rule a fact may be proved by incompetent evidence admitted without objection. Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958; Western Land Securities Co. v. Daniels-Jones Co., 113 Minn. 317, 129 N. W. 508; Wondra v. Nat. Life Ins. Co., 126 Minn. 136, 147 N. W. 961. See Digest, §§ 3268, 3288.

The rule that incompetent evidence, received without objection, is sufficient upon which to base a finding or verdict, applies only when such evidence establishes or tends to establish an enforceable right. It has no application where the fact shown or proved by the incompetent evidence furnishes no basis for recovery or of a right of action, as an oral agreement within the statute of frauds which the statute declares unenforceable. Hanson v. Marion, 128 Minn. 468, 151 N. W. 195.

RELEVANCY AND ADMISSIBILITY IN GENERAL

3228. Facts logically relevant generally admissible—Corroborative facts—(84) Robbins v. Lewiston, 77 Atl. 537; 21 Yale Law Journal 108. See State v. Chambers, 131 Minn. —, 154 N. W. 1073.

3229. Definition and nature of relevancy—(90) McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

3231. Direct evidence as to motive, belief, intent, etc.—(93) Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9 (testimony of a party that he relied on representations); Austin v. National Casualty Co., 125 Minn. 390, 147 N. W. 281 (intention of members of a public commission as to their approval of a proposed plan). See Note, 34 L. R. A. (N. S.) 323.

3232. Facts supporting or rebutting inferences—Any act showing preparation for an act is admissible to prove the latter act. State v. Kaufman, 125 Minn. 315, 146 N. W. 1115. See Digest, § 2466.

While the conduct of a person, subsequent to an alleged transaction, may be used against him to disprove the position he takes in a litigation involving the same transaction, it may not be offered to corroborate or prove the correctness of such position. Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

(95) Harris v. Great Northern Ry. Co., 124 Minn. 357, 145 N. W. 115 (action for injuries to goods shipped—goods returned without unloading—condition upon return relevant); Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180 (issue as to intoxication of a person when injured—any evidence tending to cast doubt upon defendant's theory of intoxication held admissible though not sufficient in itself to disprove it); Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754 (fact that claimant to land took a lease thereof inconsistent with his claim of title).

3234. Circumstantial evidence sufficient—(97) Holien v. Slee, 120 Minn. 261, 139 N. W. 493; State v. O'Hagan, 124 Minn. 58, 144 N. W. 410 (charge as to prerequisites to a conviction on circumstantial evidence sustained); Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; State v. Jacobson, 130 Minn. 347, 153 N. W. 845. See Digest, § 7047; Note, 97 Am. St. Rep. 771.

3235. Evidence of evidentiary facts must be direct—No presumption on a presumption—(98) See, for a criticism of the rule, 1 Wigmore, Ev. § 41; 28 Harv. L. Rev. 795.

3237. Whole of a conversation or document—(2) Argall v. Sutor, 114 Minn. 371, 131 N. W. 466 (conversation); Salo v. Duluth & Iron Range

R. Co., 121 Minn. 78, 140 N. W. 188 (document—memorandum used to refresh memory of witness); Moe v. Paulson, 128 Minn. 277, 150 N. W. 914 (conversation). See Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118 (plaintiff offered in evidence testimony given by defendant on a former trial—defendant's counsel was properly allowed to offer such other portions of the defendant's former testimony as might be necessary to supplement and explain the testimony offered by plaintiff).

3238. Negative evidence—To render the testimony of a witness that he did not hear a bell, gong, whistle, or other warning, admissible to prove that it was not given, it must appear that the circumstances were such that he probably would have heard it had it been given. Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616; Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112.

Where it is shown that the attention of a witness was otherwise attracted, or his hearing interfered with by other noises, his testimony that he did not hear a bell, whistle, or other signal, will not be permitted to overcome positive evidence that the signal was given. See Cornell v. Great Northern Ry. Co., 112 Minn. 341, 128 N. W. 22.

Where it is in issue whether a customary signal was given to servants for their guidance in the work, the fact that it was not given may be proved by the testimony of the plaintiff, or other workman, that he did not hear it. Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099.

(5) Cornell v. Great Northern Ry. Co., 112 Minn. 341, 128 N. W. 22; Moore v. Minneapolis & St. L. R. Co., 123 Minn. 191, 142 N. W. 152, 143 N. W. 326.

3239. Evidence improperly obtained—(6) See State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417 (concealed dictograph); Weeks v. United States, 232 U. S. 383 (papers seized without a warrant); Note, 136 Am. St. Rep. 135.

3241. Immaterial and remote evidence—Evidence must afford a basis for belief over and above mere conjecture and be more than remotely relevant. No general test has been established for determining whether it is too slight, conjectural or remote. These questions must be left largely to the judgment of the trial court. Watre v. Great Northern Ry. Co., 127 Minn. 118, 149 N. W. 18.

(8, 11) Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854 (issue as to mental condition of testatrix—evidence as to such condition in her last illness two years after execution of will held too remote); Watre v. Great Northern Ry. Co., 127 Minn. 118, 149 N. W. 18 (evidence of rains at a distance of 38 miles); Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093 (plaintiff struck by missile while at work on a railroad track—evidence of occasional shooting in the vicinity held too remote).

(12) McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412; Watre v. Great Northern Ry. Co., 127 Minn. 118, 149 N. W. 18.

3242. Character of parties to action—(13) Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956.

3243. Customary practice or course of business—(14) State v. Tuck, 112 Minn. 493, 128 N. W. 823 (posting notices). See Rademacher v. Pioneer Tractor Mfg. Co., 127 Minn. 172, 149 N. W. 24 (issue as to cause of fire in a factory—customary practice to burn rubbish in furnace).

3245. Conversation by telephone—Identification of speaker—One who answers a telephone call from the place of business of the person called for, and undertakes to respond as his agent, is presumed to have authority to speak for him in respect to the general business there carried on and conducted, and further evidence of identification of the person responding to the call is not necessary to the admissibility of the conversation thus held. The rule is otherwise where it is sought to charge a particular individual with an admission or conversation over the telephone. In such case the individual must be identified. Gardner v. Hermann, 116 Minn. 161, 133 N. W. 558. See 8 Col. L. Rev. 587; Note, 127 Am. St. Rep. 538; 6 L. R. A. (N. S.) 1180.

See Digest, § 1738.

3246. Experiments not in presence of jury—(17) Winters v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 964. See Note, 53 Am. St. Rep. 375.

3247. Value of property—How proved—In determining the market value of property, an inquiry as to the gross rental thereof, without also ascertaining the net receipts therefrom, is not necessarily prejudicial. Sveiven v. Thompson, 110 Minn. 484, 126 N. W. 131.

The market value of an entire farm may be ascertained by inquiry into the value of its separate parts, if such parts are available for specific purposes. Sveiven v. Thompson, 110 Minn. 484, 126 N. W. 131.

What was paid for certain land in trade, six months prior to the time in issue, held inadmissible to prove its market value. Sveiven v. Thompson, 110 Minn. 484, 126 N. W. 131.

Frequent sales of a commodity tend to establish the value of another commodity of the same general nature, the differences in characteristics being taken into consideration. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

The general observation may be made that many kinds of property have values which are uncertain and difficult to determine. Still, when it becomes necessary in a legal controversy to determine values of property which confessedly has no market value, the courts never

hesitate to do so, when convinced that sufficient available data has been furnished as a guide. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

The cost price of an automobile held admissible on an issue as to its value at the time of a conversion. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

The cost of manufacture is sometimes admissible. Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

The books of a bank and statements of its condition made by or under the direction of its president and general manager are competent evidence tending to prove the value of the shares of stock, and furnish a basis for expert testimony in an action against the president for the rescission of an exchange of land for such stock procured by misrepresentations of the condition of the bank, and of the actual value and book value of its shares of stock. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

What a thing has sold for in the market is competent evidence of its value. Uhlman v. Farm, Stock and Home Co., 126 Minn. 239, 243, 148 N. W. 102.

In the absence of direct evidence as to the value of property at the place of shipment, such value may be determined by taking the value at the place of delivery and deducting therefrom the expense of transportation thereto from the place of shipment. St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471.

On an issue as to the reasonable cost of repairs a receipt for the repairs is inadmissible against a third party. W. S. Conrad Co. v. St. Paul City Ry. Co., 130 Minn. 128, 153 N. W. 256.

Where a buyer refuses to accept goods sold to him, and the seller resells them in good faith and with reasonable diligence, the price received is evidence of their market value. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

Admission of market reports to prove market value. Virginia v. West Virginia, 238 U. S. 202; 24 Harv. L. Rev. 63.

(18, 26) Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102.

(29) Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173. See § 1161.

(34) Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Hawkins v. Mellis, Pirie & Co., 127 Minn. 393, 149 N. W. 663 (the par value of corporate stock may be taken as the actual value in the absence of other evidence—where there had been no sales to outsiders, and during the short time the corporation had been in existence its capital stock was being depleted, the par value could not be taken as prima facie evidence of its value); Virginia v. West Virginia, 238 U. S. 202.

3248. Value to prove agreed price—(38) See Barnes v. Spencer, 113 Minn. 101, 129 N. W. 140.

3249. Identification of persons—Considerable latitude is permissible in the introduction of evidence to prove the identity of persons. On a charge of homicide a conversation of the deceased shortly before his death with the prosecuting attorney in the presence of the accused, during which the deceased pointed out the accused as the guilty person, held admissible to identify the accused. State v. Findling, 123 Minn. 413, 144 N. W. 142. See 27 Harv. L. Rev. 487.

See Digest, § 3245 (person speaking through telephone).

3250. Cumulative evidence—(41) Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434 (rule applies to real or demonstrative evidence).

SIMILAR AND COLLATERAL FACTS

3252. Collateral facts—Discretion of trial court—In the reception in evidence of acts or conduct in collateral matters tending to prove admissions against interest upon an issue in litigation, the trial court must exercise discretion and consider whether, in view of surrounding circumstances, the matter offered is likely to aid the jury. Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

(48, 49) Humphrey v. Monida & Yellowstone Stage Co., 115 Minn. 18, 131 N. W. 498; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180; Wunder v. Turner, 120 Minn. 13. 138 N. W. 770; Lunschen v. Peterson, 120 Minn. 288, 139 N. W. 506; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Van Cappellan v. Chicago etc. Ry. Co., 126 Minn. 251, 148 N. W. 104; Farmer v. Studebaker Corp., 126 Minn. 346, 148 N. W. 285; Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

(51) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954.

3253. Similar facts—(52) Larson v. Barlow, 112 Minn. 246, 127 N. W. 924 (customary practice of merchant as to charging for goods sold to others); G. L. Bradley Co. v. Little, 131 Minn. —, 154 N. W. 948 (action for damage to fruit in a warehouse—evidence as to condition of fruit taken from another warehouse inadmissible—evidence as to condition of fruit of another person stored in the same warehouse inadmissible).

(55) Hinkely v. Freick, 112 Minn. 239, 127 N. W. 940 (other similar fraudulent practices in obtaining signatures to notes).

3254. Res inter alios acta—(57) Hinkely v. Freick, 112 Minn. 239, 243, 127 N. W. 940.

REAL EVIDENCE

3257. Exhibition of body to jury—(62) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161; Landro v. Great Northern Ry. Co., 117 Minn. 306, 135 N. W. 991.

3258. Physical objects—In general—(63) State v. Lindquist, 110 Minn. 12, 124 N. W. 215 (jugs and bottles of whisky).

3259. Maps, diagrams, etc.—(64) See Strasser v. Stabeck, 112 Minn. 90, 127 N. W. 384 (plat of street held inadmissible because not properly verified—sufficiency of verification rests in discretion of trial court); Erdman v. Watab Rapids Power Co., 112 Minn. 175, 127 N. W. 487, 128 N. W. 454 (government chart of river made ten years prior to the time in question held inadmissible).

3260. Photographs—Unofficial maps, plats, and photographs are admissible in evidence, when verified by the testimony of witnesses having personal knowledge as to their correctness. If there be competent evidence fairly tending to establish such verification, the question of its sufficiency is one addressed to the discretion of the trial judge; but, if there be no such evidence, it is error to receive such documents in evidence. McManus v. Nichols-Chisholm Lumber Co., 109 Minn. 355, 123 N. W. 1080; Strasser v. Stabeck, 112 Minn. 90, 127 N. W. 384.

When a competent witness testifies that a photograph is a correct representation of the objects it purports to portray, it is not for the court to decide either that the witness is unworthy of belief, or that the photograph is misleading. In such case it is error for the court to exclude the photograph as misleading. Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434; O'Neil v. Potts, 130 Minn. 353, 153 N. W. 856.

(67) Brookman v. Chicago, G. W. R. Co., 116 Minn. 409, 133 N. W. 969 (action for personal injuries—X-ray photographs held admissible—jury may take to jury-room); Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434 (action for personal injuries—photograph of the locus in quo); O'Neil v. Potts, 130 Minn. 353, 153 N. W. 856 (collision between automobiles—photograph of place of accident held admissible). See Note, 51 L. R. A. (N. S.) 842; 114 Am. St. Rep. 437.

3261. Experiments in presence of jury—(70) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161; Landro v. Great Northern Ry. Co., 117 Minn. 306, 135 N. W. 991; Note, 53 Am. St. Rep. 375.

3262. Compulsory physical examination of plaintiff—If the plaintiff, upon the examination, misleads the defendant as to the nature of the injury, it is proper to grant a second examination, when necessary to bring out all the facts. Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309.

(71) Note, 23 L. R. A. (N. S.) 463.

BEST AND SECONDARY EVIDENCE

3263. General rule—(72) McKinley v. Macbeth, 113 Minn. 148, 129 N. W. 216, 389 (judgment); Jarecki Mfg. Co. v. Ryan, 114 Minn. 38, 129 N. W. 1055, 130 N. W. 948 (contents of account books); Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357 (paper in possession of a trustee in bankruptcy in this state).

3265. Real or apparent exceptions—Whether a document is "collateral" is practically a question whether it is important enough under all the circumstances to need production, and this is a question which should be left to the trial court. Drew v. Carroll, 120 Minn. 478, 139 N. W. 953.

Oral evidence is admissible to prove the fact of the existence of a deed or other written contract, as distinguished from their contents. Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4.

The fact of a sale of realty may be proved by oral evidence. Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4.

(75) Drew v. Carroll, 120 Minn. 478, 139 N. W. 953; Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4. See State v. O'Hagan, 124 Minn. 58, 144 N. W. 410 (witness asked if a certain statement had been made to him in a letter and answered, "yes"—in absence of any request to produce letter held no error).

(76) Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4. See McKinley v. Macbeth, 113 Minn. 148, 129 N. W. 216, 389 (oral evidence of the existence of a judgment excluded).

3267. Relaxation of rule—Discretion of court—(90) Drew v. Carroll, 120 Minn. 478, 139 N. W. 953.

3268. Secondary evidence received without objection—(91) Johnson v. Stone, 111 Minn. 228, 126 N. W. 720; Western Land Securities Co. v. Daniels-Jones Co., 113 Minn. 317, 129 N. W. 587.

3268a. Primary evidence not shown to exist—Oral evidence of action of the board of directors of a corporation is properly admitted against the objection that it is not the best evidence, when it does not appear that any written evidence of such action exists. Traxler v. Minneapolis Cedar & Lumber Co., 128 Minn. 295, 150 N. W. 914.

3269. Primary evidence not obtainable—(92) Parker v. E. A. Engler Lumber Co., 129 Minn. 521, 151 N. W. 177 (action upon a written contract to cut and load logs—where an original paper containing a list of articles and figures indicating their values by the defendant had been destroyed, the court did not err in admitting in evidence a copy of it made by plaintiff—that there was another column of figures upon it was not prejudicial, in view of the charge to the jury to disregard these figures).

3270. Primary evidence out of jurisdiction—(94) Humphrey v. Monida & Yellowstone Stage Co., 120 Minn. 94, 139 N. W. 132.

3273. Primary evidence lost or destroyed—(97) Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

3275. Proof of existence of missing document—Where there is a dispute whether a written agreement between the parties ever existed, and none is produced and none found, parol evidence of the contents of the alleged instrument, the proper foundation being laid, is admissible. Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

(5) See Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426, overruling Board of Education v. Moore, 17 Minn. 412 (391).

3277. Public records—(8) State v. Great Northern Ry. Co., 114 Minn. 293, 131 N. W. 330.

3279. Duplicate originals—Letterpress and carbon copies—(13) Humphrey v. Monida & Yellowstone Stage Co., 120 Minn. 94, 139 N. W. 132. See 10 Mich. L. Rev. 495.

3283. Admissions of contents of writings—The contents of a written instrument may be proved against a party by his admissions, at least if the admissions are in writing. Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N. W. 117.

HEARSAY

3286. General rule—(29) See State v. Hunter, 131 Minn. —, 154 N. W. 1083.

(30) Northwestern Fuel Co. v. Central Lumber & Coal Co., 110 Minn. 128, 124 N. W. 981 (a letter written by appellant to its agent, the contents of which were not communicated to respondent); Weber v. Weber, 116 Minn. 494, 134 N. W. 124 (action for alienation of affections—statements and complaints made by plaintiff to a third person in the hearing of the alienated spouse held inadmissible though not contradicted by the latter); Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854 (conversations between a witness and one claimed to have exerted undue influence over a testator); Meehan v. Meehan, 119 Minn. 35, 137 N. W. 163 (statements of a third party to a claimant advising him not to press his claim); Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188 (newspaper items and telegrams concerning a fire); Walsh v. Paine, 123 Minn. 185, 143 N. W. 718 (schedules in bankruptcy); Sullivan Lumber Co. v. Thorn, 130 Minn. 296, 153 N. W. 616 (a letter passing between officers of plaintiff corporation bearing on the compensation to be paid to defendant for services); W. S. Conrad Co. v. St. Paul City Ry. Co., 130 Minn. 128, 153 N. W. 256 (issue as to reasonable cost of repairing an automobile—receipted bill for repairs inadmissible against third party); State v. Hunter, 131 Minn. —, 154 N. W. 1083 (prosecution for abor-

tion—statements of the woman to one not called as a witness to the effect that she had applied to defendant for relief and that he had refused to perform an abortion).

3287. Scope of rule—(32) Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148 (conversation between husband and wife admissible to prove that he authorized her to enter into the contract in issue between him and the defendant); State v. Chambers, 131 Minn. —, 154 N. W. 1073 (the character of a disorderly house may be shown by what the inmates say).

3287a. Self-serving declarations—Self-serving declarations, oral or written, made by a party out of court, relevant to a matter in issue, are inadmissible in his favor, unless they fall within some exception to the general rule against hearsay evidence. State v. Briggs, 122 Minn. 493, 142 N. W. 823; Dickson v. Miller, 124 Minn. 346, 145 N. W. 112; State v. District Court, 128 Minn. 221, 150 N. W. 623; Clark v. McMullen, 129 Minn. 533, 152 N. W. 1101; Foot, Schulze & Co. v. Porter, 131 Minn. —, 154 N. W. 1078. See Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W. 907.

3288. Received without objection—(33) Diaz v. United States, 223 U. S. 442. See § 3227a.

3291. Exceptions—(37) See 21 Yale Law Journal 106.

VARIOUS EXCEPTIONS TO HEARSAY RULE

3292. Statements of pain or suffering—(38, 39) Bannister v. St. Paul, 131 Minn. —, 155 N. W. 627.

3293. Statements of intention or purpose—(44) See Ruder v. National Council, 124 Minn. 431, 145 N. W. 118 (statements of intention not to pay certain insurance assessments in the future held not admissible—no offer of proof); State v. Hunter, 131 Minn. —, 154 N. W. 1083 (statements of a woman to the effect that she intended to have the defendant commit an abortion upon her). 28 Harv. L. Rev. 299.

(45) Meehan v. Meehan, 119 Minn. 35, 137 N. W. 163 (statements by a decedent to a claimant that he intended to provide for the claimant in his will); Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W. 907 (self-serving declarations of the holder of an easement tending to characterize his act in abandoning the easement—admissibility undetermined). See 28 Harv. L. Rev. 299.

3294. Statements of friendship, hatred, etc.—(47) See Weber v. Weber, 116 Minn. 494, 134 N. W. 124 (action for alienation of affections—statements of plaintiff held inadmissible).

3296. Age—Date of birth—(49) Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404. See Note, 111 Am. St. Rep. 583.

3297. Statements of decedents as to pedigree—(52) See Aalholm v. People, 105 N. E. 647 (there must be independent proof of the declarant's membership in the family); 28 Harv. L. Rev. 107.

3298. Statements of decedents against interest—Declarations made by a person since deceased as to facts relevant to the issue are admissible in evidence between third parties, when it appears that they were against his pecuniary interest and related to a matter of which he was personally cognizant, and that he had no probable motive to falsify the facts. Whether a foundation for the admission of such declarations has been shown is a question addressed to the discretion of the trial judge. Paine v. Crane, 112 Minn. 439, 128 N. W. 574. See Note, 94 Am. St. Rep. 672.

(55) Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125 (declarations of an owner of land tending to show that he had made a parol gift of it).

3299. Reputation—Reputation in the community is admissible to prove that a woman is a prostitute or unchaste. State v. Brand, 124 Minn. 408, 145 N. W. 39.

The provision of Laws 1913, c. 562, for the suppression of houses of prostitution, making reputation of the place prima facie evidence of its character, is constitutional. State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

Before a witness can be allowed to testify as to reputation it must be shown that he has first-hand knowledge thereof. State v. Stroup, 131 Minn. —, 155 N. W. 90.

(60) State v. Chambers, 131 Minn. —, 154 N. W. 1073; State v. Stroup, 131 Minn. —, 155 N. W. 90.

RES GESTÆ

3300. General rule—The statement may be testified to by the person making it. Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645.

(68) State v. Ingraham, 118 Minn. 13, 136 N. W. 258 (rape—exclamations of the woman made to the first person in whom she had confidence met after the assault); Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310 (miner injured by lowering skip—statements of engineer within twenty minutes after the accident as to why he lowered the skip); Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603 (collision between street car and automobile—statement of motorman as to cause of accident—statements of bystanders in response to statement of motorman); State v. Findling, 123 Minn. 413, 144 N. W. 142 (prosecution for homicide—crime against nature committed on a boy about eight years old—statement of boy made to a near relative a few minutes after the crime as to what had occurred, held admissible); Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645 (assault

and battery—defendant struck a team of horses driven by plaintiff—statement of a daughter of plaintiff who was riding in the carriage with plaintiff to the effect that defendant "struck our horses" held admissible); Mitton v. Cargill Elevator Co., 129 Minn. 449, 152 N. W. 753 (personal injuries—statement of superintendent of an elevator that he told the person injured to shut off the engine—statement was made about twenty minutes after the accident in response to a question as to how the accident happened); Meyer v. Travelers Ins. Co., 130 Minn. 242, 153 N. W. 523 (issue as to suicide—a few minutes after deceased shot himself he said, in response to an inquiry from a friend, as to what was the matter, "I accidently shot myself"); State v. Hunter, 131 Minn. —, 154 N. W. 1083 (prosecution for abortion—declarations made by the woman during the time she was under treatment and before the final act of abortion was committed, to the effect that defendant was her physician, had treated her for the purpose of bringing about a miscarriage, and was to administer to her future treatment for that purpose, held admissible). See Sullivan Lumber Co. v. Thorn, 130 Minn. 296, 153 N. W. 616 (a letter passing between officers of plaintiff corporation, bearing on the compensation to be paid defendant for services, held not a part of the res gestæ); Note, 42 L. R. A. (N. S.) 917; 46 Id. 975; 47 Id. 587.

(69) Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645; Meyer v. Travelers Ins. Co., 130 Minn. 242, 153 N. W. 523.

(70) See State v. Hunter, 131 Minn. —, 154 N. W. 1083.

3301. Time of statement—The utterances to which the phrase "res gestæ" is applied, in cases like the one before us, are hearsay utterances, and they are received as one of the several recognized exceptions to the hearsay rule. Their spontaniety accredits them. So it is an essential of a declaration admissible under the res gestæ doctrine that its spontaneity give the unsworn statement a credit justifying a jury in hearing and weighing and valuing it along with other items of evidence. Spontaneity or the lack of it may be evidenced by the lapse of time between the main act and the declaration, the opportunity or likelihood of fabrication, the inducement to fabrication, the natural excitement of the declarant, the place of the declaration, the presence there of the visible results of the act or occurrence to which the utterance relates. An utterance made in response to a question may be less indicative of spontaneity than an uninvited one. A declaration against interest may indicate spontaneity more certainly than a self-serving one. Time is an important but not definitely controlling consideration. The lapse of time gives an opportunity for deliberation and may be suggestive of a likelihood of fabrication. It may be one minute or many minutes. It may be so great that the law will say that the declaration fails to il-

lustrate or characterize the act and is not a part of the res gestæ. What the law altogether distrusts is not after-speech but after-thought. Meyer v. Travelers Ins. Co., 130 Minn. 242, 153 N. W. 523.

(74) Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645; Mitton v. Cargill Elevator Co., 129 Minn. 449, 152 N. W. 753.

(75) Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645. See Note, 47 L. R. A. (N. S.) 590.

(76) Note, 42 L. R. A. (N. S.) 917.

3303. Must explain or characterize act—(80) Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603.

3306. Statements of persons in possession of property—(83) Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125 (declarations of a donee of land under a parol gift, made while he was in possession of the land, tending to characterize his possession and to indicate his claim of title, held admissible); Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416 (declarations of a mortgagor to the effect that he claimed premises as his homestead, he being in possession). See Note, 59 L. R. A. (N. S.) 700; 8 Col. L. Rev. 43.

EVIDENCE AT FORMER TRIAL

3307. Witness out of state—The testimony of a witness in a former trial between the same parties in a civil action is admissible in a subsequent trial, if he is dead, or not a resident of the state, and not within the jurisdiction of the court. His testimony may be proved by a settled case, and where his testimony is read into the record on the former trial from his deposition the rule applies. Finnes v. Selover, Bates & Co., 114 Minn. 339, 131 N. W. 371.

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. Gutman v. Klimek, 116 Minn. 110, 133 N. W. 475.

The general rule applies to expert witnesses. Madden v. Duluth & Iron Range R. Co., 112 Minn. 303, 127 N. W. 1052.

Whether a sufficient foundation has been laid for the introduction of such evidence is a preliminary question addressed to the trial court, and its decision thereon will not be reversed on appeal if there is any evidence fairly tending to sustain it. Madden v. Duluth & Iron Range Co., 112 Minn. 303, 127 N. W. 1052.

It is not error to exclude such testimony when its materiality is not made to appear. Gutman v. Klimek, 116 Minn. 110, 133 N. W. 475.

See Note, 91 Am. St. Rep. 192.

3308. Death of witness—(90) Finnes v. Selover, Bates & Co., 114 Minn. 339, 131 N. W. 371.

3309a. How much admissible—The defendant was in court. Plaintiff offered in evidence testimony given by defendant on a former trial. Defendant's counsel was properly allowed to offer such other portions of the defendant's former testimony as might be necessary to supplement and explain the testimony offered by plaintiff. Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118.

3310. How proved—The testimony may be proved by a settled case though it is in the form of a deposition. Finnes v. Selover, Bates & Co., 114 Minn. 339, 131 N. W. 371.

Admissions of a party may be proved by a settled case, but the offer must be limited to so much of the case as tends to show the alleged admission. Howard v. Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557.

It has been held not error to refuse to allow the jury, upon its request, to take a transcript of the evidence to the jury-room. Ruder v. National Council, 124 Minn. 431, 145 N. W. 118.

OPINION EVIDENCE—NON-EXPERTS

3311. General rule—(3) Atherton v. Barber, 112 Minn. 523, 128 N. W. 827 (question to A whether B was acting as his agent held not prejudicial); Lead v. Inch, 116 Minn. 467, 134 N. W. 218 (question as to whether conditions in the management of a barn claimed to be a nuisance had improved since the commencement of the action); Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754 (fact that witness deposited money in a bank in the name of a proposed corporation); Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355 (testimony of an attorney that in his opinion he would have been able to prove the allegations of a complaint in another action, held admissible on the issue of good faith in a settlement); Jones v. Burgess, 124 Minn. 265, 144 N. W. 954 (testimony of a witness that he was "working for" one of the parties in a certain transaction); Swadner v. Schefcik, 124 Minn. 269, 144 N. W. 958 (that witness had a cold).

3312. Comments on rule—Discretion of trial court—Harmless error—There is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it will not be helpful to the jury. It is obvious that such a principle must allow a very great range of permissible difference in judgment, and that conclusions of that character ought not, usually, to be regarded as subject to review by higher courts. Jones v. Burgess, 124 Minn. 265, 144 N. W. 954.

(5,7) Jones v. Burgess, 124 Minn. 265, 144 N. W. 954.

(9) Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250.

3313. Laying foundation—(11) Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854.

3315. Facts that can only be described by an opinion—In a criminal case a witness may testify as to the manner of speech and appearance of the defendant under circumstances such that an accusing conscience would be likely to show evidences of guilt. State v. Virgens, 128 Minn. 422, 151 N. W. 190.

(14) State v. Jones, 126 Minn. 45, 147 N. W. 822 (drunkenness).

(16) Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472 (that a person appeared to be suffering pain); Swadner v. Schefcik, 124 Minn. 269, 144 N. W. 958 (that witness had a cold); Bannister v. St. Paul, 131 Minn. —, 155 N. W. 627 (that a person was well and strong).

3316. Sanity—Mental capacity—A witness who has had business transactions with a person, has known him, and observed and talked with him, may, after having detailed the business had and observations made of such person, properly give an opinion concerning his mental state. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

(17) Turner v. American S. & T. Co., 213 U. S. 257.

3320. Opinion of handwriting—(23) See Banks v. Penn. R. Co., 111 Minn. 48, 126 N. W. 410; Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037; Digest, § 3330; 26 Harv. L. Rev. 167.

3322. Value of property or services—The extent to which witnesses may be examined or cross-examined upon the subject of the value of property having no fixed market price rests in the discretion of the trial court. McKinley v. MacBeth, 113 Minn. 148, 129 N. W. 216, 389.

Persons familiar with the value of automobiles in Minneapolis are competent to testify as to their value in Duluth. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

Where the assets of a corporation were shown to include various items of property, the court ruled properly that a witness should not give an opinion as to the aggregate value, until he had shown qualification to estimate the value of the several items. Hawkins v. Mellis, Pirie & Co., 127 Minn. 393, 149 N. W. 663.

(28) See 24 Harv. L. Rev. 63 (knowledge acquired from market quotations).

(29) Baldinger v. Camden Fire Ins. Co., 121 Minn. 160, 141 N. W. 104; Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

(36) Western Land Securities Co. v. Daniels-Jones Co., 113 Minn. 317, 129 N. W. 587; Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

See Digest, §§ 3072, 3073, 3247, 3335.

3322a. Speed of moving object—Any person of reasonable intelligence and ordinary experience in life may, without further qualification, give

an opinion as to how fast an automobile or other moving object which he has observed was going at the time. Daly v. Curry, 128 Minn. 449, 151 N. W. 274.

OPINION EVIDENCE—EXPERTS

3325. When expert testimony admissible—General rule—(42) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057; Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6.

(43) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118; Lead v. Inch, 116 Minn. 467, 134 N. W. 218.

3326. Upon issuable facts—(44) Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011; Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057; Buck v. Buck, 126 Minn. 275, 148 N. W. 117.

3327. Cause of death—Disease—Physical condition, etc.—(46) State v. James, 123 Minn. 487, 144 N. W. 216.

(47) State v. James, 123 Minn. 487, 144 N. W. 216. See Anderson v. Wood, 125 Minn. 102, 145 N. W. 791 (that a direct blow would not cause hernia).

(50) See Digest, §§ 3316, 3328.

See Note, L. R. A. 1915 A 1056.

3330. Genuineness of handwriting—Comparison—Where the genuineness of handwriting is in issue, specimens of handwriting, admitted or proved to be genuine, are admissible for the purpose of comparison. A witness, who has seen a lost instrument alleged to have been written and signed by a certain person, may, if otherwise competent, testify, from a comparison of admittedly genuine specimens of such person's handwriting introduced in evidence for the purpose of comparison, that the lost instrument was written and signed by such person, though the witness has never seen any specimens of such person's handwriting, either admittedly genuine or otherwise, other than that in which the lost instrument was written and signed and the exhibits submitted to him for comparison. Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037. See 26 Harv. L. Rev. 167.

Conceding that a defendant charged with forgery may offer samples of his ordinary handwriting solely as standards of comparison, the genuineness of such samples, unless conceded, must be established by clear and satisfactory proof, and the trial court's ruling will not be reversed unless palpably erroneous. In this case one of the three samples, offered together, was objectionable as being made after defendant's arrest, and, as to all, more satisfactory evidence bearing upon their genuineness, although readily obtainable, was not offered; hence no error in the ruling

excluding the proffered samples. State v. Lucken, 129 Minn. 402, 152 N. W. 769.

See Digest, § 3320.

3331. Negligence—Due care—(56) McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118. See 51 L. R. A. (N. S.) 565.

3332. Expert testimony held admissible—As to the cause of the particular operation of mechanical appliances. Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011.

As to whether a method of exploding dynamite was safe or unsafe. Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590.

As to the method and safety of stringing electric wires on a bridge. Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577.

As to whether general baldness was due to fright. Ominsky v. Charles Weinhagen & Co., 113 Minn. 422, 129 N. W. 845.

As to the value of a combined churn and butter-worker operated by a certain patent device. Virtue v. Creamery Package Mfg. Co., 114 Minn. 167, 171, 130 N. W. 996.

As to whether a position on the side of a box car was the usual and customary position to take for the work in hand. Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057.

As to whether a complicated machine was dangerous. Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6.

As to the danger involved in the operation of a derrick by an inexperienced person. McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118.

As to the propriety of the treatment of a patient by a physician. Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120.

As to whether death was caused by strangulation. State v. Potoniec, 117 Minn. 80, 134 N. W. 305.

As to whether logs found in defendant's possession came from stumps on the land of the complaining witnesses. State v. Ward, 127 Minn. 510, 150 N. W. 209.

As to the distance within which an automobile might have been stopped. Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267.

3333. Expert testimony held inadmissible—As to the duties of an insurance broker under a contract to secure insurance for his principal. Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148.

3334. Conclusiveness of expert testimony—The supreme court is inclined to defer to the judgment of the trial court as to the weight that should be attached to the testimony of expert witnesses. Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375.

A medical expert testified as to the future disability of plaintiff in a personal injury action: "It is possible that he will have partial use

of his leg, and that he may always have certain disability all of his life." Held, that the opinion was so indefinite and uncertain that it should have been stricken out. Denchfield v. Minneapolis etc. Ry. Co., 114 Minn. 58, 130 N. W. 551.

(17) Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577; Ominsky v. Charles Weinhagen & Co., 113 Minn. 422, 129 N. W. 845; State v. James, 123 Minn. 487, 144 N. W. 216; Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710; Whitney v. Kaliske, 131 Minn. —, 154 N. W. 1100.

(18) Blied v. Barnard, 126 Minn. 159, 147 N. W. 1095 (evidence of plaintiff in replevin as to the value of the property could not be entirely disregarded—charge in effect that it might held prejudicial).

(21) See Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322 (verdict held not to rest solely on the opinion of experts); State v. James, 123 Minn. 487, 144 N. W. 216; Wendt v. Bowman, 126 Minn. 509, 148 N. W. 568

3335. Competency of experts—Discretion of court—(23) Selover, Bates & Co. v. Freeman, 111 Minn. 318, 127 N. W. 9; Fortier v. Skibo Timber Co., 111 Minn. 518, 127 N. W. 414; International Boom Co. v. Rainy Lake River Boom Co., 112 Minn. 104, 127 N. W. 382; Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301; McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118; Johnson v. Wild Rice Boom Co., 118 Minn. 24, 136 N. W. 262; Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037; Emerson v. Chicago etc. Ry. Co., 120 Minn. 84, 138 N. W. 1028; Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357; Magnuson v. Burgess, 124 Minn. 374, 145 N. W. 32; Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161; Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804; Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894. See § 10304 (mode of objecting to competency).

(26) Emerson v. Chicago etc. Ry. Co., 120 Minn. 84, 138 N. W. 1026 (value of a carload of frozen potatoes—dealer in potatoes); Baldinger v. Camden Fire Ins. Co., 121 Minn. 160, 141 N. W. 104 (value of bake ovens—owner competent—one who had used them for years competent); Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491 (value of timber); Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357 (value of automobile in Duluth—automobile experts in Minneapolis competent); Magnuson v. Burgess, 124 Minn. 374, 145 N. W. 32 (value of horse); Hawkins v. Mellis, Pirie & Co., 127 Minn. 393, 149 N. W. 663 (value of corporate stock).

(27) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590 (as to the safety of a method of exploding dynamite—fact that witness had never

used or seen used the method in question held not to disqualify him); Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175 (character of hand jointer and practicability of guarding knives); State v. Ward, 127 Minn. 510, 150 N. W. 209 (as to whether logs came from certain premises); Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804 (practicability of fitting a mangle with hand guards); Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894 (time within which a train might have been stopped); Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650 (amount of damage to a stock of merchandise by fire); Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267 (distance within which an automobile might have been stopped).

3336. On what based—In general—An expert in the value of jewels, who has not seen a particular jewel, may give his opinion as to the value, basing it upon descriptions of the article given by other witnesses. Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

An expert may give his opinion of the safety of a method of exploding dynamite though he has never used or seen used such a method. Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590.

3337. Opinions based on hypothetical questions—(30) Barnard v. Fergus Falls, 115 Minn. 506, 132 N. W. 998.

(31) Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854.

(34) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590.

(35) Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854.

3338. Opinions based on the evidence—One who is not a medical expert may testify that he had a cold, and such testimony is a sufficient basis for expert opinion evidence as to the propriety of an operation under such conditions. Swadner v. Schefcik, 124 Minn. 269, 144 N. W. 958.

(40) Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429 (opinion of the value of a jewel based on a description of it by other witnesses); Willard v. St. Paul City Ry. Co., 116 Minn. 183, 133 N. W. 465 (objection that question did not require witness to assume the evidence to be true held not sufficiently specific); Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267.

3340. Opinions based on knowledge acquired out of court—Expert testimony of a physician based in part upon statements made to him by others may properly be received if the evidence shows what the reported statements were and there is evidence in the case tending to prove their truth. Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180.

(49) See Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180; Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267.

3342. Cross-examination—The extent to which a witness may be cross-examined as to the value of property having no market value rests in the discretion of the trial court. McKinley v. Macbeth, 113 Minn. 148, 129 N. W. 216, 389.

3343. Impeachment—The credibility of an expert witness is ordinarily to be tested by his cross-examination, and, though it may be proper to do so by the testimony of another expert specially qualified in respect to the subject-matter, the extent to which the examination of such other expert may be carried rests, as in the case of cross-examination, in the sound discretion of the court. State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

The extent to which the competency of a witness may be tested by the cross-examination rests in the discretion of the court. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954.

(58) O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865.

(59) Landro v. Great Northern Ry. Co., 117 Minn. 306, 135 N. W. 991.

DOCUMENTARY EVIDENCE

3345. Account books—In an action against husband and wife upon an account for which it appears the wife alone is liable, an account kept in the husband's name in a daybook may be received in evidence. Wilkins v. Sublette, 111 Minn. 339, 126 N. W. 1089.

Entries in books of account of goods sold, when duly verified, are prima facie evidence of the value of the goods. Larson v. Barlow, 112 Minn. 246, 127 N. W. 924.

No inflexible rule can be laid down for the determination of the question whether entries in account books were made substantially contemporaneous with the transactions which they record. Each case must be determined by the trial judge in the exercise of a practical discretion, in view of modern business methods; and his decision thereon will not be reversed if there be any evidence fairly tending to sustain it. American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014.

Oral evidence of the contents of account books is generally inadmissible. Jarecki Mfg. Co. v. Ryan, 114 Minn. 38, 129 N. W. 1055, 130 N. W. 948.

In an action for the dissolution of a partnership and for an accounting the account books of the plaintiff held properly admitted. Fritz v. Johnson, 114 Minn. 316, 131 N. W. 337.

Loose-leaf ledgers are admissible when properly verified. B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609; Wyman-Patridge & Co. v. Henne, 127 Minn. 535, 149 N. W. 647.

Plaintiff's books of account, showing the amount and character of material sold and the cash transactions incident thereto, made in the usual course of business, and properly verified, were admissible in evidence, although part of the entries were made from reports of persons not employed by plaintiff, since these reports were produced and verified on the stand by the persons making them. The fact that some of the entries were made after suit was brought did not render them inadmissible. Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

When a party's account books are sought to be introduced against him the statutory foundation required when they are offered in his behalf need not be made. They are admissible as admissions. Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459.

A card index record, used in a wholesale house to show the state of a customer's account, is admissible in an action to recover the balance due on merchandise, when authenticated by evidence of the persons by whom it was kept. Haley & Lang Co. v. Del Vecchio, 153 N. W. 898 (S. D.).

(63) Wilkins v. Sublette, 111 Minn. 339, 126 N. W. 1089; 53 L. R. A. 513.

(67) See Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226 (certain ledger entries admissible by stipulation without any books of original entry).

See Note, 138 Am. St. Rep. 441.

3346. Regular entries—Memoranda—If part of a memorandum is introduced in evidence the counsel for the adverse party has a right to inspect the whole memorandum and to introduce it as a whole if he desires. Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188.

The entire contents of a memorandum is not rendered admissible as substantive evidence merely by the fact that a part of it may properly be used to refresh the memory of the witness. Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188.

A memorandum of an inventory taken by two persons was made by one, on information called off to him by the other. The person making the memorandum was not produced as a witness; the other made no attempt to verify the memorandum. It was properly rejected. Memoranda made by two other persons of an inventory made in similar manner, but checked back and verified in a measure by both, held admissible, though only one of the persons participating in the inventory was produced as a witness. Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768.

(80) Fortier v. Skibo Timber Co., 111 Minn. 518, 127 N. W. 414 (a memorandum book kept by one making measurements of logs, and verified by him as correct, held admissible); Kitman v. Chicago etc. Ry. Co., 113 Minn. 350, 129 N. W. 844 (record showing time railroad engines left roundhouse—record showing time when repairs were made on engines—record of train dispatcher showing movement of trains—correctness and conclusiveness of records for jury); Healy v. Hoy, 115 Minn. 321, 132 N. W. 208 (a certified copy of a death certificate made by the attending physician in the regular course of duty); B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609 (entries in a loose-leaf ledger); State v. Virgens, 128 Minn. 422, 151 N. W. 190 (books and records of a catalogue house out of the state—regular entries as to shipment of goods sold—index cards—express receipts). See Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561 (in an action by a servant against his master the exclusion of certain cards, made by the superintendent of the master, showing plaintiff's time and the character of his work, held not prejudicial as the facts were shown by other evidence). See Note, 125 Am. St. Rep. 841.

(83) See Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188 (telegrams sent by station agent of defendant held inadmissible as substantive evidence); State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417 (stenographer's notes admitted in connection with his testimony—notes made from dictograph).

(84) See Heydman v. Red Wing Brick Co., 112 Minn. 158, 166, 127 N. W. 561; Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188 (telegrams sent by station agent of defendant held inadmissible as substantive evidence).

(87) Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188.

(88) See Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819.

(89) See Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188 (newspaper article admissible to fix a date—other parts inadmissible—proper practice).

(92) Gasser v. Wall, 111 Minn. 6, 126 N. W. 284; Boyd v. Quarberg, 125 Minn. 521, 145 N. W. 746 (issue as to employment of broker—plaintiff claimed that defendant employed him in a certain conversation between them—a memorandum of the conversation made by a clerk of the plaintiff, shortly after the conversation, from a statement of the plaintiff, held inadmissible).

3347. Official records of public officers—Copies of official records are not admissible unless they are duly authenticated, but such authentication may be waived. St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471.

(93) State v. Jones, 126 Minn. 45, 147 N. W. 822 (record of liquor licenses kept by village clerk); St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471 (the records in the office of the state weighmaster made pursuant to rules established by the Railroad and Warehouse Commission are competent evidence of the facts recorded therein as required by such rules—such rules require state weighers, at the time of weighing loaded cars, to make and enter in the record notations as to any bad order condition of such cars, and such notations so entered become a proper part of such record—copies of such records are not admissible in evidence unless duly authenticated, but such authentication may be waived, and was waived in this case). See Healy v. Hoy, 115 Minn. 321, 132 N. W. 208 (death certificate of attending physician).

3348. Official reports and certificates—(98) Healy v. Hoy, 115 Minn. 321, 132 N. W. 208 (death certificate of attending physician). See St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471; Virginia v. West Virginia, 238 U. S. 202 (annual reports of railroad companies made to the state).

3349. Certified copies of public records—The authentication of copies may be waived. St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471.

(99) Healy v. Hoy, 115 Minn. 321, 132 N. W. 208 (a certified copy of the original death certificate of the attending physician on file in the office of the state board of health is competent evidence as to the cause of death).

3350. Acknowledged instruments—(8) Murray v. Foskett, 114 Minn. 44, 130 N. W. 14 (acknowledged deed prima facie evidence that it was signed by the grantor and delivered to the grantee therein named); Vessey v. Dwyer, 116 Minn. 245, 133 N. W. 613 (recorded deed prima facie evidence that it was duly delivered); Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041 (contract between joint debtors to apportion and pay debts).

3358. Books—Medical books are not admissible as substantive evidence of the facts therein stated. Landro v. Great Northern Ry. Co., 117 Minn. 306, 135 N. W. 991. See 26 Harv. L. Rev. 642.

See Note, 125 Am. St. Rep. 841.

3360. Foreign judicial records—Our statute is inapplicable to foreign records and documents authenticated and certified in accordance with the act of Congress. Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729.

See Note, 5 L. R. A. (N. S.) 938.

3361. Foreign non-judicial records—(29) See Note, 5 L. R. A. (N. S.) 938.

3362. Ancient deeds and other documents—(33) Houston Oil Co. v. Goodrich, 213 Fed. 136; McGuire v. Blount, 199 U. S. 142; Wilson v. Snow, 228 U. S. 217 (ancient deed containing recitals that it was executed by an administrator under power of sale given by order of the court will be presumed to have been executed in accordance with such recitals). See 26 Harv. L. Rev. 544.

3363. Authentication—Necessity—Discretion of court—(34) Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806 (by-law of mutual benefit society).

(35) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410.

(36) American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014.

3364. Proof of unattested instruments—Common-law rule—(37) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410.

(38) Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524 (admission of execution of instrument includes its delivery).

3365. Signatures presumed true—Statute—(40) Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637 (possession of a note by the plaintiff is prima facie evidence that it was executed by the person by whom it purports to be executed); Gardner v. United Surety Co., 110 Minn. 291, 125 N. W. 264 (statute applicable to policy of insurance found among papers of insured after his death).

(45) Kelly v. Southern Amusement Co., 131 Minn. —, 155 N. W. 214.

(48) Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

PAROL EVIDENCE

3368. General rule—Contracts—(63) National Citizens Bank v. Thro, 110 Minn. 169, 124 N. W. 965; Burwell v. Gaylord, 119 Minn. 426, 138 N. W. 685; Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870; Security Nat. Bank v. Pulver, 131 Minn. —, 155 N. W. 641. See Digest, §§ 1011–1013.

(64) Evans v. Northern Pacific Ry. Co., 117 Minn. 4, 134 N. W. 294; Pratt v. Quirk, 119 Minn. 316, 138 N. W. 38.

(66) Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048. See Digest, § 5389.

(67) Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071; Kasal v. Hlinka, 118 Minn. 37, 136 N. W. 569 (assignment of land contract); Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

(68) American Fruit Produce Co. v. Barrett & Barrett, 113 Minn. 22, 128 N. W. 1009.

(72) See Arms v. Owatonna, 117 Minn. 20, 134 N. W. 298.

(74) See Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

(76) Phelan v. Edwards, 112 Minn. 345, 128 N. W. 23 (construction contract—release—oral agreement to pay a balance); Grant v. King, 117 Minn. 54, 134 N. W. 291 (bailment of rings as security for a note); Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597 (cropping contract).

3369. Nature and basis of rule—The general rule excluding parol evidence is of very great practical importance and exceptions to it are to be allowed cautiously and sparingly. Graham v. Savage, 110 Minn. 510, 126 N. W. 394.

(78) Emmel v. Zapp, 112 Minn. 375, 380, 127 N. W. 1134, 128 N. W. 572 (preliminary negotiations are merged in the written contract). While the preliminary negotiations are not permitted to vary the express terms of the contract they are admissible, in case of ambiguity in the language of the contract, to aid in construction. See Digest, § 3399.

(79) Graham v. Savage, 110 Minn. 510, 126 N. W. 394; Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048; S. F. Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795.

3371. Parties—It may be shown by parol that the other party to the contract consented and insisted that the contract be made nominally with the agent, but for and in behalf of the principal. Curtis v. Northwestern Bedding Co., 121 Minn. 288, 141 N. W. 161.

Where an insurance policy was renewed in the name of a firm which had dissolved, and its business turned over to a corporation formed by the members of the firm, it was held permissible to prove by parol that it was the intention of the parties to insure the corporation. Lenning v. Retail Merchants Mutual Fire Ins. Co., 129 Minn. 66, 151 N. W. 425.

Parol evidence held admissible to prove that a wife was the owner of realty and that her husband acted with her authority. Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862.

(81) Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862; Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; Curtis v. Northwestern Bedding Co., 121 Minn. 288, 141 N. W. 161.

(84) Farmers Supply Co. v. Weis, 115 Minn. 428, 132 N. W. 917; Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111. See Digest, § 9081.

See Digest, §§ 1011–1013.

3372. Date of execution of instrument—Where the owner executes a lease of real estate and also executes to the lessee an option to purchase the same, parol evidence is admissible to show that both instruments were executed at the same time and as parts of the same transaction, although they bear different dates. Crystal Lake Cemetery Ass'n v. Farnham, 129 Minn. 1, 151 N. W. 418.

(86) Erickson v. Robertson, 116 Minn. 90, 133 N. W. 164.

3373. Consideration—A written contract not showing mutuality or consideration on its face may be supported by proof of another contract made at the same time and constituting the consideration for the former contract. The proof may be oral unless the contract falls within the statute of frauds. Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203.

(87) Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203; Crystal Lake Cemetery Ass'n v. Farnham, 129 Minn. 1, 151 N. W. 418. See 25 Harv. L. Rev. 663.

(89) Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785.

(90) Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203.

(92) Evans v. Northern Pacific Ry. Co., 117 Minn. 4, 134 N. W. 294; Grant v. King, 117 Minn. 54, 134 N. W. 291.

3374. Time of performance—(96) S. F. Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795.

3375. Modification—(99) Hagstrom v. McDougall, 131 Minn. —, 155 N. W. 391. See Elliott v. Robbins, 110 Minn. 481, 126 N. W. 65.

3376. Facts invalidating contract—Fraud, illegality, etc.—(3) Porteous v. Adams Express Co., 112 Minn. 31, 37, 127 N. W. 429.

(4) Gasser v. Wall, 115 Minn. 59, 131 N. W. 850; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404; Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167; Edward Thompson Co. v. Schroeder, 131 Minn. —, 154 N. W. 792.

3377. Conditional delivery—(11) S. F. Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795 (where a written order for goods is given, it is competent to prove that at the time of delivery of the order the parties agreed that it should become operative only upon the happening of a contingency or the performance of a condition). See Graham v. Savage, 110 Minn. 510, 126 N. W. 394; Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048; Digest, § 1736.

3379. Writing in part performance of oral contract—(14) French v. Yale, 124 Minn. 63, 144 N. W. 451 (conditional sale—taking piano on trial).

3381. Condition subsequent—Parol evidence is inadmissible to prove a condition subsequent which would have the effect of defeating or modifying a written contract. Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048.

The very essence of an obligation is its validity and enforcement. Hence an oral agreement, alleged to have been a part of the transaction, that the obligation should not be binding, can never be permitted to be

shown, for the writing necessarily determines that very subject to the contrary. An extrinsic oral agreement providing a condition qualifying the operation of a written obligation is ineffective, for an obligation absolute is plainly exclusive of a condition. Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048.

3382. Oral agreement that written contract should not be binding—(17) Graham v. Savage, 110 Minn. 510, 126 N. W. 394; Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048.

3386. Terms and conditions implied by law—(23) Grant v. King, 117 Minn. 54, 134 N. W. 291; Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870.

3387. Warranties in sales—(24) Wilson v. Danderand, 124 Minn. 120, 144 N. W. 460 (warranty admitted by pleading); Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167. See W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307 (conditional sale of piano—contract held incomplete and not to exclude oral evidence of a warranty); Harris v. Marsh, 217 Fed. 555 (orders for goods held not a complete contract so as to exclude parol evidence of a warranty); Digest, § 3392.

3389. Official records—(28) See Note, 50 L. R. A. (N. S.) 99.

3390. Informal and non-contractual instruments—The parol evidence rule does not apply to instruments not designed to have contractual force, such as contracts made in jest, friendship, charity or pretence. Graham v. Savage, 110 Minn. 510, 126 N. W. 394.

(32) McLoone v. Brusch, 119 Minn. 286, 138 N. W. 35. See S. F. Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795; Harris v. Marsh, 217 Fed. 555.

3392. Incomplete written contracts—(38) Grant v. King, 117 Minn. 54, 134 N. W. 291; McLoone v. Brusch, 119 Minn. 286, 138 N. W. 35; Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048; French v. Yale, 124 Minn. 63, 144 N. W. 451 (conditional sale—taking piano on trial); Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167; W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307 (conditional sale of piano).

3393. Distinct collateral contract—(40) Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715 (building contract—parol evidence held admissible to show an agreement to partition off and finish four living rooms in the basement for a certain price in addition to the original bid made upon the plans and specifications). See Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048; Van Cappellan v. Chicago etc. Ry. Co., 126 Minn. 251, 148 N. W. 104.

3395. Evidence held not to vary instrument—(47) Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850.

3396. Strangers to contract—Privies—(57) Van Cappellan **v.** Chicago etc. Ry. Co., 126 Minn. 251, 148 N. W. 104.

(58, 59) Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597 (purchaser of wheat from farm tenant not allowed to vary by parol written contract between tenant and landlord).

PAROL EVIDENCE TO AID IN CONSTRUCTION

3399. Preliminary negotiations—Evidence of prior conversations and negotiations is inadmissible if the instrument is unambiguous. Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. ——, 154 N. W. 515.

(64) Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089; Mather v. London Guarantee & Accident Co., 125 Minn. 186, 145 N. W. 963; Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109; Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597 (admissible to show sense in which parties used terms in contract—admissible to show meaning of "plowed lands" in cropping contract); O'Connell **v.** Ward, 130 Minn. 443, 153 N. W. 865.

3400. To show surrounding circumstances—Where there is no ambiguity in the terms of a conveyance, valid as made, its meaning cannot be varied by extrinsic evidence of a particular purpose or intent existing in the mind of the grantor. White v. Coburn, 114 Minn. 213, 130 N. W. 1028.

Parol evidence is constantly necessary to translate words and the implication of words into things. Porto Rico Sugar Co. v. Lorenzo, 222 U. S. 481.

(67) Murray Cure Institutes Co. v. McClure, 110 Minn. 1, 124 N. W. 213; Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089; Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094; Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109; Blocher v. Mayer Bros. Co., 127 Minn. 241, 149 N. W. 285; O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865.

3402. To identify subject-matter—(72) Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791. See Digest, § 1433.

(75) Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597.

3402a. To identify parts of contract—Plans and specifications—Parol evidence is admissible to identify plans and specifications forming part of a building contract. Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715.

3404. To explain technical terms—(77) Lampert Lumber Co. v. Minneapolis & St. L. R. Co., 127 Minn. 195, 149 N. W. 133 (figures in a bill of lading indicating weight of goods shipped); Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597 (meaning of plowed land in a

cropping contract). See McInnis v. Nat. Casualty Co., 113 Minn. 156, 129 N. W. 125, 388 (meaning of words held not ambiguous so as to let in extrinsic evidence); Porto Rico Sugar Co. v. Lorenzo, 222 U. S. 481 (admitted to show the season for grinding sugar cane).

3405. To show subsequent conduct of parties—Practical construction—(78) Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597.

3407. When instrument plain on face—(82) McInnis v. National Casualty Co., 113 Minn. 156, 129 N. W. 125, 388; Oil Well Supply Co. v. MacMurphey, 119 Minn. 500, 138 N. W. 784.

ADMISSIONS

3408. Nature—An admission is evidence only in the sense that it relieves from the necessity of proving the fact admitted. Goehrig v. Stryker, 174 Fed. 897.

3409. By party to action—It is competent to prove admissions of a party to the action, which are relevant and material to the issue, without laying a foundation therefor. Such admissions may be proven by the testimony of the party given on a former trial of the same action, as shown by a settled case relating to his testimony; but the offer must be limited to so much thereof as tends to show the alleged admission. Howard v. Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557.

(90) Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25 (petition and schedules in bankruptcy); Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1 (action on benefit certificate—admissions in proof of claim as to cause of death); Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116 (issue as to consideration for a note—conversation with maker and his wife after maturity of the note involving an admission of liability and tending to contradict and discredit their testimony).

(92) Howard v. Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557.

(93) Heydman v. Red Wing Brick Co., 112 Minn. 158, 165, 127 N. W. 561.

(98) Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

(99) Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292 (where it appeared that a purported sender of a telegram was in a state of coma from a paralytic stroke so that it was impossible for her to have caused or directed a message to be sent, the telegram was properly excluded when offered as an admission against interest)

3410. By agents—Where a manager of defendant directed the plaintiff to confer with a salesman of defendant concerning the matter in issue, the conversation was held admissible. Farmer v. Studebaker, 126 Minn. 346, 148 N. W. 285.

(1) First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980; Anderson v. Great Northern Ry. Co., 126 Minn. 352, 148 N. W. 462; Berg v. Pittsburg Construction Co., 128 Minn. 408, 150 N. W. 1092; McCoy v. City Nat. Bank, 128 Minn. 455, 151 N. W. 178. See Goehrig v. Stryker, 174 Fed. 897 (effect of incompetent admission admitted without objection).

(12) Anderson v. Great Northern Ry. Co., 126 Minn. 352, 148 N. W. 462.

See Digest, § 1738 (agent speaking through telephone—identification—presumption of authority); § 3413 (admissions by public officers); § 3418 (admissions by corporate officers).

3411. By partners—(17) See 8 Col. L. Rev. 481.

3413. By public officers—A certificate indorsed on a mortgage by a county treasurer before it was recorded, to the effect that it was not subject to a registry tax, held not to conclude the holder of the title to the mortgaged property under a prior foreclosure. Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

An admission by a county attorney of the validity of a judgment in drainage proceedings held not to estop the state or county. State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

See Digest, § 3211.

3417. By former owners—The general rule that admissions of a former owner of property in disparagement of his title, made after he has parted with the title and possession, cannot be received in evidence against his successor in interest applies to commercial paper. Under the rule, admissions made by the payee of a negotiable promissory note after he has transferred the same to a third person, tending to show that the note was by him obtained in fraud, are hearsay and inadmissible against the indorsee, in an action against the maker. Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080.

(28) Dickson v. Miller, 124 Minn. 346, 145 N. W. 112 (delivery of a deed to third party to be delivered to grantee upon the death of the grantor—declarations of the grantor while in possession and after the delivery of the deed to the third party to the effect that he retained the right to recall the deed held inadmissible). See Digest, § 3917.

(30) See Digest, § 3918.

See Note, 134 Am. St. Rep. 610.

3418. By corporate officers—(33) First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980; Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768; Berg v. Pittsburg Construction Co., 128 Minn. 408, 150 N. W. 1092; McCoy v. City Nat. Bank, 128 Minn. 455, 151 N. W. 178.

3419. By conduct—In the reception in evidence of acts or conduct in collateral matters tending to prove admissions against interest upon an issue in litigation, the trial court must exercise discretion and consider whether, in view of surrounding circumstances, the matter offered is likely to aid the jury. Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

(34) Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754 (claimant to land taking a lease inconsistent with his claim of title).

3420. By silence—When a claim for money is made on a person under such circumstances that a reply would naturally be made and he makes none, evidence thereof is admissible as an admission of the validity of the claim. Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

(36) Note, 25 L. R. A. (N. S.) 542; 42 Id. 889.

3421. By strangers—The declarations of one of two or more legatees or devisees are not admissible against the others. McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

Whether declarations by an insured person are binding on his beneficiary is an open question. Ruder v. National Council, 124 Minn. 431, 145 N. W. 118.

3424. In pleadings—Where a complaint in an action was not verified, and was neither signed by the plaintiff nor otherwise adopted by him, and no knowledge of its contents was brought home to him, it was not, after having been superseded by an amended complaint, admissible against him for any purpose, except upon the mere fact of its existence. Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188.

(43) Humphrey v. Monida & Yellowstone Stage Co., 115 Minn. 18, 131 N. W. 498.

PRESUMPTIONS

3430. Nature and effect—A presumption is an assumption of the law. Hitchcock v. Consolidated School District, 123 Minn. 119, 143 N. W. 120.

Whether a presumption is overcome is, in the determination of the issues, a question for the jury, unless the evidence is conclusive. Ruder v. National Council, 124 Minn. 431, 145 N. W. 118.

A rule of presumption is simply a rule changing the burden of proof, that is, declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced. State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

Where certain proof makes out only a prima facie case it is error to charge that it raises a "strong" presumption. Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

(56) Hitchcock v. Consolidated School District, 123 Minn. 119, 143 N. W. 120; State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

3434. Death—Person not heard of for seven years—(66) Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806. See Note, L. R. A. 1915B, 729.

3435. Performance of official duty—It has been held that the presumption of performance of official duty was at least equal as between two officers. Foster v. Brick, 121 Minn. 173, 141 N. W. 101.

(68) Swift v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6 (service of writ of attachment by sheriff presumed to have been made within his county); Howley v. Scott, 126 Minn. 271, 148 N. W. 116 (county auditor—preparing tax lists—indorsing "Sold for taxes" when proper).

See Digest, §§ 9170–9172.

3436. Legality and regularity—Acts required to be done in sequence may usually be done on the same day, and where they are so done it will be presumed, in the absence of evidence to the contrary, that they were done in such order as to render them valid. Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

(77) Clay County v. Olson, 123 Minn. 437, 143 N. W. 970 (that an engineer in ditch proceedings who had been paid by the county for his services had given the bond required by law).

3437. Innocence and good faith—Where the facts shown are as consistent with rightful conduct as with wrongful conduct, the presumption is that the conduct was rightful. Reick v. Great Northern Ry. Co., 129 Minn. 14, 151 N. W. 408.

(78) See State v. Giantvalley, 123 Minn. 227, 143 N. W. 780 (presumption against violation of law).

3438. Continuance of facts of a continuous nature—When a personal business relation such as that between employer and employee is once shown to exist it will be presumed to continue for a reasonable time. Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774.

That a notice of election posted on Sunday remained posted on the following Monday may be presumed. Thoreson v. Susens, 127 Minn. 84, 148 N. W. 891.

The presumption applies to the pendency of an action. Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

(83) See State v. Roby, 128 Minn. 187, 150 N. W. 793 (carnal abuse of child).

(88) See Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

(94) See 9 Col. L. Rev. 435.

(95) See Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

3439. Good character—Chastity—(99) Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897.

3440. Sanity—Intelligence—(2) Ledy v National Council, 129 Minn. 137, 151 N. W. 905.

3441. Intention and knowledge—It is presumed that a person entering into a contract intends the reasonable meaning of his words and actions. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

(9) Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620 (presumption that one knows the law of the state wherein he transacts business).

3444. Withholding or failing to produce evidence—Failing to testify—Withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available gives rise to a presumption against the party. Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120. See Peterson v. Skarp, 117 Minn. 102, 134 N. W. 503.

A verdict cannot rest wholly on this presumption, unsupported by affirmative proof. Lewis v. Chicago, G. W. R. Co., 124 Minn. 487, 145 N. W. 393.

(15) Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945 (accident at railroad crossing—engineer called—fireman not called); Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148 (failure to produce documentary evidence); Murphy v. Twin City Taxicab Co., 122 Minn. 363, 142 N. W. 716; Bodkin v. Great Northern Ry. Co., 124 Minn. 219, 144 N. W. 937; State v. McLarne, 128 Minn. 163, 151 N. W. 787. See Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093 (failure to produce a maul which was the alleged cause of an accident).

3445. Receipt of mail in due course—(18) Ruder v. National Council, 124 Minn. 431, 145 N. W. 118. See Note, 49 L. R. A. (N. S.) 458.

3447. Miscellaneous presumptions—It will be presumed that a person died intestate and left an heir or heirs. Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

It may be presumed that a person driving the team of another is doing so as the agent of the owner. Langworthy v. Owens, 116 Minn. 342, 133 N. W. 866.

The execution of a promissory note gives rise to a presumption that the payee was not at the time indebted to the maker. Beneke v. Estate of Beneke, 119 Minn. 441, 138 N. W. 689; Sullivan Lumber Co. v. Thorn, 124 Minn. 532, 144 N. W. 1135, Id., 130 Minn. 296, 153 N. W. 616.

It is a strong presumption that that which never has been done cannot by law be done at all. Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878.

The owner of property is presumed to know the business conducted thereon. State v. Ryder, 126 Minn. 95, 147 N. W. 953.

That a foreign born resident who has voted has been naturalized may be presumed. Hitchcock v. Consolidated School District, 123 Minn. 119, 143 N. W. 120.

That an employment continued after the original term at the same rate of compensation as during the original term, may be presumed. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

JUDICIAL NOTICE

3448. Nature—Modern tendency to enlarge scope—Bentham said that jurisprudence might be defined as "the art of being methodically ignorant of what everybody knows." It is to the credit of English and American judges that they have so largely, since Bentham's day, avoided this reproach to the science which they profess, by enlarging the scope of judicial notice. It is a master-key in the hands of a judge, who breathes the life of his time and generation. It unlocks many a door that counsel have left shut, or have had no other way to open. Justice Baldwin, 21 Yale Law Journal 109.

3450. Court may inform itself—Courts will sometimes take judicial notice of facts, when properly called to their attention by counsel, which they would otherwise ignore. Quong Wing v. Kirkendall, 223 U. S. 59.

(34) State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496.

3451. Matters of common knowledge—The natural tendency of ripe fruit to decay. Whitaker v. Chicago etc. Ry. Co., 115 Minn. 140, 131 N. W. 1061.

The need of separating the grades of streets and railroads in cities. Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193.

The usual procedure, when public service corporations desire to make connections with private premises, in securing authority from the local municipal authorities. State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104.

The fall in the purchasing power of money during recent years. Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

The generally known methods of railroad companies in the transaction of business, including the method of adjusting claims. Chicago etc. Ry. Co. v. Kelm, 121 Minn. 343, 141 N. W. 295.

That farm lands in this state have always been conveyed with the understanding that public roads are not an incumbrance within the meaning of a covenant against incumbrances. Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878.

The great danger connected with the use of dynamite and other high explosives. Laine v. Consolidated V. & E. Co., 123 Minn. 254, 143 N. W. 783.

That X-ray machines sometimes inflict serious burns. State v. Lester, 127 Minn. 282, 149 N. W. 297.

The duties of a conductor of a street car. Koeller v. Wisconsin etc. Co., 130 Minn. 265, 153 N. W. 519.

(37) United States v. Union Pacific R. Co., 188 Fed. 102, 124.

(63) Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386.

3452. State and federal laws—Municipal charters—Ordinances—Judicial notice will be taken of home rule charters and amendments thereto regularly adopted, certified and deposited as provided by law. Jones v. Red Lake Falls, 116 Minn. 454, 134 N. W. 121; A. A. White Townsite Co. v. Moorhead, 120 Minn. 1, 138 N. W. 939.

(72) Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175 (federal statute); McDonald v. Railroad Transfer Co., 121 Minn. 273, 141 N. W. 177 (id.); Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297 (id.).

(78) State v. Overby, 116 Minn. 304, 133 N. W. 792.

3453. Foreign laws—Laws of sister states—Our courts will not take judicial notice of the laws of a foreign country. Lando v. Lando, 112 Minn. 257, 127 N. W. 1125; O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112.

(81) Twin City Box Factory v. Adirondack Fire Ins. Co., 114 Minn. 475, 131 N. W. 497; Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N. W. 117; Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. —, 154 N. W. 515; Culver v. Johnson, 131 Minn. —, 154 N. W. 739.

(82) Twin City Box Factory v. Adirondack Fire Ins. Co., 114 Minn. 475, 131 N. W. 497; Walson v. McGregor, 120 Minn. 233, 139 N. W. 353; Culver v. Johnson, 131 Minn. —, 154 N. W. 739.

3454. Legislative journals—(83) Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

3455. Judicial proceedings and facts disclosed therein—A court takes judicial notice of the proceedings by which it acquires jurisdiction. Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

The supreme court is probably not required to take judicial notice of facts learned by it in previous cases. See Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 50, 131 N. W. 855.

An appellate court may take judicial notice of its own records; and, if not res judicata, may, on the principles of stare decisis, examine and consider decisions in former cases affecting the consideration of one under advisement. It may take judicial notice of its own records in regard to proceedings formerly had by a party to a proceeding before it. De Bearn v. Safe Deposit & Trust Co., 233 U. S. 24.

(84) State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

3456. Political and governmental matters—That a city has adopted a home rule charter. Jones v. Red Lake Falls, 116 Minn. 454, 134 N. W. 121. See Digest, § 3452.

The conduct of public affairs in an organized county. State v. St. Louis County, 117 Minn. 42, 134 N. W. 299.

(87) Rutherford v. Yorks, 113 Minn. 248, 126 N. W. 404 (that a county has been organized as such for a long time).

(89) Rud v. Pope County, 66 Minn. 358, 68 N. W. 1062.

(90, 91) State v. Brotherhood, 111 Minn. 39, 126 N. W. 404 (official character of state insurance commissioner).

See Note, 82 Am. St. Rep. 439.

3457. Population—Census—(95) State v. Wasgatt, 114 Minn. 78, 130 N. W. 76 (population of counties).

3458. Official signatures—Courts will take judicial notice of the official signature of the state insurance commissioner. State v. Brotherhood, 111 Minn. 39, 126 N. W. 404.

3459. Geographical facts—Courts of this state take judicial notice of the general topography of the state and of its rivers, including their general source, course, and outlet, but not of the precise point of water parting between one drainage area and another. Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333.

See Note, 86 Am. St. Rep. 439.

3461. Facts affecting constitutionality of statutes—(8) State v. Standard Oil Co., 111 Minn. 85, 99, 126 N. W. 527; State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545; State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496.

3467. Facts not judicially noticed—Miscellaneous cases—The supreme court has refused to take notice of a custom of plowing by farm tenants. Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750.

(15) State v. Provencher, 129 Minn. 409, 152 N. W. 775.

BURDEN OF PROOF

3468. Definition and nature—We doubt whether any practical gain is made in the administration of justice by the adoption of a rule requiring a jury to stop at intervals in the trial to determine which litigant wins if the trial there ends. The minds of jurors differ. One may conclude a fact is proved, when the others are still doubting or unconvinced. In a certain sense, during the trial of the case, the burden continually shifts or changes, in that after one witness has testified the court or jury might conclude that, if there was no further proof, the facts testified to by such witness are established; but, as other witnesses are heard, the conclusion first arrived at is overcome. It is also true that the proof

of certain facts in a trial may give rise to presumptions of the existence of an ultimate fact or issue necessary to establish, and that, unless evidence is then adduced to overcome such presumption, the case ends. This is sometimes referred to as shifting of the burden of proof, but we think improperly. The fact is, the burden in every case rests on the litigant who has the affirmative of an issue to prove it; otherwise, his opponent wins. It seems neither useful nor proper to inquire how he maintained this burden at any particular stage in the trial. The important consideration is: Where is he left when all the evidence is in? Does the fair preponderance thereof then establish the issues he by his pleadings undertook to establish? McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

It has been said that where the burden of proof should rest is merely a question of policy and fairness, based on experience in the different situations. Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

The order of pleading does not always determine the burden of proof. Tinker v. Midland Valley Mercantile Co., 231 U. S. 681.

A party is entitled to the benefit of all the testimony in the case from whatsoever source it comes, and, though he has the burden of proof, he need not prove any fact otherwise established. New Orleans & N. E. R. Co. v. National Rice Milling Co., 234 U. S. 80.

(21) Whitaker v. Chicago etc. Ry. Co., 115 Minn. 140, 131 N. W. 1061; Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727; Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

3469. Burden of establishing allegations—While plaintiff must prove a negative when it is essential, it is not necessary for him to negative possible defences or furnish proof which would more properly come from the other side. Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

When a defendant pleads new matter in justification or avoidance he has the burden of proving his allegations. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

(22) McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

(23) See Farmers Warehouse Assn. v. Montgomery, 92 Minn. 194, 99 N. W. 776.

3470. Burden of going forward with the evidence—(25) State v. Nelson, 116 Minn. 424, 133 N. W. 1010. See Tinker v. Midland Valley Mercantile Co., 231 U. S. 681 (the order of pleading does not always determine the burden of proof).

(28) See McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

DEGREE OF PROOF REQUIRED

3473. In general—Judgments and judicial and other public records cannot be set aside except upon proof beyond a reasonable doubt. Foster v. Brick, 121 Minn. 173, 141 N. W. 101. See Digest, § 5091.

Proof "to the satisfaction of the court" is practically equivalent to the phrase "satisfaction by a preponderance of the evidence." State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951.

(32) United States v. Regan, 232 U. S. 37 (action for the recovery of a penalty).

Digest, §§ 127, 1083, 3839.

EXCHANGE OF PROPERTY

3476. Particular contracts construed—(45) Wilkes v. Holmes, 128 Minn. 349, 150 N. W. 1098 (exchange of automobile for corporate stock—contract held sufficiently definite—failure of party to sign).

3479. Fraud—(50) Knight v. Leighton, 110 Minn. 254, 124 N. W. 1090; Sveiven v. Thompson, 110 Minn. 484, 126 N. W. 131; Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282; Selover, Bates & Co. v. Freeman, 111 Minn. 318, 127 N. W. 9; Atherton v. Barber, 112 Minn. 523, 128 N. W. 827; Johnson-Van Sant Co. v. Martens, 113 Minn. 486, 129 N. W. 859; Miller v. Bricker, 117 Minn. 394, 136 N. W. 14; Nelson v. Gjerstrum, 118 Minn. 284, 136 N. W. 858; Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9; Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775; Jones v. Magoon, 119 Minn. 434, 138 N. W. 686; Green v. Hayes, 120 Minn. 201, 139 N. W. 139; Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118; Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167; Milton v. Greer, 128 Minn. 533, 150 N. W. 1102; Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308; Kautenberger v. Johnson, 131 Minn. ——, 154 N. W. 943. See §§ 10059–10069.

3480. Election of remedies—Plaintiff conveyed land to defendant and gave his notes and chattel mortgage in exchange for the latter's livery stable business. Eight months after, the parties agreed that defendant should take back the stock and return plaintiff's notes and chattel mortgage. The deed had not been recorded. Plaintiff then brought an action to cancel the deed because of fraudulent representations and for other relief. Held that plaintiff was entitled to the remedy invoked. Green v. Hayes, 120 Minn. 201, 139 N. W. 139.

3482. Damages—When the fraud consisted in part as to the value of plaintiff's land and the necessity or advisability of a sale, the price agreed upon by plaintiff at the time of the sale as the value of his land is not controlling. He may upon the trial show a higher value, and such larger amount may be taken by the jury as the value of that with which the plaintiff parted. Knight v. Leighton, 110 Minn. 254, 124 N. W. 1090.

(56) Knight v. Leighton, 110 Minn. 254, 124 N. W. 1090; Selover, Bates & Co. v. Freeman, 111 Minn. 318, 127 N. W. 9. See Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

EXCHANGES

3484. Membership a species of property—Membership in a board of trade or stock exchange is a species of property and is taxable and can be reached by creditors. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

3485. Conditions of membership—Expulsion—In mandamus proceedings involving the expulsion of a member the question for the court is not whether, passing upon the evidence as res nova, it would have reached the same conclusion as that of the board of managers, or whether the conclusion was reasonable or unreasonable, but simply and wholly whether the case was so bare of evidence to sustain the decision that no honest mind could reach the conclusion that the relator's conduct was "inconsistent with just and equitable principles of trade." See Rigler v. National Council, 128 Minn. 51, 150 N. W. 178.

3487. Lien on membership—The Chamber of Commerce of Minneapolis has authority to provide by rule or by-law that one member shall have a lien upon the membership of another for an indebtedness arising from or entered into between one and the other by virtue of membership in the chamber. On May 13 and May 14, 1907, the defendant Welch Company had a lien under such rule for $4,535.07 on the membership of the plaintiff for wheat sold him. It first claimed that title did not pass, and sought to recover in conversion from one to whom the plaintiff had sold. It was defeated. Held, in the absence of intervening injury to another, it may still maintain its lien on the plaintiff's membership. Under the rules of the chamber, a proceeding to enforce the lien cannot be brought until ninety days after the creation of the indebtedness, in this case until ninety days after May 13 or 14, 1907. Held, that a proceeding commenced on July 22, 1913, is not barred by the six-year statute of limitations. Under rule 12 of the chamber, the determination in respect of the lien is properly made by the board of directors; and the finding of the court that proceedings were had before the board, that the plaintiff

participated therein, and that a fair trial and investigation was had, is sustained. Mohler v. Chamber of Commerce, 130 Minn. 288, 153 N. W. 617.

EXECUTION

IN GENERAL

3489. Means of enforcing judgments—Where a judgment requires the payment of money, or the delivery of real or personal property, it may be enforced in those respects by execution. Upton v. Merriman, 122 Minn. 158, 142 N. W. 150.

3490. Kinds—Alias writ—No order of court is necessary for the issuance of an alias writ. An original writ of execution must be returned before an alias writ can issue. Where the evidence shows the original writ returned and the alias writ issued on the same day, it will be presumed, in the absence of evidence to the contrary, that these acts were done in such order as to render both valid. Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

3501. Amendment—(5) Note, 101 Am. St. Rep. 550.

PROPERTY SUBJECT TO EXECUTION

3509. Interest of pledgor or mortgagor in personalty—When a sheriff levies an execution on the right and interest of a pledgor or mortgagor in pledged or mortgaged personal property, it should appear from his return and from the notice of sale that the property is pledged or mortgaged, and that what is levied on and to be sold is only the right and interest of the pledgor or mortgagor therein. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

(21, 26) In re Bird, 180 Fed. 229.

3510. Held subject to levy—The right to membership in a stock exchange or board of trade is probably leviable. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

(35) Note, 57 Am. St. Rep. 436.

(43) 27 Harv. L. Rev. 384.

See Digest, § 3966.

3511. Held not subject to levy—The personal property of A cannot lawfully be seized and sold under an execution against B though B has it in his possession as agent or bailee for the owner. Heberling v. Jaggar, 47 Minn. 70, 49 N. W. 396.

Money deposited in court on an appeal, in lieu of an appeal bond, held not subject to levy. Spear v. Johnson, 111 Minn. 74, 126 N. W. 402.

The interest of a legatee prior to a sale of realty necessary to obtain funds out of which to pay the legacy, held not subject to levy. Greenman v. McVey, 126 Minn. 21, 147 N. W. 812.

(52) Spear v. Johnson, 111 Minn. 74, 126 N. W. 402.

See Digest, § 3967.

LEVY

3513. Realty—(58) Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

CLAIMS OF THIRD PARTIES

3528. Affidavit of claim by third party—Statute—In an action for conversion against a sheriff it is not necessary to plead service of the statutory notice. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

(1) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120 (substantial compliance with statute sufficient).

(99) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120.

SALE

3530. Notice of sale—When a sheriff levies an execution on the right and interest of a pledgor or mortgagor in pledged or mortgaged personal property, it should appear from his return and from the notice of sale that the property is pledged or mortgaged, and that what is levied on and to be sold is only the right and interest of the pledgor or mortgagor therein. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

Adjournment of sale. Note, 97 Am. St. Rep. 653.

Redemption from sale. See Digest, §§ 6382–6424.

3531. Officer acts in ministerial capacity—Liability—The officer may render himself liable for a failure to comply with the requirements of the law in connection with the sale. See Foster v. Malberg, 119 Minn. 168, 174, 137 N. W. 816.

3534. Service of papers on judgment debtor—The fact that the copy of the execution served on the judgment debtor does not bear the signature or seal of the clerk of the court, does not invalidate a sale of real estate made under the execution. Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

3536. Title and rights of purchaser of realty—Caveat emptor—The rule of caveat emptor applies to execution sales. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748. See Digest, § 5215.

(54) Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

RETURN

3542. In general—When a sheriff levies an execution on the right and interest of a pledgor or mortgagor in pledged or mortgaged personal

property, it should appear from his return and from the notice of sale that the property is pledged or mortgaged, and that what is levied on and to be sold is only the right and interest of the pledgor or mortgagor therein. Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

A return of a levy on logs to the effect that the sheriff levied upon and attached "all the right, title and interest" of defendants in and to the logs and timber involved in the action, held sufficient. The presumption of the performance of official duty may be invoked in aid of a return. Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

The failure of the sheriff to make a return after a sale does not invalidate it. Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

Admissibility of return as evidence. Note, 129 Am. St. Rep. 848.

(72) Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

(74) Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

SUPPLEMENTARY PROCEEDINGS

3546. Effect as a lien—Priority—(90) Note, 3 L. R. A. (N. S.) 123.

WRONGFUL LEVY

3552. Injunction—See Note, 111 Am. St. Rep. 97.

EXECUTORS AND ADMINISTRATORS

ADMINISTRATION IN GENERAL

3558. Nature and object—(47) See Tilt v. Kelsey, 207 U. S. 43.

(48) See Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851.

(49) See Tilt v. Kelsey, 207 U. S. 43; Goodrich v. Ferris, 214 U. S. 71.

3559. Necessity—Amicable distribution—(50) Note, 112 Am. St. Rep. 727.

LETTERS OF ADMINISTRATION

3561. Who entitled to letters—Foreign consuls—Creditors—It is the general policy of most of the states to give administration of intestate estates first to persons interested in the estates, upon the presumption that such persons will be most likely to conserve the assets for their own benefit and for that of all other persons who may be entitled to share therein, and that in the absence of express power of nomination the right so given is personal and non-delegable. In some states a power to appoint by virtue of a general equitable jurisdiction is recognized, in addition to the power conferred by statute. But this power, if it exists in this state, cannot be exercised until the limits prescribed

by the several subdivisions of section 3696, R. L. 1905 (G. S. 1913, § 7287) have expired; for otherwise the statute would be emasculated, if not virtually wiped out. Under R. L. 1905, § 3696 (G. S. 1913, § 7287), a foreign consul, who resides in this state and who has filed a copy of his appointment with the Secretary of State, is, next after the surviving spouse or next of kin, entitled to be appointed administrator of the estate of one of his deceased nationals dying in this state, or to nominate the person to be appointed, provided that he be suitable and competent to discharge the trust, and that he apply for administration within thirty days after receiving the notice provided for by section 3642; but otherwise the statute gives him no preference whatever. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300. See 37 L. R. A. (N. S.) 549; 25 Harv. L. Rev. 735; In re D'Adamos' Estate, 212 N. Y. 214, 106 N. E. 81.

A foreign consul, as such, has a proper status to intervene in and to become a party to proceedings upon an application to appoint an administrator of the estate of one of his deceased nationals dying in this state, and likewise may appeal from the order of the court making the appointment. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

It is questionable whether the "most favored nation clause" in a treaty between the United States and a foreign nation carries the benefit of a provision of a consular convention between the United States and another country, conferring upon the representatives of the parties thereto the right to administer upon the estates of their deceased nationals. Article 14 of the treaty between the United States and Sweden, proclaimed March 20, 1911, purports to give to the consuls of the parties thereto the right to administer upon the estates of their deceased nationals only "so far as the laws of each country will permit"; and hence any right thereby conferred upon a foreign consul, under the "favored nation clause," with respect to the administration of the estate of one of his deceased nationals dying in Minnesota, is expressly subject to the conditions imposed by the laws of this state. A foreign consul cannot, as such, assert the priority of right of administration conferred, by R. L. 1905, § 3696, § 1, upon the surviving spouse or next of kin of one of his deceased nationals. R. L. 1905, § 3696, in limiting the time within which the priorities of right of administration thereby conferred must be asserted, uses the word "neglect" synonymously with "fail." Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

One holding a claim for funeral expenses is a "creditor," within R. L. 1905, § 3696, subd. 2, and may apply for administration pursuant to the provisions thereof. A creditor, whose claim is for funeral expenses of the deceased, may be appointed administrator of the estate of his deceased debtor, though the only assets consist of a cause of action for

the wrongful death of the decedent. Under R. L. 1905, § 3696, subd. 2, the probate court has no power to grant letters of administration to any one except a creditor, or to some other person interested in the administration of the estate; a creditor having no authority under such subdivision to nominate a stranger. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

Under R. L. 1905, § 3696, subd. 3, construed in the light of its history, interest in the administration of the estate is not essential to eligibility to appointment as administrator after the lapse of four months from the death of the deceased without application by any person so interested. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

Right of non-residents to letters. Note, 1 L. R. A. (N. S.) 341.

(54) First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

3562. Petition for letters—Notice—When an application is made for administration on the estate of a foreigner dying in this state, the notice provided by R. L. 1905, § 3642 (G. S. 1913, § 7231), should be given. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

The petition is jurisdictional. If it affirmatively appears from the record, or is conceded, that none was made, all subsequent proceedings are void and subject to collateral attack. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

3563. Effect—Collateral attack—If it affirmatively appears from the record, or is conceded, that no petition for letters of administration was made, the letters are void and subject to collateral attack. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

(56) Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362. See Digest, § 7774.

(57) See Tilt v. Kelsey, 207 U. S. 43.

POWERS, DUTIES AND LIABILITIES OF REPRESENTATIVES

3565. Trust relation—(61) First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291; Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

3567. Right to realty—Since, under our statutes, an executor has the right to the possession of his testator's lands, without regard to the sufficiency of the personal assets to pay debts, and since the damages in condemnation proceedings stand in the place of the land, where the damages upon the condemnation of certain property were paid into court, an executor, claiming that the property belonged to his testator's estate at the time of its taking, had the right to sue, as for money had and received, a party who had obtained such money out of court, and

this without regard to the financial status of the estate. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

A personal representative has no right to the possession of the homestead of the decedent. That does not form any part of the estate for purposes of administration. Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876. See Digest, § 4224.

(65) Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

See Note, 136 Am. St. Rep. 81.

3568. Right to personalty—On the death of the decedent the property descends to the heirs at law. In each case it is subject to the payment of the debts. Primary responsibility therefor is on the personalty. But the beneficial interest in the real property and in the corpus of the personalty is in the heirs. The personal representative of the decedent, charged with the duty of administration, has neither the rights nor the responsibilities of an owner. In special cases the right of the heirs may be shown to be superior to those of the personal representative, and may be successfully asserted against the personal representative and third persons by the heirs. Brown v. Strom, 113 Minn. 1, 129 N. W. 136.

(75) See Brown v. Strom, 113 Minn. 1, 129 N. W. 136.

(76) Brown v. Strom, 113 Minn. 1, 129 N. W. 136.

3569. Contracts—Promissory notes—Carrying on business of decedent. Note, 40 L. R. A. (N. S.) 201.

(79) Note, 52 Am. St. Rep. 118.

3570. Purchase of trust property—One who holds the position of an administrator is incapable of acquiring for his own use an interest in the estate, and if he attempts so to do equity impresses a constructive trust upon the title so acquired, regardless of whether such acquisition was accomplished innocently, or even without knowledge of the fact that the property belonged to the estate, or was tainted with actual fraud. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

See Digest, § 9934.

3574. Conversion of realty into personalty—(86) See Digest, § 3133.

3575. Funeral expenses—(87) See 14 Col. L. Rev. 685.

3576. Negligence—Loss of funds—A complaint, in an action by heirs against the administrator of their intestate's estate, to recover the value of lands alleged to have been lost through defendant's failure to pay taxes or to redeem from tax sale, is demurrable where it contains no allegations of negligence and shows an unassailed discharge of defendant by a probate court having jurisdiction in the premises. Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

Deposit of funds in bank. Note, 98 Am. St. Rep. 371.

3580. Bonds—Liability—Actions—A surety on an administrator's bond is liable thereon where the principal converts the proceeds of a settlement of a statutory cause of action for the wrongful death of the intestate. Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

In an action, on an executor's bond, based on the failure of the executors to pay a claim against the estate that had been allowed and ordered paid, held, that a decree of the United States Circuit Court allowing plaintiff's claim against the estate and ordering it paid was conclusive that the claim was not barred by statute, and obligated the executors to pay the claim out of the funds of the estate. No order of the probate court was necessary. Findings that the estate was solvent, and that the executors, at and after the time the decree was filed, had funds of the estate under their control sufficient to pay the claim, and without excuse refused to do so, are sustained by the evidence. The failure to pay the claim constituted a breach of the bond. The decree was conclusive against the surety on the bond, though it was not a party to the litigation. The principal having broken the bond, the surety is liable. The fact that plaintiff applied for an order of the probate court directing the executors to pay the claim does not affect the right to recover on the bond. After an action on an executor's bond is commenced, an order of the probate court vacating its order granting leave to bring such action has no effect. Connecticut Life Ins. Co. v. Schurmeier, 125 Minn. 368, 147 N. W. 246.

In an action to recover on the bond of the administratrix of the estate of a deceased person, held, that the failure of the administratrix to pay over to her successor an amount found due from her to the estate by an order of the probate court settling her account was a breach of the bond for which the surety is liable unless the order may be impeached, set aside, or modified in the action on the bond. From the nature of the obligation entered into by a surety on an administrator's bond, he is, though not a party to the proceeding, bound and concluded by a judgment against his principal, in the absence of fraud or collusion; the judgment against the principal is res judicata and cannot be collaterally attacked in an action on the bond. Such judgment or order of the probate court cannot be attacked by the surety on the ground that the court was mistaken in the facts on which the order was based, or on the ground that it was erroneous as a matter of law. Pierce v. Maetzold, 126 Minn. 444, 148 N. W. 302.

(97) Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

3583. Administrator de bonis non—An administrator de bonis non has the same powers as the original representative. He may maintain an action on the bond of the original representative for a conversion by the latter of the proceeds procured by him by a settlement of a cause of

action for death by wrongful act. Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

(18) See Digest, § 3580.

3584. Special administrator—It conclusively appeared that no petition was presented to the probate court for the appointment of a special administrator. Such petition is jurisdictional, and without it, the probate court has no jurisdiction to appoint such administrator, to approve his bond, or to issue letters of administration. Such orders are nullities, and a settlement made by the special administrator, so attempted to be appointed, in no way binds the next of kin of deceased dependent upon him for support. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

(25) Castigliano v. Great Northern Ry. Co., 129 Minn. 279, 152 N. W. 413.

ASSETS

3586. What are assets—A deposit account in a bank of this state, which is subject to withdrawal by check or surrender of the bank book, held and owned by a nonresident of this state at the time of his death, constitutes property situated in this state, within the meaning of our statutes upon the subject of the administration of the estates of nonresident deceased persons. Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010.

Land entered as a homestead under the federal laws and commuted to a cash purchase is an asset. Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

All simple contract debts are assets at the domicil of the debtor though the creditor is a non-resident. This rule is not affected by the fact that the debt is evidenced by a bill or note. State v. Probate Court, 128 Minn. 371, 150 N. W. 1094. See 27 Harv. L. Rev. 115.

A certificate of stock in a foreign corporation is an asset and may be the basis for administration proceedings where it is found. Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 103 N. E. 697; 27 Harv. L. Rev. 384; Note, L. R. A. 1915D, 856.

(27) Note, 26 L. R. A. (N. S.) 411; 112 Am. St. Rep. 406.

3587. Property fraudulently conveyed by decedent—Action by administrator to set aside transfer of personalty by intestate in anticipation of death. Held, that the evidence justified the court in finding that the property was transferred to a third party in trust to pay the expenses and debts of the intestate after his death, and to distribute the balance among the members of his family; that the wife and children acquiesced in this disposition of the property; and, ample provision having been made by the order of the trial court for the payment of the creditors, the

record furnishes no ground for grievance on the part of the administrator. Ober v. Brewster, 113 Minn. 388, 129 N. W. 776.

Evidence held not to justify a finding that an assignment of a real estate mortgage was obtained by fraud or undue influence. Wallendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812.

(34) See Note, 50 L. R. A. (N. S.) 320.

(35) Corey v. Corey, 120 Minn. 304, 139 N. W. 509. See First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

CLAIMS AGAINST ESTATE

3591a. What constitutes—A claim against the estate of a deceased person, within the meaning of our statutes, is a demand of a pecuniary nature which could have been enforced against him in his lifetime. A demand for the whole or a part of the estate is not a claim against it, within the meaning of the statutes. Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

3592. Necessity of presenting to probate court—Where a representative is a party to an action to foreclose a mechanic's lien the judgment will bind the estate though the claim has never been presented to the probate court. Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472.

(49) Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

(52) Order of St. Benedict v. Steinhauser, 179 Fed. 137 (limitation in statute not applicable to claims not provable in probate court). See Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472.

(55) See, as to jurisdiction of federal courts, Connecticut Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N. W. 1; Waterman v. Caval, 215 U. S. 33.

3595. Held not provable in probate court—A claim for a whole or a part of the estate. Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

A claim against the estate of a deceased surety on the bond of an administrator growing out of a conversion of funds by the administrator. Martz v. Mahon, 114 Minn. 34, 129 N. W. 1049.

A claim of a third party that he was the owner of property in the hands of an administrator. Order of St. Benedict v. Steinhauser, 179 Fed. 137.

3596. Mode of presenting—(84) Note, 130 Am. St. Rep. 311.

3598. Extension of time to present claims—(89, 91) State v. Williams, 123 Minn. 57, 142 N. W. 945 (relief should be granted freely but cause must be shown—application based on neglect of attorney—no affidavit or testimony of attorney presented—application properly denied). See Schurmeier v. Conn. etc. Co., 171 Fed. 1.

3599. Proof—Sufficiency of evidence—Evidence held insufficient to justify a verdict for plaintiff on a claim for services rendered decedent. Meehan v. Meehan, 119 Minn. 35, 137 N. W. 163.

3607. Order allowing or disallowing claims—Decree of federal court—An allowance of a claim not constituting a claim against the estate within the meaning of the statutes is a nullity. Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

Federal courts in equity have jurisdiction to establish the claim of a foreign creditor against the estate of a decedent by a decree to that effect. Such a decree, when a certified copy thereof is filed in the proper probate court, stands as a claim duly proven and allowed against the estate of the decedent. It is the duty of the personal representative of the decedent to pay the claim in the due course of administration, and no order of the probate court allowing the claim or directing its payment is necessary. Connecticut Mutual Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N. W. 1; Id., 125 Minn. 368, 147 N. W. 246.

3608. Payment—Duty of representative—(16) Connecticut Mutual Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N. W. 1 (duty to pay claim established by decree of federal court).

3612. Action in federal court—A judgment in a federal court allowing a claim is conclusive on the personal representative and he is bound to pay the claim out of any funds of the estate in his hands, no order of the probate court being necessary. Connecticut Mutual Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N. W. 1; Id., 125 Minn. 368, 147 N. W. 246.

(31) Connecticut Mutual Life Ins. Co. v. Schurmeier, 125 Minn. 368, 147 N. W. 246.

SALES OF REALTY

3614. Jurisdiction of probate court exclusive—(35) Note, 80 Am. St. Rep. 96; 32 L. R. A. (N. S.) 676. See Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498; Greenman v. McVey, 126 Minn. 21, 147 N. W. 812.

3615. Grounds for selling—Realty is frequently sold under a license from the probate court, though a sale might be had without such license under a power in a will. See Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498; Greenman v. McVey, 126 Minn. 21, 147 N. W. 812.

(36) Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851 (homestead under federal laws—for what may be sold).

3622. Bond of representative before sale—(61) See Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640; Note, 33 L. R. A. 761 (necessity of bond by guardian).

3624. Representative cannot purchase—(69) See Note, 136 Am. St. Rep. 789.

3630. Five essentials of a valid sale—Statute—(88, 89) Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851.

ACCOUNTING AND DISCHARGE

3641. Jurisdiction—Executors and administrators who receive money in settlement of damages for the wrongful killing of a decedent are officers of the district court and may be required to account for and distribute the fund in accordance with the rules of that court. State v. District Court, 114 Minn. 364, 131 N. W. 381.

(16) Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302. See Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255; Beaulieu v. Ain-E-Waush, 126 Minn. 321, 148 N. W. 282.

3644. Account—Form—Items allowable—An administrator, who as such has received money as belonging to the estate of his intestate, must account for it, regardless of whether he could have collected it in a suit at law; there being no adverse claim asserted. Beaulieu v. Ain-E-Waush, 126 Minn. 321, 148 N. W. 282.

Where the surviving spouse is tenant for life of the homestead of the deceased spouse and also administrator of her estate, he cannot charge the estate with taxes paid by him upon the homestead nor with the value of improvements placed by him thereon. Under chapter 265, Laws 1899, claims theretofore paid by the administrator without having been allowed by the probate court, may be credited to him in his final account upon proof that such claims were just and existing demands against the estate at the time of payment. Where the administrator takes possession of the real estate he must account for the rents and profits received therefrom, and if the amount received cannot be otherwise determined, the court may charge him with the rental value of the land. Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

(27) See Note, 28 L. R. A. (N. S.) 572 (what allowable as funeral expenses).

(31) Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255 (liability to account for funds procured by a settlement of a cause of action for the wrongful death of the decedent).

3650. Discharge of representative—The probate court should refuse a discharge until it is made to appear that the representative has paid inheritance taxes. State v. Probate Court, 112 Minn. 279, 287, 128 N. W. 18. See, as to payment of general taxes, Winters v. Ellefson, 128 Minn. 3, 150 N. W. 170.

A representative is not entitled to a discharge until it appears that he has in all things well, faithfully and fully administered his trust. Vukmirovich v. Nickolich, 123 Minn. 165, 143 N. W. 255.

A discharge under the statute bars an action by the heirs against the representative for breach of trust or negligence in his administration. Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

If the court has jurisdiction an order discharging a representative is not subject to collateral attack. Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

FINAL DECREE OF DISTRIBUTION

3658. Powers of court—In assigning an estate to trustees for the beneficial use of another the court has no power to determine what taxes will accrue in the future. State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

It has power to determine the right of a child adopted by an intestate, by agreement, to share in the personalty of the intestate, and to make an award accordingly. Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

(61) Odenbreit v. Utheim, 131 Minn. —, 154 N. W. 741.

(67) See Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455; Odenbreit v. Utheim, 131 Minn. —, 154 N. W. 741.

3659. Partition—See Note, 41 Am. St. Rep. 140.

3660. Effect—Res judicata—Collateral attack—Presumptively a decree of distribution is in accordance with the will. Hart v. Hart, 110 Minn. 478, 126 N. W. 133.

A final decree is conclusive as to the right of a pretermitted child to inherit under G. S. 1913, § 7260. Odenbreit v. Utheim, 131 Minn. —, 154 N. W. 741.

(74) See Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

(75) See Tilt v. Kelsey, 207 U. S. 43.

(76) Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053.

3661. Right to distributive share—A transfer of the interest of an heir to him through a fictitious sale, held to constitute a payment by the executor to the heir of his interest. Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053.

One entitled to a distributive share may sue the administrator in a federal court. Pulver v. Leonard, 176 Fed. 586.

3664. Appeal—Who may attack—(82) Casey v. Brabec, 111 Minn. 43, 126 N. W. 401. See Digest, § 7785.

RESIGNATION AND REMOVAL OF REPRESENTATIVES

3666. Removal—Upon a petition by a widow, who had renounced her husband's will, to remove the executor named by the will, on the ground of his personal interest in certain transfers made by the testator in his lifetime and alleged by the petitioner to be invalid, held, that the establishment of the invalidity of such transfers was not essential to the

granting of the relief sought. The fact that the petitioner was the only person who would be benefited by a restoration of the property so transferred held not to bar her right to have the matter passed upon by an impartial representative in the first instance, and to have such a person in charge of the estate so long as such matter is in controversy. Corey v. Corey, 120 Minn. 304, 139 N. W. 509.

(84) First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291 (evidence held to require the removal of an administrator as an "unsuitable" person to act as such—lack of diligence in administering estate).

See Note, 138 Am. St. Rep. 525.

ACTIONS BY AND AGAINST REPRESENTATIVES

3667. **Actions by representatives**—See Dunnell, Minn. Pl. 2 ed. §§ 93–106.

3669. **Actions against representatives**—See Dunnell, Minn. Pl. 2 ed. §§ 93–106.

3671. **Limitation of actions**—A cause of action against an administrator and the surety on his bond for conversion held not barred. Martz v. McMahon, 114 Minn. 34, 129 N. W. 1049.

(1) Howard v. Farr, 115 Minn. 86, 93, 131 N. W. 1071.

3672. **Pleading**—In an action by heirs against a representative for negligence in his administration the complaint must allege negligence. Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

Under a denial that a representative was appointed the invalidity of a pretended order of appointment may be shown. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 166, 150 N. W. 387.

See Dunnell, Minn. Pl. 2 ed. §§ 662, 663.

FOREIGN EXECUTORS AND ADMINISTRATORS

3677. **Powers—In general**—See Note, 45 Am. St. Rep. 664.

3678. **Actions by**—(17) Pulver v. Leonard, 176 Fed. 586.

(18) See Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729 (sufficiency of authentication).

(20) Pulver v. Leonard, 176 Fed. 586.

See Digest, § 3672 (pleading).

ANCILLARY ADMINISTRATION

3679. **In general—Assignment of estate**—R. L. 1905, § 3687 (G. S. 1913, § 7278), providing, among other things, that upon administration in this state of the estate of a non-resident testator the real estate shall be assigned according to the will, is not a statute of devolution; and, when

construed in connection with the general statutes of descent and distribution, as it must be, it merely declares that such real estate shall be so assigned, as in the case of a domestic will, subject to any conditions and restrictions imposed by the statutes of this state upon testamentary dispositions of land generally. Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129. See Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428.

Distribution of assets to next of kin or beneficiary. Note, L. R. A. 1915 A, 431.

Powers of ancillary administrators. Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 103 N. E. 697.

EXEMPTIONS

3680. In general—(29) See 24 Harv. L. Rev. 238.

3682. Wages—So much of Laws 1913, c. 375 (G. S. 1913, § 7951) subd. 16, as is contained in the proviso thereto rendering the wage exemption prescribed by the main portion of the act inoperative as against a debt for necessaries supplied to the debtor or his family dependent upon him, where he has been paid thirty-five dollars or more on account of his wages for the thirty days next preceding the levy, is obnoxious to art. 1, § 12, of the constitution and therefore void; but the remainder of the act is not thereby invalidated. Bofferding v. Mengelkoch, 129 Minn. 184, 152 N. W. 135.

See Note, 102 Am. St. Rep. 81.

3685. Wearing apparel and household goods—A piano, together with its stool and cloth cover, held exempt. Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307.

See Note, 125 Am. St. Rep. 43 (exemption of wearing apparel).

3688. Tools and stock in trade—See Note, 123 Am. St. Rep. 139 (tools and implements).

3689. Insurance—(57) See Note, L. R. A. 1915A, 1201.

3689a. Proceeds of sale of exempt property—Where property exempt from execution is voluntarily sold for money, or other property not exempt, the proceeds of the sale are not exempt, in the absence of a statute to the contrary. Stephenson v. Lohn, 115 Minn. 166, 131 N. W. 1018.

3692. Funds of benefit societies—(62) See Note, L. R. A. 1915A, 1201.

3694. Residence—A residence is not lost by a temporary absence from the state on a visit. Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307.

(64, 65) See Note, L. R. A. 1915A, 396, 421.

3695. Claiming exemption—Levy on excess—(67) Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307.

See Note, L. R. A. 1915D, 381.

3695a. Property subject to particular debt though generally exempt—Remedies of creditor—Where property, though exempt from the general debts and obligations of the owner, is subject to the payment of a particular debt, the creditor has the election of remedies to subject the same to the payment of his claim: (1) He may proceed in equity, setting up all the facts, and have the amount of the debt decreed a specific lien upon the property; (2) he may proceed by attachment; or (3) by an execution issued upon a judgment in an ordinary action for the recovery of the debt. Gregory Company v. Cale, 115 Minn. 508, 133 N. W. 75.

EXPLOSIVES

3699. Explosions—Liability for negligence—Defendant kept a quantity of explosive fuse caps in a toolhouse on a lot in the city. Boys went into the toolhouse through an opening in the loose stones used as a foundation, tooks the caps, and threw them on the ground outside of the house. Plaintiff's six year old son, in playing about the premises, found one of the caps, and was injured by its explosion while he was playing with it. Held, that the evidence sustained a finding that the defendant was negligent in storing the fuse caps in the toolhouse without sufficient precautions to prevent children from entering and taking them. It was a question for the jury whether such negligence was the proximate cause of the injury, and the evidence sustained the verdict on this point. Vills v. Cloquet, 119 Minn. 277, 138 N. W. 33.

A complaint alleged in effect that the defendant left unguarded large quantities of carbide, a dangerous substance and attractive to children of tender years, on its premises near a public street, knowing that such children were accustomed to pick up the carbide, pour water upon it, whereby gas was generated, and then explode it by applying a light; that the plaintiff's son, five years old, secured some of the carbide so left by defendant, put it in a can, poured water on it, and in attempting to light the gas an explosion followed, whereby he was seriously injured. Held, that the complaint stated facts sufficient to constitute a cause of action. Juntti v. Oliver Iron Mining Co., 119 Minn. 518, 138 N. W. 673.

Where articles in such common use as gasolene, naphtha, and kerosene are kept in a proper receptacle, at a place where it is proper for them to be, and where there is no reason to anticipate that they will be meddled with, the mere failure so to guard them that trespassing children cannot get possession of them does not, in itself, constitute action-

able negligence under either the doctrine of the "turntable cases" or the rule applying to explosives. Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796.

(76) Eckart v. Kiel, 123 Minn. 114, 143 N. W. 122 (defendant had dynamite caps on his farm and sold the farm to plaintiff—child of plaintiff picked up cap in barnyard of farm and was injured by its explosion—defendant's negligence held a question for the jury); Bartness v. Pittsburgh Iron Ore Co., 123 Minn. 131, 143 N. W. 117 (blasting operations in iron mine near highway—plaintiff walking along highway near mine was struck by piece of ore thrown by explosion—negligent failure to warn plaintiff—two mines near accident—explosions in both mines—question from which mine piece of ore striking plaintiff came—verdict held not based on speculation or conjection); Laine v. Consolidated V. & E. Co., 123 Minn. 254, 143 N. W. 783 (degree of care required in use of explosives—frozen sticks of dynamite).

(78) Note, 113 Am. St. Rep. 1014.

3700. Blasting—See 10 Col. L. Rev. 465; 34 L. R. A. (N. S.) 211; 123 Am. St. Rep. 565.

EXTORTION

3702. Indictment—An indictment for an attempt to commit extortion held sufficient. State v. Lampe, 131 Minn. —, 154 N. W. 737.

3702a. Evidence—Sufficiency—Evidence held insufficient to justify a conviction for an attempt to commit extortion. State v. Lampe, 131 Minn. —, 154 N. W. 737.

EXTRADITION

3703. Duty and discretion of governor—(83) State v. Langum, 126 Minn. 38, 147 N. W. 708.

3705. Who is a fugitive from justice—(01) State v. Gerber, 111 Minn. 132, 126 N. W. 482.

3707. Proof that person demanded is a fugitive—(91) State v. Curtis, 111 Minn. 240, 126 N. W. 719; State v. Langum, 126 Minn. 38, 147 N. W. 708.

3708. Sufficiency of requisition papers—The certificate of authentication need not be in any particular form. It is sufficient if it shows that a copy of an indictment or affidavit annexed to the requisition is authentic. A certificate in the following form has been sustained: "It appears from the annexed papers, duly authenticated in accordance with the laws of this state." State v. Curtis, 111 Minn. 240, 126 N. W. 719.

3709. Sufficiency of warrant—(4) See State v. Curtis, 111 Minn. 240, 126 N. W. 719.

3712. Trial for other offence—(7, 8) Note, 47 L. R. A. (N. S.) 807.

3713. Review by courts—Habeas corpus—The guilt or innocence of the accused cannot be inquired into on habeas corpus. State v. Gerber, 111 Minn. 132, 126 N. W. 482.

The warrant of rendition is presumptive evidence that the person demanded is a fugitive from justice and places upon him the burden of proving that he is not. State v. Curtis, 111 Minn. 240, 126 N. W. 719.

In habeas corpus proceedings for the discharge of one arrested on the warrant of the Governor in interstate extradition proceedings, the burden of showing that he is not a fugitive from justice is upon the prisoner. A warrant in due form, and containing the proper recitals, is prima facie evidence that the accused is a fugitive from justice. What amount of proof is necessary to rebut this prima facie case is not decided. The courts will not try on habeas corpus the question of the prisoner's guilt or innocence, nor will they, on the ground that the proceedings were instituted in bad faith, or from ulterior motives, review the action of the Governor in granting the warrant. State v. Langum, 126 Minn. 38, 147 N. W. 708.

(9) State v. Langum, 126 Minn. 38, 147 N. W. 708.

FACTORS

3714a. Regulation—Factors are subject to regulation under the police power for the protection of those doing business with them. State v. Sperry & Hutchinson Co., 110 Minn. 378, 395, 126 N. W. 120.

3716a. Duty to follow instructions—Plaintiff consigned horses to defendant for sale on commission. Defendant sold the horses, and plaintiff brought this action, claiming that he instructed defendant not to sell at less than a stated price, which was larger than that received on the sale made, and seeking to recover damages. Held, that the decision of the trial court to the effect that no instructions as to price were given, and that the sale was made at the best price obtainable on the market, is sustained by the evidence. Hoven v. Charles L. Haas Commission Co., 120 Minn. 509, 140 N. W. 110.

3716b. Duty to account—It is the duty of a factor to account to the consignor as agreed, or, in the absence of agreement, within a reasonable time or upon a reasonable demand. Farmers Co-operative Elevator Co. v. Enge, 126 Minn. 485, 148 N. W. 465.

3726a. Wrongful sale by factor—Right of principal to recover property—Estoppel—Where the owner ships property to a factor and the factor

wrongfully executes a bill of sale therefor to one having notice of his wrongdoing, and thereafter such vendee sells to another to whom he exhibits his bill of sale, and who, without the production of the bill of lading, and without knowing or inquiring the source of the factor's title, and without knowing or inquiring by whom or on what conditions the property had been shipped, takes it while still in the car in which it had been shipped to the factor, the owner is not estopped from reclaiming his property. Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971. See Digest, §§ 3204, 8597.

3726b. Commingling funds—A factor need not keep separately moneys received from sales for different consignors, but may commingle them with his own funds, becoming in such cases forthwith a debtor of and liable to the consignor. Farmers Co-operative Elevator Co. v. Enge, 126 Minn. 485, 148 N. W. 465.

3727a. Bond of commission merchants—Section 2119, R. L. 1905 (G. S. 1913, § 4603), providing that, if a licensed commission merchant shall fail to account for any property consigned to him for sale, the consignor may file with the Railroad and Warehouse Commission an affidavit setting forth the facts, and thereafter bring an action upon the commission merchant's bond, construed, and held, that the provision for filing the affidavit is merely directory, and the failure to file the same not fatal to the right of action on the bond. That provision of the statute was not incorporated therein for the benefit of the commission merchant or the surety on his bond. Farmers Co-operative Elevator Co. v. Enge, 122 Minn. 316, 142 N. W. 328.

An agreement between plaintiff a country grain dealer, and a commission merchant, pursuant to which their business was conducted, and their course of dealing thereunder, held not to relieve defendant surety company from liability on its bond, given under G. S. 1913, § 4598 et seq., where such merchant failed to account for proceeds of sales of grain consigned to him by plaintiff. Farmers Co-operative Elevator Co. v. Enge, 126 Minn. 485, 148 N. W. 465.

3727b. Actions by—A factor has a special property in the goods, and if they are taken from him or injured by a third party, he may maintain an action for their recovery or for damages. Grinnell-Collins Co. v. Illinois Central R. Co., 109 Minn. 513, 516, 124 N. W. 377. See Dunnell, Minn. Pl. 2 ed. § 55n.

FALSE IMPRISONMENT

3728. What constitutes—See Note, 67 Am. St. Rep. 408; 118 Id. 719.

3730. Probable cause—In an action for false imprisonment against a constable, a defence may be made out if the officer proves that he had probable ground for believing the person arrested guilty of a felony, though when he made the arrest he mistakenly believed he had a warrant therefor. Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818.

3730a. Defences—Arrest of insane person by officer—In an action for false arrest and imprisonment it is not a justification that the defendant as a police officer made the arrest upon reliable information that the plaintiff was insane, that the officer in good faith believed this to be true, and that an ordinarily prudent person, under the same conditions, would have entertained and acted upon such belief, the arrest being made without warrant, and there being no proof of insanity, nor any urgent necessity for restraint, even had plaintiff been in fact insane. Witte v. Haben, 131 Minn. ——, 154 N. W. 662.

3732. Evidence—Admissibility—Where exemplary damages are involved the court should admit all evidence bearing on the presence or absence of malice. Evidence of the defendant's financial standing is admissible. Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818.

3733. Damages—(46, 47) Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818.

(48) Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818 (detention for a short time in going from a railway station to an attorney's office—verdict for $500 sustained).

FALSE PRETENCES

3734. What constitutes—Representations as to the value of property will not ordinarily render the person making them liable. Boasberg v. Walker, 111 Minn. 445, 448, 127 N. W. 467.

A representation by the defendant, charged with obtaining property by false pretences, that he "was the brother of one V. V. Harris, a contractor at the city of Virginia, and that he and the said contractor, as partners, had a contract with the Oliver Iron Mining Company, a corporation at the city of Virginia," does not relate to the defendant's "ability to pay," within the meaning of section 5089, R. L. 1905 (G. S. 1913, § 8882), providing that a purchase of property by means of a false pretence is not criminal, where the false pretence relates to the purchaser's means or ability to pay, unless such pretence shall be made in writing and signed by the party to be charged. State v. Harris, 116 Minn. 401, 133 N. W. 980.

See Note, 25 Am. St. Rep. 378.

3736. Indictment—Complaint—A complaint for obtaining money by fraudulent draft held fatally defective. Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813.

3737. Variance—When an indictment alleges grand larceny in the first degree committed by obtaining "current and genuine money" by fraudulent representations, and the evidence shows that the one defrauded drew a draft on a Missouri bank in favor of a Minnesota bank, and the latter bank honored it and was ready to pay the money to the defendant and he requested two drafts and a deposit credit, there is no fatal variance. State v. Cary, 128 Minn. 481, 151 N. W. 186.

3739. Evidence—Sufficiency—(67) State v. Cary, 128 Minn. 481, 151 N. W. 186 (evidence insufficient to sustain a conviction for obtaining money by false representations as to the ownership of property with intent to cheat and defraud).

SWINDLING

3740. What constitutes—See Note, 134 Am. St. Rep. 363.

FAMILY SETTLEMENTS—See Wills, 10251a.

FARMERS INSTITUTE ANNUAL—See Agriculture, 245b.

FEDERAL COURTS

3744. Jurisdiction—The federal court of the district of Minnesota had jurisdiction of an action brought by the stockholders of the various railroads of the state to test the validity of chapter 97 of the Laws of 1907 (G. S. 1913, §§ 4288, 4289), known as the two-cent fare law, and authority and jurisdiction by injunction to restrain such companies, their agents and officers, from putting in force, during the pendency of the action, the rate prescribed by that statute. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

(79) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

See Digest, § 3612 (allowance of claims against estates of decedents).

3746. Conflict with state courts—A conflict between federal and state courts should be avoided, and where a federal court with jurisdiction restrains the putting into effect of a state statute the state courts will not punish a person for failing to do what the statute directs him to do, contrary to the injunction. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

3747. Decisions conclusive on state courts—(87) Connecticut Mutual Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N. W. 1; Id., 125 Minn. 368, 147 N. W. 246.

3748. Following decisions of state courts—(89) Note, 40 L. R. A. (N. S.) 380.

3751. Foreclosure of mortgages—Deficiency judgment—(92) See Mackay v. Randolph, 178 Fed. 881.

FENCES

3753. No duty to fence at common law—(94) Liability of one in possession of unfenced land for injuries to live stock which strays thereon. Note, 52 L. R. A. (N. S.) 133.

3755. Partition fences—A parol contract as to a division fence, acted upon by the parties thereto, is binding upon them, but not on grantees or lessees who have not recognized and acted upon it. Tuebert v. Sons, 116 Minn. 195, 133 N. W. 467. See Note, 27 L. R. A. (N. S.) 226.

FERRIES

3756. Charter—Franchise—(4) See Port Richmond etc. Co. v. Hudson County, 234 U. S. 317 (at common law the right to maintain a public ferry lies in franchise).

FIRES

3764. Liability for negligence—Where the owner or occupant of lands causes or permits fire to be set thereon to accomplish a desired result under such conditions that the act of then setting such fire necessarily endangers the property of others unless proper precautions are taken, a duty arises to take such precaution, which cannot be avoided by delegating the work to an independent contractor. Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 117 Minn. 59, 134 N. W. 309. See Note, 17 L. R. A. (N. S.) 788.

The fact that plaintiff did not object to the building of a small fire on his land held not to estop him from recovering for damages resulting from a spread of the fire. McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434.

Where a landowner knows that a fire, started by a stranger, is burning on his premises, and that if it is not put out it is likely to spread and injure or destroy adjacent property of others, he owes the latter a legal duty to exercise reasonable care to put it out. Farrell v. Minneapolis & Rainey River Ry. Co., 121 Minn. 357, 141 N. W. 491.

Failure to make due exertion to save property from a fire will defeat or reduce a recovery. Mullen v. Otter Tail Power Co., 130 Minn. 386, 153 N. W. 746.

(27) St. Paul Fire & Marine Ins. Co. v. Great Northern Ry. Co., 116 Minn. 397, 133 N. W. 849 (tent of a surveying party of a railway company caught fire—held a question for the jury whether the fire escaped and destroyed a barn in the neighborhood).

(31) Note, 36 L. R. A. (N. S.) 194.

3764a. Fire escapes—Statute—The owner of a building who, during the term of a lease thereof, unlawfully fails to equip the building with fire escapes, cannot maintain an action on the lease for rent. Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856.

A fire escape ladder must be such that it affords a reasonably safe escape from a burning building when other ways are closed or cut off. The fact that a ladder upon a building did not come within twenty feet of the ground justified a finding that it did not satisfy the statute. In an action for personal injury in descending from a ladder to the ground while a building was on fire, held, that the plaintiff was rightfully in

the building as a guest of a sub-tenant; that she came within the protection of the statute; that the building was one requiring non-combustible fire escape ladders on the outside; that plaintiff was not guilty of contributory negligence as a matter of law in attempting to escape by means of a defective ladder; and that defendant was liable under the statute. Wardwell v. Cameron, 126 Minn. 149, 148 N. W. 110. See Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830.

3764b. Actions—Joinder of parties plaintiff—An insurance company, which has paid the amount of a loss covered by one of its policies, may join with the owner of the property destroyed in an action against a third person for negligently causing the loss, even though a part of the property so destroyed, and for which recovery is sought is not included in the policy. Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727.

3764c. Evidence—Sufficiency—Evidence held to justify a finding that a fire was caused by the burning of rubbish in a furnace. Rademacher v. Pioneer Tractor Mfg. Co., 127 Minn. 172, 149 N. W. 24.

FIXTURES

3766. General principles—Tests—The fact that the article is not removable without being taken to pieces, and is worth less when removed, are circumstances to be considered, but they are not conclusive. White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. W. 114.

Though the principles of the law of fixtures are well settled, there are no fixed rules or standards applicable alike to all cases by which to determine what are or are not removable as such. Each case must be determined in the light of its own particular facts. As between landlord and tenant, specific articles of personal property attached to real estate might be removable as fixtures, and entirely the reverse be true as between the tenant and a purchaser of the realty without notice of the tenant's rights. As between such purchaser without notice and the tenant, it may safely be stated, as a general rule, that the purchaser of land takes all articles of personal property which are annexed thereto at the time of the purchase, where in character they are such as ordinarily are attached as permanent improvements of the particular class of realty. This would, of course, exclude all such chattels, though in some form or other attached to the land, as apparently were brought and placed thereon for some domestic use of convenience, such as trade fixtures, and such as ordinarily are not essential or indispensable to the use and enjoyment of the land or the purposes to which it may have been improved or adapted. Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714. See 7 Col. L. Rev. 1.

Where a controversy arises between vendor and vendee or mortgagor **and mortgagee**, all articles originally personalty, which have been actu**ally or** constructively attached, are fixtures and part of the freehold. **When the** question arises between landlord and tenant, articles, ordi**narily fixtures**, if attached by a tenant for trade purposes, may be re**moved during** the tenancy, so long as such removal does not result in **material and** permanent injury to the freehold. In no case can the ten**ant remove** fixtures, if they are permanent in their nature, and if their **removal will** leave the freehold in a substantially worse plight than be**fore the annexation** was made. Northwestern Lumber & Wrecking Co. **v. Parker, 125** Minn. 107, 145 N. W. 964.

(35) White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. **W. 114; Northwestern** Lumber & Wrecking Co. v. Parker, 125 Minn. **107, 145 N. W.** 964. See Detroit Street Co. v. Sistersville Brewing Co., **233 U. S. 712.**

(38) White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. **W. 114.**

3768. Special agreements—An article which would ordinarily be deem**ed an irremovable** fixture may be treated as a chattel by special agree**ment. Northwestern** Lumber & Wrecking Co. v. Parker, 125 Minn. 107, **145 N. W. 964.** See Note, 84 Am. St. Rep. 877.

(41) See Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714.

3770a. Timber severed by act of God—As between a grantor and **grantee timber** severed from the land by an act of God remains a part **of the realty.** Whether this is true as between a landowner and a tort**feasor is an** open question in this state. Reynolds v. Great Northern Ry. **Co., 119 Minn.** 251, 138 N. W. 30.

3771. Time in which to remove—Waiver—A tenant in possession, **owning and** having the right to remove fixtures placed on the premises **at his own** expense and for his personal convenience, does not, by enter**ing a new lease** wherein he covenants to keep the buildings and improve**ments in repair**, thereby waive his ownership and right to remove such **fixtures during** the term of the new lease. Sassen v. Haegle, 125 Minn. **441, 147 N. W.** 445. See 28 Harv. L. Rev. 108 (criticising reasoning of **court).**

3772. Held a part of realty—A combination steam heating and power **plant. Northwestern** Lumber & Wrecking Co. v. Parker, 125 Minn. 107, **145 N. W. 964.**

A building for the inclosure of a gasolene engine and a wire netting **inclosing a poultry** yard. Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714.

3773. Held not a part of realty—A florist's refrigerator. White **Enamel Refrigerator** Co. v. Kruse, 121 Minn. 479, 140 N. W. 114.

Wagon scales, hay carrier, storm windows and doors, elevator, feed

mill and horse power on a leased farm. Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445.

A gasolene engine and equipment placed on a farm by a tenant for use in pumping water from a well under agreement for removal. Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714.

Electric light fixtures. Lyons v. Westerdahl, 128 Minn. 288, 150 N. W. 1083.

(61) Note, 43 L. R. A. (N. S.) 675.

(64) See Detroit Steel Co. v. Sistersville Brewing Co., 233 U. S. 712 (conditional sale of brewery tanks—successive mortgagees).

3774. Wrongful removal—Actions—(74) See Hamlin v. Parsons, 12 Minn. 108 (59); Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445.

FOOD

3776. Milk—License for sale—Inspection of dairies—(78) Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445 (ordinance requiring dairy cows to be subjected to the tuberculin test sustained). See Cobb v. French, 111 Minn. 429, 127 N. W. 415.

3778. Butter—Oleomargarine—Laws 1911, c. 183, regulating the sale of oleomargarine, held unconstitutional in part. State v. Hanson, 118 Minn. 85, 136 N. W. 412.

3782. Impure food—Liability of seller—The sale of adulterated or poisonous cooking oil by a wholesale dealer is prima facie evidence of negligence in failing to ascertain its true character, though the package was properly labeled as cotton seed oil. A manufacturer, or dealer, who sells adulterated or poisonous cooking oil to a retail merchant, is liable to the vendee for his consequent loss of business in selling the oil to his customers. Neiman v. Channellene Oil & Mfg. Co., 112 Minn. 11, 127 N. W. 394. See Note, 21 L. R. A. 139.

3782a. Discrimination in sale of milk, etc.—Chapter 468, Laws 1909, an act to prevent unlawful discrimination in the sale of milk, cream, and butter fat, does not violate the equality provision of either the state or federal constitution, or the prohibitions of the state constitution as to special legislation. The classification of the act is not an arbitrary one, and the act is constitutional. State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496.

3782b. Coloring confectionery with coal tar—Defendant, as traveling salesman for a New York manufacturer, took an order from a dealer in St. Paul for certain confectionery; such order being subject to acceptance or rejection by the manufacturer. The order was accepted by packing the confectionery in boxes and delivering the same to a car-

rier in New York for shipment to the dealer in St. Paul. A portion of such confectionery was colored with coal-tar dye. Held, that the sale of the confectionery took place wholly in New York, and therefore did not constitute a violation of R. L. 1905, § 1767 (G. S. 1913, 3701), prohibiting the manufacture or sale of confectionery colored with coal-tar dye. Defendant, in taking and forwarding the order, was not guilty of selling adulterated confectionery in this state, or of aiding or abetting in such a sale. State v. Gruber, 116 Minn. 221, 133 N. W. 571.

FORCIBLE ENTRY AND DETAINER

3783. When lies—An action will not lie under the statute against one who peaceably and under claim of right enters into possession and does not forcibly detain the property. Unlawful detention, unaccompanied with force, the original possession having been taken peaceably and under claim of right, does not authorize an action under the statute. Mastin v. May, 127 Minn. 93, 148 N. W. 983.

3784. Nature and object of action—(90) See Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094; Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571.

(91) Mastin v. May, 127 Minn. 93, 148 N. W. 983 (action under statute not a substitute for ejectment).

FOREIGN LAWS

3786. Presumptions—There is no presumption that the law of Cuba is the same as the common law. Cuba Railroad Co. v. Crosby, 222 U. S. 473.

(93) State v. Gerber, 111 Minn. 132, 126 N. W. 482; Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806; Kolliner v. Western Union Tel. Co., 126 Minn. 122, 147 N. W. 961.

(94) Headline v. Great Northern Ry. Co., 113 Minn. 74, 128 N. W. 1115; Culver v. Johnson, 131 Minn. —, 154 N. W. 739.

(95) Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806.

See Note, 113 Am. St. Rep. 868.

3788. How proved—A translation of the law of Germany as to marriage, stipulated by the parties to be a correct translation, construed. Lando v. Lando, 112 Minn. 257, 127 N. W. 1125.

(1) Walson v. McGregor, 120 Minn. 233, 139 N. W. 353 (court cannot consider decisions not in evidence).

See Note, 113 Am. St. Rep. 868.

3789. **Necessity of pleading—Not judicially noticed**—A foreign statute held admissible under a general denial in an action for conversion. Nichols v. Minn. Thresher Mfg. Co., 70 Minn. 528, 73 N. W. 415.

The federal statutes are not foreign laws and need not be pleaded. Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297.

(3) State v. Gerber, 111 Minn. 132, 126 N. W. 482; Twin City Box Factory v. Adirondack Fire Ins. Co., 114 Minn. 475, 131 N. W. 497.

(4) O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112 (when foreign law is mere evidentiary matter it need not be pleaded); Wood v. Johnson, 117 Minn. 267, 135 N. W. 746 (id.).

3790. **How pleaded**—An allegation that the legal title to the estate of a foreign legatee is vested by the laws of his domicil in the plaintiff is an allegation of the legal effect of those laws and sufficient. Sultan of Turkey v. Tiryakian, 213 N. Y. 429, 108 N. E. 72.

(6) Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

FORFEITURES

3793. **Relief against—Disfavored**—Equity is inclined against a forfeiture. Mason v. Frichner, 120 Minn. 185, 139 N. W. 485.

The forfeiture of a right of action through the operation of a condition subsequent will be enforced only where the right thereto is plain. Johnson v. Bankers Mutual Casualty Co., 129 Minn. 18, 151 N. W. 413.

(10) See State v. Duluth St. Ry. Co., 128 Minn. 314, 150 N. W. 917.

See Note, 86 Am. St. Rep. 48; 29 Harv. L. Rev. 117.

FORGERY

3794. **What constitutes**—(01) State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

3796. **Held not forgery**—Filling in blanks obviously left for the purpose of being filled in. Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911.

3798a. **Evidence—Admissibility**—In the trial upon a charge of forgery, when the identity of the accused and his guilty intent are necessary to be proved, it is proper for the state to prove that he passed other forged checks, similar in appearance, upon other persons near the same place and at about the same time, and the fact that he had been tried and acquitted upon some criminal charge in relation to these other

checks would not render the facts in connection with passing or uttering them inadmissible. State v. Lucken, 129 Minn. 402, 152 N. W. 769.

Conceding that a defendant charged with forgery may offer samples of his ordinary handwriting solely as standards of comparison, the genuineness of such samples, unless conceded, must be established by clear and satisfactory proof, and the trial court's ruling will not be reversed unless palpably erroneous. In this case one of the three samples, offered together, was objectionable as being made after defendant's arrest, and, as to all, more satisfactory evidence bearing upon their genuineness, though readily obtainable, was not offered. Held not error to exclude the proffered samples. State v. Lucken, 129 Minn. 402, 152 N. W. 769.

3799. Evidence—Sufficiency—(35) State v. Lucken, 129 Minn. 402, 152 N. W. 769.

UTTERING FORGED INSTRUMENTS

3800. What constitutes—See Note, 119 Am. St. Rep. 317.

3803. Indictment—It is not necessary, in an indictment for forgery, to set out extrinsic matter concerning the execution of the forgery, and an allegation in the indictment that defendant did utter, dispose of, and put off as true was adequate. State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

FORGED CHECKS—See Bills and Notes, 999.

FORGED DEEDS—See Deeds, 2661c; Recording Act, 8288.

FORNICATION

3805. What constitutes—(53) State v. Gieseke, 125 Minn. 497, 147 N. W. 663 (the offence may be committed though the parties live together for some lawful purpose, and conceal, or attempt to conceal, their immoral relations—they must dwell together for some time—single or sporadic acts do not constitute the offence of fornication).

FRANCHISES

3807. Definition—(56) See Arpin v. Thief River Falls, 122 Minn. 34, 141 N. W. 833.

3812. Transfer—(68) Note, 35 Am. St. Rep. 390.

3813. Construction—(69) Detroit United Ry. Co. v. Detroit, 229 U. S. 39; Russell v. Sebastian, 233 U. S. 195 (the construction must be fair and reasonable). See § 8990.

3814. Forfeiture—See Digest, § 9584.

FRAUD

WHAT CONSTITUTES

3816. Definition—Courts are disinclined to lay down a hard and fast definition of fraud. Diamond v. Manheim, 61 Minn. 178, 182, 63 N. W. 495; Macomber v. Kinney, 114 Minn. 146, 155, 128 N. W. 1001, 130 N. W. 851; Purcell v. Thornton, 128 Minn. 255, 260, 150 N. W. 899.

(75) Riley v. Pearson, 120 Minn. 210, 129 N. W. 361; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606; Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944.

3817. In law and in equity—(77, 78) See Cock v. Van Etten, 12 Minn. 522 (431); Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

3818. Essentials of deceit—(81) Flaherty v. Till, 119 Minn. 191, 137 N. W. 815; Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

(85) Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

See Note, 18 Am. St. Rep. 555.

3819. Intention to deceive—Knowledge—A palpable clerical error in a statement is not actionable. Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

There may be a recovery for innocent misrepresentations in an action at law for deceit. Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566; Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 N. W. 1110. See Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914; Digest, § 3826; 24 Harv. L. Rev. 415.

It has been erroneously said in one of our cases that the action for deceit must be based on fraud and not on mere negligent misrepresentation. O'Brien v. American Bridge Co., 110 Minn. 364, 377, 125 N. W. 1012, citing Derry v. Peek, 14 A. C. 337. The case of Derry v. Peek is not the law of this state. See cases supra and 24 Harv. L. Rev. 415.

Equity may grant relief for an innocent misrepresentation. Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

One who does not profess to have knowledge of facts and gives the source of his information is not liable. Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Petrie v. Clarke, 126 Minn. 119, 147 N. W. 1097.

(86) Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387; Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

(87) Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 N. W. 1110; Miller v. Bricker, 117 Minn. 394, 136 N. W. 14; Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(88, 89) Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 N. W. 1110; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

3820. Materiality of representation—(92) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930 (representations as to infringement of a patent on a churn); Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965 (fraud in sale of a bank—representation that bank was not indebted related to a material fact).

3821. Acting upon representation—Independent investigation—Where representations are made by a party who is presumed to know their truth reliance thereon will be presumed. Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975.

To maintain an action for deceit based upon false representations, it is incumbent upon plaintiff to show that he relied upon such representations, and was deceived thereby to his injury. If a purchaser relies in part upon his own examination as to the character and condition of the property, and in part upon the representations of the adverse party, and is deceived thereby to his injury, he may maintain an action for such deceit. But, if the purchaser undertakes to and does investigate and determine the entire matter for himself, and is afforded an opportunity to make his investigation as full and complete as he chooses, and he then accepts the property, he cannot be heard thereafter to assert that he relied upon misrepresentations of the adverse party. Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167. See Note, 39 L. R. A. (N. S.) 1143.

Where there is no opportunity to investigate and discover the falsity of the representations, or where an investigation will not disclose their falsity, the fact that the victim attempts to verify the representations by an investigation does not defeat his action. Brown v. Andrews, 116 Minn. 150, 133 N. W. 568; Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775; Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430.

One having knowledge of general facts affecting contemplated contractual relations cannot contract in disregard thereof and thereafter al-

lege ignorance of details as a ground of action for fraud. Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65.

Contracts sometimes contain stipulations to the effect that a party has relied wholly on his own investigations and not on the representations of the other party. Such stipulations are not conclusive. See Peterson v. Landahl, 86 Minn. 32, 89 N. W. 1131; Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282.

(95) Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 N. W. 1110; Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167. See Digest, §§ 8589, 10067.

(96) See Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430; Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167; Digest, §§ 8589, 10067.

3822. Negligence of defrauded party—In an action for relief on the ground of fraud, 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 the relief. Kempf v. Ranger, 131 Minn. —, 155 N. W. 1059.

(2) Meland v. Youngberg, 124 Minn. 446, 455, 145 N. W. 167.

(3) Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

(97) See Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282 (party must have acted in the reasonable belief that the representations were true—stipulation as to reliance on representations).

(99) Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

See Digest, §§ 3832, 10067.

3823. Concealment and silence—(5) See Kautenberger v. Johnson, 131 Minn. —, 154 N. W. 943.

3824. Expressions of opinion—(11) Boasberg v. Walker, 111 Minn. 445, 127 N. W. 467 (representations as to matters of value are generally regarded in law as mere expressions of opinion); Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061 (representations in a petition for the allowance of a trustee's account).

(13) Nelson v. Chicago etc. Ry. Co., 111 Minn. 193, 126 N. W. 902 (release of a claim for personal injuries obtained by misrepresentations of physician as to probability of recovery); Flaherty v. Till, 119 Minn. 191, 137 N. W. 815 (representations of a physician as to the effect of a treatment in effecting a cure and not harming the patient); Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965 (representations as to the value of bank stock by the president and manager of the bank); Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914 (rep-

resentations by a corporation, seeking to sell its corporate stock, as to the nature and value of property owned by it). See McElrath v. Electric Investments Co., 114 Minn. 358, 131 N. W. 380 (representations as to the point to which an electric railway was to be built within a certain time); Adan v. Steinbrecher, 116 Minn. 174, 133 N. W. 477 (representations of seller as to value of property—parties not dealing at arm's length); First State Bank v. Pederson, 123 Minn. 374, 143 N. W. 980 (representations of a physician as to a disease and its cure).

See Digest, §§ 8589–8593; 10059–10069.

3825. Misrepresentations of law—Opinions expressed by one contracting party to the other on doubtful questions of law are not actionable, even though the person expressing them is an attorney at law. Valley v. Crookston Lumber Co., 128 Minn. 387, 151 N. W. 137.

3826. Innocent misrepresentation—Equity may grant relief for an innocent misrepresentation. Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914.

(17) O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012 (the action for deceit must be based on fraud and not on mere negligent misrepresentation). The statement of the text of the Digest is supported by the cases cited but is not a true statement of the law. See § 3819.

(18) See § 1189.

3827. Promises and statements of intention—Future acts or events—False representations, known to be false, that certain events will be brought about in the future, if intended to create the belief that it was the then intention to bring them about, and be so understood and relied upon, may be made the basis of an action for fraud and deceit. McElrath v. Electric Investments Co., 114 Minn. 358, 131 N. W. 380.

Although fraud cannot generally be predicated on a promise to do an act in the future, still, where the promise implies a present state of mind or existing intention of the promisor, and such is not the fact, but the promisor, in order to obtain a release, falsely induces the promisee to believe in and rely on the existence of such state of mind or present intention, such conduct may constitute legal "fraud." Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070.

A representation of intention as to future acts or events, not having been falsely made with the purpose to deceive, is not, though the act or event did not occur as represented, a sufficient ground upon which to predicate a charge of fraud, or be made the basis for the rescission of a contract induced and brought about by the representation. Bigelow v. Barnes, 121 Minn. 148, 140 N. W. 1032.

A vendor, who induces the purchase of corporate stock by promising the vendee a salaried position with the corporation, knowing that the

vendee will not be accepted for such position, and not intending that his representation will be made good, is guilty of actionable fraud. Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308.

(19) Bigelow v. Barnes, 121 Minn. 148, 140 N. W. 1032. Note, 10 L. R. A. (N. S.) 640; 24 Id., 735.

(20) McElrath v. Electric Investments Co., 114 Minn. 358, 131 N. W. 380; Olson v. Smith, 116 Minn. 430, 134 N. W. 117; Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754; Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Holmes v. Wilkes, 130 Minn. 170, 153 N. W. 308. See Note, 10 L. R. A. (N. S.) 640; 24 Id. 735.

3828. Necessity of damage—The rule that fraud without damage is not actionable does not apply where the party asking relief seeks to recover because of an alleged fraud which was not successful, and asks to be placed in statu quo. Bauer v. Sawyer & Britsch Land Co., 90 Minn. 536, 97 N. W. 428.

Damage need not be proved to justify a rescission of a contract or transfer induced by fraud. Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914. See § 1810.

(21) Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

3829. Communication through third person—Husband and wife—There was no error in an instruction to the jury that representations made to the wife of plaintiff would be the same as if made to the plaintiff, if they found that plaintiff was a man that listened to and was governed by his wife's directions, and that the defendant knew or had reason to believe such to be the situation. Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775.

(23) Note, 85 Am. St. Rep. 368.

3830. Disparity between parties—(24, 25) See Adan v. Steinbrecher, 116 Minn. 174, 133 N. W. 477; Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754; Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775.

3832. Signatures obtained by fraud—(29) Providence Jewelry Co. v. Crowe, 113 Minn. 209, 129 N. W. 224; Van Metre v. Nunn, 116 Minn. 444, 133 N. W. 1012.

EFFECT

3834. In general—All private agreements and writings of every kind are subject to collateral attack for fraud. It is unnecessary to assail them by direct proceedings. Gibson v. Nelson, 111 Minn. 183, 190, 126 N. W. 731.

If one who has been induced by fraud to enter into an executory contract discovers the fraud while it is still executory, he cannot go on with

the contract and accept the benefits thereof, and then sue for damages for the fraud, or recoup them in an action against him on the contract. To allow him to do so would be to permit him to recover for self-inflicted injuries. Thompson v. Libby, 36 Minn. 287, 31 N. W. 52; Bartleson v. Vanderhoff, 96 Minn. 184, 104 N. W. 820. See Foster v. Malberg, 119 Minn. 168, 175, 137 N. W. 816.

Where both parties are guilty of fraud in entering into a contract in violation of law courts will generally decline to aid either of them. See First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599.

One who may avoid a contract for fraud ratifies it by accepting and retaining money paid thereon. Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705.

See Digest, §§ 1810, 1814, 1815, 4308, 8604–8612, 10088, 10095–10097, 10100.

ACTIONS

3836. Pleading—An allegation in a complaint that plaintiff relied upon and was induced by the representations to enter into the contract is equivalent to an allegation that plaintiff "believed" the representations to be true, if such an allegation is necessary in an action for deceit. Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

(44) Berry v. Kolb, 120 Minn. 522, 139 N. W. 138; Merchants & Miners State Bank v. Chisholm, 119 Minn. 459, 138 N. W. 682.

(45) Marshall-Wells Hardware Co. v. Emde, 121 Minn. 524, 140 N. W. 1027. When a written instrument is introduced under a general allegation not disclosing its existence the adverse party may introduce evidence of fraud in its execution or procurement under a denial. Reeves & Co. v. Cress, 80 Minn. 466, 83 N. W. 443.

(48) McElrath v. Electric Investments Co., 114 Minn. 358, 131 N. W. 380 (complaint for fraud in inducing plaintiff to lease certain hotel property sustained in part); Olson v. Smith, 116 Minn. 430, 134 N. W. 117 (complaint for fraudulent representations as to intention to furnish logs for plaintiffs' sawmill, whereby they were induced to move the mill, sustained); Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754 (complaint for recovery of money obtained by fraudulent representations of intention to organize a corporation sustained); Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9 (complaint held to state a cause of action for deceit and not for breach of contract—exchange of property); Merchants & Miners State Bank v. Chisholm, 119 Minn. 459, 138 N. W. 682 (complaint construed and held to state a cause of action to recover damages which resulted from alleged fraudulent and illegal acts of defendant in procuring a loan from plaintiff to be made to an insolvent borrower for defendant's purposes).

See Dunnell, Minn. Pl. 2 ed. § 669.

3837. Presumptions and burden of proof—As a general rule one who asserts fraud has the burden of proving it, and carries the burden throughout the trial. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

There is no presumption of fraud or undue influence in a conveyance from a parent to a child. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

(50) See McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

3838. Evidence—Admissibility—No particular order of proof is necessary. It often requires a full disclosure of all the negotiations of the parties to uncover fraud. Gasser v. Wall, 115 Minn. 59, 131 N. W. 850.

(52) Selover, Bates & Co. v. Freeman, 111 Minn. 318, 127 N. W. 9 (fraud in exchange of mining stock for land—evidence that the land was valueless admissible); Merritt v. Joyce, 117 Minn. 235, 242, 135 N. W. 820 (circumstantial evidence generally necessary—inferences of great weight may be drawn from the conduct of the parties and the ease with which their memories fail when called for cross-examination); Miller v. Bricker, 117 Minn. 394, 136 N. W. 14 (irrelevant evidence held not prejudicial); Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754 (evidence as to payment of money in bank held admissible); Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080 (representations and negotiations leading up to the giving of a note—circumstantial evidence). See Walsh v. Paine, 123 Minn. 185, 143 N. W. 718 (schedules of assets and liabilities in bankruptcy filed after the alleged fraud held inadmissible—acts of one of the defendants not connected with the fraud held inadmissible).

(56) Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754; Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9.

3839. Evidence—Sufficiency—Where there is a fiduciary or confidential relation between the parties, so that they do not deal at arm's length, less evidence is required to prove fraud than in ordinary cases. Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

Fraud cannot be proved by a cry of it. Petrie v. Clarke, 126 Minn. 119, 147 N. W. 1097.

Evidence held sufficient to justify a finding of fraud. Gasser v. Wall, 115 Minn. 59, 131 N. W. 850; Bragg & Co. v. Goldstein, 128 Minn. 64, 150 N. W. 223.

(57) Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775; Tyra v Cheney, 129 Minn. 428, 152 N. W. 835.

(58) Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

(59) Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775; Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Petterson v. Butler Bros., 123 Minn. 516, 144 N. W. 407 (instructions as to degree of proof sus-

tained); Kautenberger v. Johnson, 131 Minn. —, 154 N. W. 943. See Digest, §§ 1202, 8347.

3840. Law and fact—(60) Walsh v. Paine, 123 Minn. 185, 143 N. W. 718; Bragg & Co. v. Johnson, 128 Minn. 64, 150 N. W. 223; Cox v. Edwards, 126 Minn. 350, 148 N. W. 500.

3841. Measure of damages—In cases of fraud or deceit, the defendant is responsible for those results which must be presumed to have been within his contemplation at the time of the commission of the fraud, and plaintiff may recover for any injury which is the direct and natural consequence of his acting on the faith of defendant's representations. It must appear that the fraud and damage sustain to each other the relation of cause and effect, or at least that the damage might have resulted directly from the fraud. While the sequence need not be so close as in actions of contract, it still must appear in an appreciable sense that the damage flowed from the fraud as the proximate and not the remote cause. Walsh v. Paine, 123 Minn. 185, 143 N. W. 718.

In an action for damages for fraudulently representing the financial standing of the makers of promissory notes, the measure of damages is the difference between the value of the notes and the amount paid for them; but where the makers of the notes are insolvent, and the value was measured by the value of the mortgage security, the amount realized at a public sale of the property may be shown, as bearing on the value of the notes at the time of their purchase. Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 N. W. 1110.

(61) Walsh v. Paine, 123 Minn. 185, 143 N. W. 718. See Digest, § 10100.

(62) Selover, Bates & Co. v. Freeman, 111 Minn. 318, 127 N. W. 9 (exchange of mining stock for land); Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858 (exchange of land); Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9 (exchange of land—misrepresentation as to interest due on a mortgage—effect of plaintiff buying a second mortgage on land for less than face); International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895 (the amount of damages recoverable for fraudulent misrepresentation as to the quality of the property sold is the difference between the purchase price and the value of the property in its true condition). See Digest, § 10100.

(63) Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

3841a. Findings—Sufficiency—Findings of fact held sufficiently definite as against an objection first made on appeal. Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

FRAUDULENT CONVEYANCES

WHAT CONSTITUTES

3844. Voidable not void—Good between parties—A fraudulent conveyance is good between the parties and the title vests in the grantee, subject to the right of the creditors to have the grant set aside as to them. Redmond v. Hayes, 116 Minn. 403, 133 N. W. 1016; Underleak v. Scott, 117 Minn. 136, 134 N. W. 731.

3846. Essential elements—(75) Underleak v. Scott, 117 Minn. 136, 134 N. W. 731.

3848. Fraudulent intent—(77) Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

(81) Sovell v. Lincoln County, 129 Minn. 356, 152 N. W. 727.

3849. Consideration—(83) Melges Bros. Co. v. Duluth Brewing & Malting Co., 118 Minn. 139, 136 N. W. 401.

3850. Property must be appropriable to payment of creditors—Where a husband, in order to induce his wife to join in the sale of the family homestead, agrees that she shall receive the proceeds of the sale, the agreement is valid, and the transaction is not fraudulent as to creditors of the husband. They have no claim upon the homestead property, and this agreement as to the disposal of the land and its proceeds is of no concern to them. Schroeder v. Gohde, 123 Minn. 459, 144 N. W. 152. See Digest, § 4216.

See, as to insurance, § 3867a; 26 Harv. L. Rev. 362.

3851. Participation of grantee in fraud—(90) National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879. See Note, 34 Am. St. Rep. 395.

3852. Preferences—While preferential payments and transfers are void only when an insolvency or bankruptcy law makes them so, and then only in aid of the insolvency or bankruptcy proceedings, they may be actually fraudulent as to creditors and avoidable on that ground, though not avoidable as preferences. Crookston State Bank v. Lee, 124 Minn. 112, 144 N. W. 433.

A mortgage to secure an existing debt which gives to the mortgagee a preference over other creditors of the mortgagor is not for that reason fraudulent. Such a mortgage may be set aside if part of a plan to defraud creditors and the mortgagee be chargeable with notice of that fact. This action is to foreclose a preferential mortgage, but if any fraud existed the mortgagee was not chargeable with notice of it, and the mort-

gage is valid. National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879.

(94) Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

(95) National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879; Harris v. Spencer, 130 Minn. 141, 153 N. W. 125.

See Digest, §§ 613, 743, 755, 4591–4609.

3855. Sale of chattels—Change of possession—Statute—(13) Note, 24 L. R. A. (N. S.) 1127.

3856. Sale of stock of merchandise—Statute—(16, 17) Melges Bros. Co. v. Duluth Brewing & Malting Co., 118 Minn. 139, 136 N. W. 401. See Note, 2 L. R. A. (N. S.) 331.

3857. Assignment of debt—Statute—(19) See Merillat v. Hensey, 221 U. S. 333.

3858. Transfers between near relatives—(21) Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25.

3859. Transfers between husband and wife—Evidence held to justify a finding that there were no existing creditors at the time of a transfer between a husband and wife and that there was a good consideration for the transfer. Bradford v. Borg, 114 Minn. 387, 131 N. W. 373.

(22) See Sovell v. Lincoln County, 129 Minn. 356, 152 N. W. 727.

See Note, 90 Am. St. Rep. 497.

3867a. Insurance money—A debtor assigned to a creditor as security for his debt the proceeds of an insurance policy on property that had been destroyed by fire. Held, that a finding of the trial court that there was no intent to defraud creditors is sustained by the evidence. Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372. See 26 Harv. L. Rev. 362.

VOLUNTARY TRANSFERS

3872. Not fraudulent per se—(38) Underleak v. Scott, 117 Minn. 136, 134 N. W. 731.

3873. Presumptively fraudulent—A voluntary conveyance of real estate is void as to subsequent creditors of the grantor, providing it is established that it was actually fraudulent, and that the purpose or effect of the conveyance is to defraud such creditors. Sovell v. Lincoln County, 129 Minn. 356, 152 N. W. 727.

(39) Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25; Sovell v. Lincoln County, 129 Minn. 356, 152 N. W. 727.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

3876. General rule—(44) Note, 58 Am. St. Rep. 74.

CHATTEL MORTGAGES

3885. Retention of possession by mortgagor with power of disposal— A mortgage is void as against creditors where the authority to the mortgagor to dispose of the property as his own is given by a separate agreement, oral or written. Harris v. Spencer, 130 Minn. 141, 153 N. W. 125.

(63) Citizens State Bank v. Brown, 110 Minn. 176, 124 N. W. 990; Harris v. Spencer, 130 Minn. 141, 153 N. W. 125 (mortgage held not to come within rule). See Note, 36 L. R. A. (N. S.) 1181.

(64) Note, 36 L. R. A. (N. S.) 1181.

(70) Citizens State Bank v. Brown, 110 Minn. 176, 124 N. W. 990.

RIGHTS AND LIABILITIES OF PURCHASERS

3890. Title of grantee—(75) Redmond v. Hayes, 116 Minn. 403, 133 N. W. 1016.

WHO MAY AVOID

3898. In general—(2) Way v. Ruff, 112 Minn. 57, 127 N. W. 564, 609. See Digest, § 747.

3900. Subsequent creditors—(18) Bradford v. Borg, 114 Minn. 387, 131 N. W. 373.

3902. Confirmation—Waiver—(24) Hempstead v. Leland, 111 Minn. 224, 126 N. W. 736. See Shearer v. Barnes, 118 Minn. 179, 189, 136 N. W. 861.

REMEDIES OF CREDITORS

3906. Sale on execution—Attachment—If a conveyance of real estate made by a non-resident debtor is fraudulent as to creditors, the land remains the property of the debtor as against such creditors, and may be seized by them under a writ of attachment as the basis of an action against such non-resident. Where such attachment has been made, the creditor has the right to proceed to judgment and to sell the real estate thereunder without first contesting the validity of the conveyance. The service of the summons upon the debtor in such an action cannot be set aside upon affidavits that he has no interest in the property. The validity of the conveyance cannot be determined upon affidavits, nor in an action to which the claimant thereunder is not a party. Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915.

(29) Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915.

3906a. Effect on title of setting aside—Where a fraudulent conveyance is set aside in an action by a creditor, it does not operate to reinvest title in the grantor; but as to the creditor who, claiming in hostility to the

deed, secures its cancelation, such annulment only restores to him and to the grantor, as against each other, their respective rights as they existed before the deed was executed. The rights of neither can be enlarged by the cancelation of the deed. A creditor, having avoided a fraudulent deed, cannot set it up as a valid deed to destroy a right which the grantor would have been entitled to if the deed had not been made, nor to secure for himself an advantage which he would not have been entitled to if the canceled deed had not been executed. Redmond v. Hayes, 116 Minn. 403, 133 N. W. 1016.

EVIDENCE

3917. Declarations of debtor after transfer—(60) Note, 41 L. R. A. (N. S.) 1.

3918. Acts and declarations of debtor in possession—(62) Note, 41 L. R. A. (N. S.) 1.

ACTION TO SET ASIDE

3923. Necessity of judgment and execution—After the return unsatisfied of an execution issued in the county in which a judgment was rendered, the issuance of an execution in another county, in which land conveyed by the judgment debtor was located, is not essential to the maintenance of an action to set aside the conveyance. Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

3925. Complaint—A complaint by a judgment creditor sustained on demurrer. Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

3926. Answer—The invalidity of the judgment of the creditor is matter of defence to be raised by answer and not by demurrer. Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

3927. Defences—See Hempstead v. Leland, 111 Minn. 224, 126 N. W. 736 (laches of creditor—confirmation—waiver—estoppel of creditor to attack transfer); Way v. Ruff, 112 Minn. 57, 127 N. W. 564, 609 (sale of capital stock—bankruptcy of purchaser—waiver).

3929. Evidence—Sufficiency—Findings—(6) Whitman v. Gorman, 126 Minn. 141, 147 N. W. 958; Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

GAME AND FISH

3931a. Game and fish commission—Appropriation—Chapter 140, Laws of 1913 (G. S. 1913, §§ 48, 49), abolishing standing appropriations, except where there is a provision for a tax levy or fees or receipts for any purpose set apart as a special fund, abolished the standing appropriation of hunters' license fees to the use of the game and fish commission. Such fees were never "set apart in a special fund," so as to be excepted from the operation of that act. Money received by auditors before August 1, 1913, and remitted to the state treasurer after that date, is not available by the commission for payment of expenses incurred during the fiscal year ending July 31, 1914. State v. Iverson, 126 Minn. 110, 147 N. W. 946.

3935. Ruffed grouse—Unlawful sale and possession—(19) See 4 Mich. L. Rev. 236.

3937. Deer and moose skins—Purchase—(21) Hanson v. Storey, 114 Minn. 463, 131 N. W. 481.

3938. Mode of catching fish—Seines—(23) See State v. Seeling, 126 Minn. 386, 148 N. W. 458 (fishing with a seine).

See, as to the law of fishing, Note, 131 Am. St. Rep. 750.

3940. Burden of proof as to unlawful taking or killing—On a prosecution for illegal fishing with a seine, in violation of Laws 1905, c. 344, as amended by Laws 1907, c. 469, and Laws 1909, c. 190 (G. S. 1913, § 4808), the state makes out a prima facie case by proving the acts prohibited thereby, without negativing the exceptions provided by Laws 1909, c. 54 (G. S. 1913, § 4850); justification under the latter being a matter of defence. State v. Seeling, 126 Minn. 386, 148 N. W. 458.

GAMING

3941. Gambling—What constitutes under G. S. 1913, § 8732—R. kept a gambling room, with tables and appliances, in a building leased by the owner to B. Plaintiff frequented the room, and lost money there in playing poker with other customers. Neither B. nor R. took part in the games, or had any share in the money won; but R. did receive a fixed sum from each game before the winner was determined. Held, that neither B. nor R. was a player or better at the games, and neither was a winner of the money plaintiff lost. Nagle v. Randall, 115 Minn. 235, 132 N. W. 266.

See Note, 121 Am. St. Rep. 693.

GARNISHMENT

EFFECT

3953. In general—(55) Marsh v. Wilson Bros., 124 Minn. 254, 144 N. W. 959.

3954. Lien—A creditor by the garnishment of a debt gets nothing more than an inchoate lien; and this inchoate lien can be perfected only by proceeding to judgment against the garnishee in the manner provided by statute. Marsh v. Wilson Bros., 124 Minn. 254, 144 N. W. 959. (57, 58) National Surety Co. v. Hurley, 130 Minn. 392, 153 N. W. 740.

3957. Property affected—Where defendant had drawn his pay in advance from the garnishee before the garnishee summons was served, the court did not err in discharging the garnishee. It was immaterial that the garnishee city had no right to pay before the end of the month, or defendant to receive his pay. Melin v. Stuart, 119 Minn. 539, 138 N. W. 281.

3959. Conditions of payment unaffected—(66) Truan v. London Guarantee & Accident Co., 124 Minn. 339, 145 N. W. 26.

3960. Effect on other actions—Stay—Plea—Abatement—In an action to recover money the plaintiff is not entitled to judgment, where the money sought to be recovered is subject to an undetermined garnishment, though as between the plaintiff and the defendant the right to recover is complete. First Nat. Bank v. State Bank, 125 Minn. 262, 146 N. W. 1093; Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66.

3960a. Stay pending other actions or proceedings—Where a debtor, by trust deed assented to by all his creditors, conveyed his property to

trustees to be converted into money, and the proceeds thereof to be distributed to his creditors, the creditors took a vested and not a contingent interest in the trust estate. The interest of a creditor in such trust estate is subject to garnishment; and, if it cannot be determined at the time of the disclosure whether the amount to which such creditor is entitled will be sufficient to satisfy the claim of the plaintiff in the garnishment proceeding, the garnishment proceeding should be continued until the amount applicable to such claim can be determined. National Surety Co. v. Hurley, 130 Minn. 392, 153 N. W. 740.

JURISDICTION

3961. In general—(72) Note, 51 L. R. A. (N. S.) 597.

3962. Not dependent on situs of debt—(75) See 11 Col. L. Rev. 684.

3963. Debt owing to non-resident—In an action brought by a resident plaintiff to recover damages for a negligent shipment of goods to a point in this state over the lines of the defendants, a debt due from a corporation doing business in this state to a defendant corporation not doing business in this state is subject to garnishment. The garnishment of such debt, it being made up of traffic balances arising out of interstate commerce, is not an interference with interstate commerce. Starkey v. Cleveland etc. Ry. Co., 114 Minn. 27, 130 N. W. 540.

See 11 Col. L. Rev. 684.

WHAT GARNISHABLE

3965. Judgments—(81) Note, 43 L. R. A. (N. S.) 531.

3966. Held garnishable—Traffic balances arising out of interstate commerce due a railroad company. Starkey v. Cleveland etc. Ry. Co., 114 Minn. 27, 130 N. W. 540.

A debt owing by an insurance company to the insured, on a judgment against the insured, the company having appeared and defended the action as provided in the policy. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281. See Truan v. London Guarantee & Accident Co., 124 Minn. 339, 145 N. W. 26; 13 Col. L. Rev. 261 (criticising Patterson case).

The proceeds of the sale of certain property which defendant had transferred to a third party in fraud of creditors, under an agreement providing for the sale of the property and the application of the proceeds to the payment of a debt due from defendant to such third party upon an executory contract for the sale of land, held garnishable as the property of defendant. Johnson v. Carlin, 123 Minn. 444, 143 N. W. 1130.

Compensation ordered under G. S. 1913, § 8513, in favor of an attorney at law for defending an indigent person accused of crime. Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66.

The interest of a creditor in a trust estate held for the benefit of creditors. National Surety Co. v. Hurley, 130 Minn. 392, 153 N. W. 740.

(84) Note, 51 Am. St. Rep. 114.

(85) Melin v. Stuart, 119 Minn. 539, 138 N. W. 281 (defendant had drawn his pay in advance before the garnishee summons was served —held that garnishee was properly discharged—immaterial that garnishee had no right to pay before end of month or defendant to receive his pay in advance). See Laws 1915, c. 202.

(91) See 25 Harv. L. Rev. 470; 27 Id. 384.

3967. Held not garnishable—A guarantee insurance company held not liable as garnishee upon a judgment against the assured on an indemnified risk, where, at the time of service of the garnishee summons and when disclosure was made, it held a valid claim for policy premiums against assured in excess of such judgment, though it defended the main action. Truan v. London Guarantee & Accident Co., 124 Minn. 339, 145 N. W. 26.

(3) See Davis v. Cleveland etc. Ry. Co., 217 U. S. 157.

(6) Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66 (money ordered to be paid to an attorney at law for defending an indigent accused person held not in custodia legis).

(99) Truan v. London Guarantee & Accident Co., 124 Minn. 339, 145 N. W. 26.

PRACTICE IN GENERAL

3969. Garnishee summons—Municipal officers can only be served in the municipality. State v. District Court, 120 Minn. 458, 139 N. W. 947.

A garnishee summons issued prior to the commencement of the main action by the issuance of a summons therein is void. Hudson v. Patterson, 123 Minn. 330, 143 N. W. 792.

3977. Abuse of process—(35) See Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808.

SUPPLEMENTAL COMPLAINT

3990. Statutory procedure exclusive—Where an issue as to liability is raised by the disclosure of the garnishee the only remedy is by supplemental complaint. The issue cannot be tried before the clerk in the disclosure proceedings, or upon affidavits on a motion for judgment against the garnishee, or on a motion for his discharge. Culver v. Johnson, 131 Minn. ——, 154 N. W. 739.

THIRD PARTIES AS CLAIMANTS

4007a. Independent action by third party claimant—The garnishment proceedings do not bind a claimant to the fund who is not made a party. He may maintain a subsequent independent action against the garnishee on the ground that the money garnished belonged to him. McCoy v. City Nat. Bank, 128 Minn. 455, 151 N. W. 178 (money deposited in bank in name of A—issue as to whether it did not belong to B—finding that it belonged to A, as disclosed in the garnishment proceedings, sustained).

JUDGMENT

4008. In general—Judgment is rendered against a garnishee, if at all, for the amount due the defendant, or for so much as may be necessary to satisfy the judgment in favor of the plaintiff. When the property disclosed is a debt it can be reached only through a judgment against the garnishee. Marsh v. Wilson Bros., 124 Minn. 254, 144 N. W. 959.

Garnishment proceedings were duly instituted in which it was sought to charge the garnishee with liability to defendant under an indemnity insurance contract; the contract was entered into in the state of Nebraska, where the parties resided, and was to be performed in that state. In the disclosure the garnishee alleged and claimed that under the laws of Nebraska no liability under the contract attached until the defendant, the contract indemnitee, had in fact suffered loss or damage by the payment of the claim from which he was protected by the contract. Held, that the disclosure was in effect a denial of liability, was sufficient in form, and presented an issue of fact as to the law of Nebraska, to be tried upon supplemental complaint, as provided for by section 7870, G. S. 1913. In view of the issue thus presented, plaintiff was not entitled to judgment on the disclosure. Culver v. Johnson, 131 Minn. —, 154 N. W. 739.

(4) Stub v. Hein, 129 Minn. 188, 152 N. W. 136; Culver v. Johnson, 131 Minn. —, 154 N. W. 739.

4013. Effect—(18) See McCoy v. City Nat. Bank, 128 Minn. 455, 151 N. W. 178 (action by third party claimant not made a party—issue as to ownership of money in bank—finding that the ownership was as disclosed in the garnishment proceedings sustained).

GAS

4018. Liability for escaping gas—A gas company held liable where it neglected to shut off the gas after removing a meter, and in consequence the house filled with gas and when a stove was lighted an explosion occurred, setting the house on fire. Haas v. St. Paul Gaslight Co., 113 Minn. 379, 129 N. W. 759.

A municipality held liable for personal injuries from an explosion in a cellar caused by a leak in a service pipe. Brantman v. Canby, 119 Minn. 396, 138 N. W. 671.

Where plumbers left a sewer pipe open it was held a question for the jury whether they were negligent and whether plaintiff's illness was caused by sewer gas escaping from the open pipe. Brown v. Smith, 121 Minn. 165, 141 N. W. 2.

A gas company held liable where gas escaped in destructive quantities from a service pipe negligently and improperly installed by the company on the consumer's premises, at his expense. Manning v. St. Paul Gaslight Co., 129 Minn. 55, 151 N. W. 426 (complaint held sufficient to admit proof of the improper instalation—rule of res ipsa loquitur applicable).

(27) Manning v. St. Paul Gaslight Co., 129 Minn. 55, 151 N. W. 423. See Note, 29 L. R. A. 337; 32 L. R. A. (N. S.) 809; L. R. A. 1915E, 1022.

4019. Supply by public service corporations—Rates—(30) Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728 (rates established by city council—presumptively fair—burden of proof—ordinance fixing rates—when takes effect—temporary injunction against putting into effect an ordinance fixing rates properly denied). See St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262 (discrimination in rates); § 2182.

4019a. Liability of gas company for failure to furnish—The acceptance by the defendant of an order from plaintiff to furnish such meters and connections as should be necessary to supply gas for the premises occupied by him as a tenant did not make the defendant liable for damages resulting from a shortage in the supply of gas, caused by defects in a distributing pipe within the building over which defendant had no control. Alverdes v. St. Paul Gaslight Co., 115 Minn. 318, 132 N. W. 275.

GASOLENE ENGINES—See Fixtures, 3773; Negligence, 6998a.

GIFTS

IN GENERAL

4021. Inter vivos and causa mortis distinguished—(34) Roeser v. Ryckman, 121 Minn. 56, 140 N. W. 126.

4026. Delivery—(41) McMahon v. German-American **Nat. Bank, 111** Minn. 313, 127 N. W. 7 (taking a certificate of deposit **from a bank and** delivering it to a guardian of minors held sufficient); **Roeser v. Ryck**man, 121 Minn. 56, 140 N. W. 126 (evidence held not to **show a sufficient** delivery of a certificate of deposit); Sorlien v. Rolla, 126 **Minn. 500, 148** N. W. 301 (leaving promissory note with third party **and stating to** donee that the note was his and that he might go and **get it held not a** sufficient delivery of a gift inter vivos).

See 26 Harv. L. Rev. 87 (delivery of a bill of sale sufficient); **Herbert** v. Simson, 220 Mass. 480, 108 N. E. 65 (delivery of shares **of stock suf**ficient though not indorsed).

4027. Acceptance—The acquiescence of minors in a **delivery to their** guardian presumed. McMahon v. German-American **Nat. Bank, 111** Minn. 313, 127 N. W. 7.

4030. Of money in a bank—(55) Roeser v. Ryckman, **121 Minn. 56,** 140 N. W. 126. See McMahon v. German-American **Nat. Bank, 111** Minn. 313, 127 N. W. 7 (taking a certificate of deposit **from a bank and** delivering it to a guardian of minors held a sufficient **delivery).**

See Note 17 L. R. A. (N. S.) 181; 22 Id. 568.

4031. Of realty—(57) Kanne v. Kanne, 119 Minn. 265, **138 N. W. 25;** Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125; **Trebesch v. Trebesch,** 130 Minn. 368, 153 N. W. 754. See Digest, § 8885.

4033. Of personalty to take effect after death—The **owner of personal** property may make a valid gift thereof with the right **of enjoyment in** the donee postponed until the death of the donor, if **the subject of the** gift be delivered to a third person with instructions to **deliver it to the** donee upon the donor's death, and if the donor parts **with all control** over it, reserves no right to recall, and intends a final **disposition of the** property given. Innes v. Potter, 130 Minn. 320, 153 N. **W. 604. See 26** Harv. L. Rev. 86.

4035. Undue influence—Presumption—There is no **presumption of** undue influence in a gift between brothers and sisters. **Howard v. Farr,** 115 Minn. 86, 131 N. W. 1071.

(64) Howard v. Farr, 115 Minn. 86, 131 N. W. 1071. **See Digest, §** 7310.

GIFTS CAUSA MORTIS

4040. Definition—(71) See 28 Harv. L. Rev. 430 (nature of expectation of death—hope of recovery—dying from another disease than the one he feared).

4042. Delivery—(73) Roeser v. Ryckman, 121 Minn. 56, 140 N. W. 126.

GOOD WILL

4045. A species of property—(78) Note, 96 Am. St. Rep. 610.

4046. Sale—(79) See Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415 (a contract held not to constitute a sale of a good will).

GRAND JURY

4046a. Nature—Part of court—Limited powers—The grand jury is but a branch or department of the court, with limited and clearly defined authority, and in this respect occupies a position substantially like that of a petit jury. State v. Young, 113 Minn. 96, 129 N. W. 148.

4059. Jurisdiction—Resubmission of charge—Under the statute a report to the court of no indictment found in a matter which has been regularly submitted to and considered by the grand jury is a complete termination of the authority of the jury in respect to the particular charge so reported upon. The matter of resubmission rests with the court, and if no order to that effect be made the court has no alternative but to dismiss the charge, when application is made therefor. State v. Young, 113 Minn. 96, 129 N. W. 148.

4061. Accused as a witness—(36) Mankato v. Olger, 126 Minn. 521, 148 N. W. 471.

4064. Secrecy—Duty of jurors—Impeachment—On the cross-examination of a prosecuting witness he may be asked as to his testimony before the grand jury for purposes of impeachment. State v. Trocke, 127 Minn. 485, 149 N. W. 944.

GUARANTY

IN GENERAL

4070. What constitutes—The word guaranty is not decisive of a collateral or secondary liability. Merritt v. Haas, 113 Minn. 219, 129 N. W. 379; Lindeke v. McArthur's Incorp., 125 Minn. 1, 145 N. W. 399.

(49) See Merritt v. Haas, 113 Minn. 219, 129 N. W. 379.

4071. Consideration—There is a consideration for a guaranty of the payment of a note as a matter of law. Greenberg v. Van Duzee, 124 Minn. 411, 145 N. W. 124.

4073. Construction—In general—A commercial guaranty should neither be strictly construed nor extended beyond the fair import of its terms. It should have a fair and reasonable construction. Bradshaw v. Barber, 125 Minn. 479, 147 N. W. 650.

A guaranty is a mercantile instrument to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties. Bradshaw v. Barber, 125 Minn. 479, 147 N. W. 650.

4074. Particular contracts construed—(59) Baumann v. Michel, 114 Minn. 481, 131 N. W. 495 (guaranty of part of the payments of a land contract—findings as to modification of contract sustained); Longbotham v. Ritchie, 117 Minn. 264, 135 N. W. 816 (bond guaranteeing payment for use of a show—date of expiration of bond—surety liable for the full amount of the bond); Curtis v. Northwestern Bedding Co., 121 Minn. 288, 141 N. W. 161 (sale of business—guaranty that books of company were correct as to the accounts therein and that the books truthfully stated the debts and credits—held that the guaranty covered the private ledger, and the failure of it to correctly disclose the debts and credits constituted a breach of the guaranty, and to the extent that it showed the debts and credits to be more favorable to the company than was the fact, defendant was prima facia damaged—the same applies to omissions from the books of liabilities incurred for running expenses and invoices for goods received as stated in the opinion); Bradshaw v. Bar-

ber, 125 Minn. 479, 147 N. W. 650 (a commercial credit guaranty couched in general terms, without express limitation as to time, amount, or place, but executed for the purpose of enabling the person whose credit was guaranteed to procure goods for a particular business located at a certain place, construed and held, under the facts of the case, not to extend to the credit of such person after she had ceased to do business at that place and while she was conducting a business of the same kind subsequently established in another state); Hoban v. Hudson, 129 Minn. 335, 152 N. W. 723 (a guaranty of the performance of a contract to refund money paid for corporate stock—personal notice of election on principal essential to charge guarantor); Mitchell v. Remington, 131 Minn. —, 154 N. W. 1070 (contract for the sale of a controlling interest in a bank closed with this sentence: "The whole part of this contract relating to loans to become void June 1, 1914."—held that this provision limits the time within which the loss guaranteed against must occur in order to create a liability, but does not fix the time within which suit upon the liability must be brought).

4076. **Guaranty of payment—Promissory notes**—A contract guaranteeing the payment of any existing debt due from an agent to his principal held absolute and not to require any notice of acceptance. J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966.

4077. **Guaranty of collection**—(68) Note, 64 Am. St. Rep. 393.

4079. **Limited or continuing—Limited as to place**—The guaranty may be limited as to place as well as to time and amount. Bradshaw v. Barber, 125 Minn. 479, 147 N. W. 650.

(71) Note, 39 L. R. A. (N. S.) 724.

DISCHARGE OF GUARANTOR

4082. **Neglect to pursue principal**—Whether a guarantor of the payment of a note knew that one of the makers had been or was to be released, held the only issue in the case, and a finding that he did, justified by the evidence. Greenberg v. Van Duzee, 124 Minn. 411, 145 N. W. 124.

4083. **Extension of time**—(79) See J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966; Greenberg v. Van Duzee, 124 Minn. 411, 145 N. W. 124.

4085. **Departure from terms of contract**—A material departure from the terms of a prior contract between the same parties, and under which the indebtedness arose, and which would have released the guarantors if action had been brought thereon, held not available as a defence to the present action, founded upon a new and independent guaranty of payment. J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966.

STEPS TO CHARGE GUARANTOR

4089. **Acceptance and notice**—A contract guaranteeing the payment of any existing debt due from an agent to his principal held absolute and not to require any notice of acceptance. J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966.

(89) See J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966; Note, 16 L. R. A. (N. S.) 353; 33 Id. 960; Note, 48 Id. 198.

(91) See United States Fidelity & Guaranty Co. v. Riefler, 239 U. S. 17.

ACTIONS

4095. **Evidence—Admissibility**—In an action on a guaranty in connection with the sale of the business of a corporation, held, that it was permissible to show by parol that defendant was the real purchaser and entitled to recover for the breach of the guaranty, and that plaintiff was bound by the guaranty, as well as the corporation. Curtis v. Northwestern Bedding Co., 121 Minn. 288, 141 N. W. 161.

GUARDIAN AND WARD

IN GENERAL

4096. **Jurisdiction**—(8) See Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

4103. **Bond of guardian—Liability**—In an action brought by the plaintiff against the devisees of his former guardian, and the heirs and devisees of the guardian's bondsmen, to charge them with liability because of the failure of the guardian to redeem certain property of his ward from a mortgage foreclosure sale, the action being brought thirty-five years after the foreclosure, and twenty years after the ward became of age, the only excuse given for the delay being that he was not apprised of his ownership of the mortgaged land or his rights under the guardianship until shortly before suit, held, that the complaint affirmatively shows laches and that a demurrer was properly sustained. Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

4105. **Natural guardians**—(25, 26) Note, 33 L. R. A. (N. S.) 868.

4108a. **Sales of realty**—A failure of a guardian to give a statutory bond before making a sale held to render the title unmarketable. Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640. See Note, 33 L. R. A. 761.

See Digest, §§ 3614–3640.

4110a. Compromise of claims of ward—An improvident and fraudulent settlement by a guardian of his ward's cause of action, though approved by the court in which the action is pending, may be vacated and set aside upon a showing of a facts, even though the defendant in the action be not affirmatively shown to have participated in the fraud. Dasich v. La Rue Mining Co., 126 Minn. 194, 148 N. W. 45. See Note 21 L. R. A. (N. S.) 338.

4117. Foreign guardians—A bill in equity by a foreign guardian held not demurrable for failure to allege a filing of a copy of his letters as required by R. L. 1905, § 3842 (G. S. 1913, § 7455). Pulver v. Leonard, 176 Fed. 586.

Custody of children and conflict of laws. 24 Harv. L. Rev. 142.

ACCOUNTING AND SETTLEMENT

4120. Death of guardian—(52) See Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

ACTIONS

4125a. How entitled—An action by a guardian in behalf of his ward should be entitled in the name of the ward, by his guardian, but a defect in this regard may be corrected by amendment. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973. See Digest, § 7701.

HABEAS CORPUS

4127. Remedy for illegal restraint of person—Where a person committed to an insane hospital under G. S. 1894, § 7344 (G. S. 1913, § 9218), recovers his sanity in fact and in the opinion of the superintendent of the hospital, he is entitled to be discharged therefrom, and his further detention is illegal. Where, in such a case, the superintendent refuses to discharge such persons, habeas corpus is a proper remedy. Northfoss v. Welch, 116 Minn. 62, 133 N. W. 82. See Note, 1 L. R. A. (N. S.) 540; 25 Id. 946.

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes; but the judicial proceeding under it is not to inquire into the criminal act, which is complained of, but into the right to liberty, notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding

in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but, if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. Such a proceeding on his part is a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. State v. McDonald, 123 Minn. 84, 142 N. W. 1051. See Note, 36 L. R. A. (N. S.) 578.

4129. Scope of review—Not a substitute for appeal—A defect in a complaint cannot be raised on habeas corpus when it is sufficient to invoke the jurisdiction of the court. State v. McDonald, 112 Minn. 428, 128 N. W. 454; State v. Riley, 116 Minn. 1, 133 N. W. 86.

Where a court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

(69) State v. Langum, 112 Minn. 121, 127 N. W. 465 (judgment or sentence for contempt of court); State v. McDonald, 112 Minn. 428, 128 N. W. 454 (conviction before municipal court—sufficiency of complaint); State v. Riley, 116 Minn. 1, 133 N. W. 86 (conviction in justice court—sufficiency of complaint); State v. McDonough, 117 Minn. 173, 134 N. W. 509 (municipal court—commitment for contempt—preliminary examination); State v. Steele, 117 Minn. 384, 135 N. W. 1128 (propriety of order or abuse of discretion not reviewable); State v. Wolfer, 119 Minn. 368, 138 N. W. 315 (failure of sentence to reformatory to state age of convict).

(70) State v. McDonough, 117 Minn. 173, 134 N. W. 509.

4130. Successive applications—Res judicata—(72) See Note, 49 L. R. A. (N. S.) 83; 14 Col. L. Rev. 77.

4131. Review of evidence—(74) State v. Haugen, 124 Minn. 456, 145 N. W. 167.

4132. Persons held under final judgment of competent tribunal—In habeas corpus proceedings the usual presumption in favor of the regularity of a judgment prevails. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

(75) Note, 87 Am. St. Rep. 167.

4133. Custody of children—Where a child, adjudged by the juvenile court to be dependent within Laws 1905, c. 285 (G. S. 1913, §§ 7162–7175), and committed to the care of an eleemosynary association, leaves the home of persons to whom its custody is given by the association

for sufficient cause, and finds a home with other persons, the prime consideration, on habeas corpus by the association to recover custody, is the child's welfare, and not the legal right to custody. A determination in favor of respondent in such a case will not necessarily interfere with the general plan or administration of the Juvenile Court Act (Laws 1905, c. 285 [G. S. 1913, §§ 7162–7175]), even though the legislative preference, indicated by section 13 (G. S. 1913, § 7174) thereof, as to the religious beliefs of those to whom the custody of children within its terms be thereby disregarded, especially in absence of radical differences of religious faith; the considerations involved in such section, however, being grave and weighty, and constituting an important element in the final determination. State v. White, 123 Minn. 508, 144 N. W. 157.

(79) Gauthier v. Walter, 110 Minn. 103, 124 N. W. 634; State v. Halverson, 127 Minn. 387, 149 N. W. 664.

4136. Jurisdiction—While court commissioners are authorized to grant a writ of habeas corpus the petition therefor must be addressed to the supreme or district court. State v. Haugen, 124 Minn. 456, 145 N. W. 167.

The supreme court will not issue a writ unless there are special circumstances justifying it. State v. Wolfer, 127 Minn. 102, 148 N. W. 896.

(83) State v. Haugen, 124 Minn. 456, 145 N. W. 167.

4137. Petition—While court commissioners are authorized to grant a writ of habeas corpus the petition therefor must be addressed to the supreme or district court. State v. Haugen, 124 Minn. 456, 145 N. W. 167.

4137a. Writ—Form and sufficiency—While a court commissioner may grant writs they should be attested in the name of the presiding judge. But an attestation in the name of a commissioner is a defect of form and not fatal. By virtue of statute all defects of form are to be disregarded. State v. Haugen, 124 Minn. 456, 145 N. W. 167.

4140. Remand—(95) State v. Langum, 125 Minn. 304, 146 N. W. 1102.

4142. Appeal to supreme court—Stay of proceedings—Assignments of error are not necessary. The rules of the supreme court as to service of briefs and assignments of error are not applicable. State v. Riley, 116 Minn. 1, 133 N. W. 86.

On appeal to the supreme court errors and irregularities below need not be considered. State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

Where a prisoner, after conviction and sentence to imprisonment, but before commitment, obtains a writ of habeas corpus, and after hearing thereon is remanded to custody under the criminal proceedings, an appeal by him from the order discharging the writ, and so remanding him, does not stay the criminal proceedings, so as to deprive the court of au-

thority to issue a commitment upon such conviction and sentence pending the appeal. State v. McDonald, 123 Minn. 84, 142 N. W. 1051.

(1) Gauthier v. Walter, 110 Minn. 103, 124 N. W. 634.

(98) State v. Haugen, 124 Minn. 456, 145 N. W. 167 (relator having made no application under the statute cannot invoke its aid).

HEALTH

4149. Boards of health—Powers that may be delegated to boards of health. Note, 80 Am. St. Rep. 212.

4150. Expenses—Liability of municipalities—(26) Vistaunet v. Thief River Falls, 111 Minn. 537, 126 N. W. 1134 (complaint by physician against city for reasonable value of his services as health officer in quarantining and disinfecting various buildings—complaint sustained though it did not allege that the salary had been fixed by the city council); Bjelland v. Mankato, 112 Minn. 24, 127 N. W. 397 (member of a city board of health on a fixed salary cannot recover from the city for services rendered in controlling and eradicating an epidemic of small pox and typhoid fever in the city on a contract with the city board of health—R. L. 1905, § 5032 [G. S. 1913, § 8817] forbids such contracts).

4151a. Death certificate—The original death certificate is sent to the state board of health. A duly certified copy of such a certificate on file in the office of the state board of health is competent evidence tending to show the cause of the death. Healy v. Hoy, 115 Minn. 321, 132 N. W. 208.

4152. Compulsory vaccination—See Note, 103 Am. St. Rep. 864.

4152a. Offensive trades—Permits—Appeal to district court—R. L. 1905, § 2146 (G. S. 1913, § 4669), providing for the abatement of premises and occupations menacing the public health, is constitutional as a proper exercise of the police power. McMillan v. State Board of Health, 110 Minn. 145, 124 N. W. 828.

G. S. 1913, § 4668, gives a right of appeal to the district court from an order of a town board of health denying an application for a permit to operate a rendering plant within the town. The court on appeal does not try the matter anew as an administrative body and substitute its findings for those of the board. It will not disturb the action of the board, unless such action is arbitrary, oppressive, or unreasonable, or is without evidence to support it, or is contrary to law. Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869.

HIGHWAYS

IN GENERAL

4154. Definition—A railway platform held a public highway within the meaning of an insurance policy. Rudd v. Great Eastern Casualty & Indemnity Co., 114 Minn. 512, 131 N. W. 633.

4155. Title in state—(36) Foster v. Duluth, 120 Minn. 484, 140 N. W. 129.

4158. Legislative control—The legislature may give to counties control over highways within municipalities. Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738.

LAW OF THE ROAD—COLLISIONS

4163. Vehicles meeting—Turning to right—(52) Erwin v. Shell, 119 Minn. 496, 138 N. W. 691. See Note, 41 L. R. A. (N. S.) 322; 48 Am. St. Rep. 366.

(53) Lyford v. Jacob Schmidt Brewing Co., 110 Minn. 158, 124 N. W. 831; Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542. See Note, 41 L. R. A. (N. S.) 346; 48 Am. St. Rep. 366.

4164. Vehicles passing—Turning to left—(54) Sina v. Carlson, 120 Minn. 283, 139 N. W. 601. See Note, 41 L. R. A. (N. S.) 322, 48 Am. St. Rep. 366.

4164a. Keeping to right of center of street—It is not, as between a pedestrian and the municipality, negligence as a matter of law to walk upon the left side of a street or driveway, nor, for the purpose of avoiding a rapidly approaching vehicle, to turn to the left. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

A driver of a motor vehicle, who negligently, because of excessive speed or not having his machine under control, fails to keep to the right of the intersection of a public street, when turning to the right, but crosses to the left instead, and collides with another vehicle lawfully upon that side of the street, whose driver is free from negligence, is responsible for the consequent damages. Molin v. Wark, 113 Minn. 190, 129 N. W. 383. See Chase v. Tingdale Bros., 127 Minn. 401, 149 N. W. 654.

Plaintiff's intestate, a boy of twelve years, was killed while coasting down hill on a street in the city of Eveleth, by his sled coming in collision with a sleigh of defendant which was coming up the hill on the left-hand side of the street. Held, that Laws 1911, c. 365, § 15 (G. S. 1913, § 2634), providing, among other things, that "all vehicles must keep to the right of the center of the street," applies to the case, and

that under the circumstances the violation of this law by defendant was at least evidence of negligence, and justified a finding thereof. It does not appear from the evidence that plaintiff's intestate was guilty of negligence as a matter of law. A sled is not a "motor vehicle," as that term is used in the statute referred to. Terrill v. Virginia Brewing Co., 130 Minn. 46, 153 N. W. 136.

4164b. Keeping near right curb—The statute provides that in cities or villages, or any place where traffic is large, or on streets usually congested with traffic of horse-drawn vehicles or street cars, slow-moving vehicles must keep near the right curb, allowing those moving rapidly to keep nearer the center of the street. G. S. 1913, § 2634; State v. Bussian, 111 Minn. 488, 127 N. W. 495 (conviction under statute sustained though defendant was not blocking traffic).

4164c. Vehicles turning in street—Duty of driver to look to rear—One driving an automobile has a right to turn around in a street and to take as much room as may be necessary for that purpose, provided that he uses due care. The law of the road does not apply. Lyford v. Jacob Schmidt Brewing Co., 110 Minn. 158, 124 N. W. 831; Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

Defendant was driving an automobile on a public street. He saw plaintiff's automobile, in front of him and headed in the same direction, commence to turn in the street. Practically the whole width of the street was required to make the turn. Defendant could have stopped his car and avoided a collision. Instead of doing so, he increased his speed and attempted to pass ahead of plaintiff's car before it should reach the left curb. The result was a collision. Held, the evidence was sufficient to charge defendant with negligence. The evidence sustains a finding that plaintiff was not negligent in making the turn. The law of the road has no application to such a case. Violation of a city ordinance requiring a driver to look to the rear before turning is negligence per se, but if one riding with him looks and then directs him to go ahead, the ordinance is complied with. Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

4164d. Vehicles crossing street—The so-called law of the road (G. S. 1913, § 2634) does not apply to a vehicle crossing from one side of a street or road to the other. Lyford v. Jacob Schmidt Brewing Co., 110 Minn. 158, 124 N. W. 831; Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

4166. Relative rights of pedestrians and vehicles—Collisions—(56) Liebrecht v. Crandall, 110 Minn. 454, 126 N. W. 69; McAweeny v. Journal Printing Co., 114 Minn. 262, 130 N. W. 1103; Langworthy v. Owens, 116 Minn. 342, 133 N. W. 866; Johnson v. Scott, 119 Minn. 470,

138 N. W. 694; Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462; Johnson v. Young, 127 Minn. 462, 149 N. W. 940. See Digest, § 4171.

4166a. Collisions between teams and pedestrians—Plaintiff struck by team as he was crossing a city street. Presumption that driver of team of another is the agent of the latter. Business card found in carriage as evidence that carriage belonged to defendant. Held error not to submit case to jury. Langworthy v. Owens, 116 Minn. 342, 133 N. W. 866.

Evidence held insufficient to justify a finding that a driver of a team was negligent in permitting them to get beyond his control or in failing to direct their course so as to avoid a collision with plaintiff. Melberg v. Wild Rice Lumber Co., 127 Minn. 524, 149 N. W. 1069.

4166b. Collisions between teams—Evidence held to justify a recovery for the death of the driver of a one-horse wagon caused by the collision of his wagon with a two-horse wagon of defendant. Testimony as to the manner of the collision conflicting. Gronlund v. Cudahy Packing Co., 127 Minn. 515, 150 N. W. 176.

AUTOMOBILES AND OTHER MOTOR VEHICLES

4167. Right to use streets and roads—Automobilists have a right to use the public highways, but they have no exclusive rights. They are bound to operate their cars with a care and skill commensurate with the dangers incident to their use, and with due regard to the rights and safety of others. Liebrecht v. Crandall, 110 Minn. 454, 126 N. W. 69.

Automobilists have a right to use a public highway for the repair of their cars in a reasonable manner and with due regard for the convenience and safety of others. Fischer v. McGrath, 112 Minn. 456, 128 N. W. 579.

4167a. Speed—Regulation—Laws 1909, c. 259, § 16, regulating the speed of motor vehicles, is constitutional. State v. Waterman, 112 Minn. 157, 127 N. W. 473.

The statutory provision relative to speed of motor vehicles (section 16, c. 365, Laws 1911) is for the benefit of all who may be injured in person or property from the unreasonable or excessive speed of such vehicles; it is a rule of evidence of general application whenever the question of unreasonable speed of motor vehicles is involved. Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

What constitutes excessive speed depends upon the circumstances. The statute makes certain rates of speed under certain conditions prima facie evidence of negligence. G. S. 1913, § 2635; Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

4167b. Operating unregistered car does not defeat recovery—The fact that plaintiff's automobile is not registered as required by law does not prevent his recovery. Violation of law on the part of plaintiff which will preclude a recovery for an injury sustained by him must bear to the injury the relation of cause to effect. Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

4167c. Duty to keep to right of center of street—It is the duty of a driver of a motor vehicle to keep to the right of the center of a street or road. Molin v. Wark, 113 Minn. 190, 129 N. W. 383; Erwin v. Shell, 119 Minn. 496, 138 N. W. 691.

This rule does not apply when a motor vehicle, through no fault of the driver, skids on a slippery pavement and is thus thrown across the center line of the street. Chase v. Tingdale Bros., 127 Minn. 401, 149 N. W. 654.

4167d. Duty to stop to avoid frightening horses—The statute requires the driver of a motor vehicle to stop on signal to avoid frightening horses under certain circumstances. G. S. 1913, § 2632; Eberling v. International Harvester Co., 125 Minn. 466, 147 N. W. 441.

The statute does not require the driver to stop the motive power of the vehicle in all cases, in addition to stopping the vehicle itself. Whether he should do so depends on the circumstances. Mahoney v. Maxfield, 102 Minn. 377, 113 N. W. 904.

The statute fixes a standard of conduct the non-observance of which constitutes negligence per se. The duty arises though the person giving the signal to stop is not the driver of the approaching vehicle, provided he is riding therein. Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275.

It is the duty of the person operating an automobile upon a public highway, when meeting a team of horses being driven thereon, to exercise reasonable care to avoid frightening the team, and, if necessary, to slow down or stop his car, as the situation presented may require. The operator of the automobile is not relieved from this duty by the failure of the driver of the team to signal him to stop his car. Whether the failure to so signal will constitute contributory negligence will depend upon the facts presented in the particular case. Nelson v. Halland, 127 Minn. 188, 149 N. W. 194. See Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

4167e. Duty to signal cars in rear before stopping—A failure to signal cars in the rear before stopping an automobile may constitute negligence. It is a question for the jury unless tthe evidence is conclusive. O'Neil v. Potts, 130 Minn. 353, 153 N. W. 856.

4167f. Duty to slow down in approaching street car taking on or discharging passengers—G. S. 1913, § 2632, requiring operators of motor

vehicles to slow down in approaching or passing a street car, which has been stopped to allow passengers to alight or embark, and to stop, if necessary, for the safety of the public, was intended to create a zone of safety around and about the entrance of such car, by placing the burden of the lookout upon the driver of the motor vehicle; and hence one alighting from a standing street car is not obliged to keep a lookout for automobiles, under penalty of being charged with contributory negligence if he fails to do so. Johnson v. Young, 127 Minn. 462, 149 N. W. 940; Daly v. Curry, 128 Minn. 449, 151 N. W. 274.

It is admitted that plaintiff, a street car conductor, was injured by defendant's auto truck. He claimed that the truck ran into him while he was standing in the street adjusting the trolley upon his car. Defendant claimed, and the great preponderance of the evidence indicated, that, while attempting to adjust the trolley, he fell from the platform of the car in front of the truck. The evidence is sufficient to sustain the verdict, if the accident happened in either manner, and the failure to sustain plaintiff's claim in this respect does not require a reversal. The conductor of a street car is within the class of persons for whose benefit the statute requires motor vehicles to slow down, and, "if necessary for the safety of the public," to stop not less than ten feet from a street car which is receiving and discharging passengers. While a street car is receiving and discharging passengers, pedestrians to and from the car have the right of way, and it is the duty of an auto driver to stop, if necessary for their safety, and if he does not stop, to exercise such care in the management of his machine as, under the circumstances, shall appear to be reasonably necessary to guard against injury to any one. Kling v. Thompson-McDonald Lumber Co., 127 Minn. 468, 149 N. W. 947; Daly v. Curry, 128 Minn. 449, 151 N. W. 274.

Independent of statute a driver of a motor vehicle is bound to slow down and exercise special caution when approaching a street car stopped to take on or discharge passengers. A person boarding a street car or alighting therefrom is not guilty of contributory negligence as a matter of law in not looking for approaching motor vehicles. Arseneau v. Sweet, 106 Minn. 257, 119 N. W. 46; Liebrecht v. Crandall, 110 Minn. 454, 126 N. W. 69; Strasser v. Sabeck, 112 Minn. 90, 127 N. W. 384.

4167g. Duty to slow down when passing vehicles driven by a child, woman or aged person—The statute forbids a driver of a motor vehicle to pass a draft animal driven by a woman, child or aged person, at a greater speed than four miles an hour. The non-observance of the statute constitutes negligence per se. If a signal to stop is given the driver must stop though it is given by an occupant of the other vehicle who is not driving it. G. S. 1913, § 2634; Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275.

4167h. Collisions between automobiles and pedestrians—Plaintiff struck by automobile as he was crossing a street—automobile driven at excessive speed and without lights—issue of wilful negligence tried by consent—evidence sufficient to submit question of wilful negligence to jury—held not error to refuse to charge that plaintiff was guilty of contributory negligence if he failed to look before he started to cross the street and while crossing it—verdict for plaintiff sustained. Johnson v. Scott, 119 Minn. 470, 138 N. W. 694.

Plaintiff struck by an automobile being driven at an excessive speed by a servant of defendant to test it to see if repairs had been properly made. Verdict for plaintiff sustained. Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611.

Plaintiff struck by an automobile at a street crossing in a city. Verdict for plaintiff sustained. Wendt v. Bowman & Libby, 126 Minn. 509, 148 N. W. 568.

Plaintiff struck by an automobile as he was crossing the triangular space formed by the junction of Sixth, Seventh and Franklin streets, in the city of St. Paul, to take a street car on the corner of Sixth and Franklin—about one o'clock in the morning—automobile running about fifteen miles an hour without signally its approach and without lights—plaintiff looked for automobiles as he left the curb and saw none—streets lighted but it was too dark to see far—verdict for plaintiff sustained. Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267.

Plaintiff struck by automobile as he was crossing a street. Evidence as to circumstances of accident conflicting. Verdict for plaintiff sustained. Smith v. Bruce, 131 Minn. —, 154 N. W. 659.

Reciprocal duties of automobilists and pedestrians to use due care. Note, 1 L. R. A. (N. S.) 215; 4 Id. 1130; 20 Id. 232; 24 Id. 557; 25 Id. 40; 38 Id. 487; 42 Id. 1178; 51 Id. 981.

4167i. Collisions between automobiles—Defendant was driving an automobile along Minnehaha Parkway and at the same time plaintiff was driving an automobile in the same direction just behind defendant—plaintiff passed defendant, turned into the road ahead of him, and, without warning, stopped his car—defendant's car ran into plaintiff's car—admission of evidence tending to show a practice among automobile drivers of signalling cars behind them before stopping held not prejudicial—failure to follow practice evidence of negligence but not conclusive—verdict for defendant sustained. O'Neil v. Potts, 130 Minn. 353, 153 N. W. 856.

4167j. Collisions between automobiles and teams—Automobile being turned in street of city struck a carriage drawn by a team of horses—the horses were frightened and ran away, damaging another vehicle belonging to plaintiff—driver of team saw the automobile and consequently the

failure of the chauffeur to sound his horn was immaterial—verdict for plaintiff sustained. Thomas v. Armitage, 111 Minn. 238, 126 N. W. 735.

Automobile struck a single seated one-horse carriage in which plaintiff and four others were riding—plaintiff was not driving—it was conceded that the driver did not keep a proper lookout and that the danger from the automobile was apparent—whether plaintiff and the others were engaged in a joint enterprise so that the negligence of the driver was imputable to her was properly submitted to the jury—a verdict for the plaintiff sustained. Ward v. Meeds, 114 Minn. 18, 130 N. W. 2; Tereau v. Meeds, 114 Minn. 517, 130 N. W. 3.

Collision between an automobile and a team attached to a farm wagon with an empty hayrack—country road—dark, misty night—plenty of room for vehicles to pass—claim that defendant did not keep to right of road—evidence conflicting—verdict for plaintiff sustained. Erwin v. Shell, 119 Minn. 496, 138 N. W. 691.

Collision between an automobile and a horse tied to a hitching post at the curb of a street—as automobile neared the horse it became necessary to turn it suddenly to avoid a collision with a bicyclist—automobile slipped on wet pavement in bad condition and struck the horse—rule of res ipsa loquitur applied—verdict for plaintiff sustained. Whitwell v. Wolf, 127 Minn. 529, 149 N. W. 299.

4167k. **Collisions between automobiles and bicyclists**—Plaintiff was riding a bicycle on the right-hand side of a city street and had just passed around the left side of a team ahead of him and resumed his course on the right-hand side of the street when an automobile came rapidly up from behind diagonally across the street and struck him—automobile did not stop—only important issue was the identification of the owner of the car—proof of number of car and that it was registered in defendant's name made out a prima facia case—verdict for plaintiff sustained. Painter v. Davis, 113 Minn. 217, 129 N. W. 368.

4167*l*. **Frightening horses**—Plaintiff, a young woman, was driving a gentle horse and carriage along a country road when she saw ahead of her on the road an automobile standing in the road—the driver of the automobile was on his knees examining the car and two young ladies were standing near—plaintiff did not stop or signal defendant—as plaintiff was passing the car defendant, without giving any warning suddenly started the motor of the car, causing a great noise which frightened the horse—plaintiff was thrown from the carriage—held error not to submit the case to the jury. Fischer v. McGrath, 112 Minn. 456, 128 N. W. 579. See Note, 14 L. R. A. (N. S.) 251; 48 Id. 561.

Plaintiff was seated in a carriage with a team attached in a public road near a church—her husband was standing near the team—defendant drove an automobile near the team and so frightened the horses that

they ran away—plaintiff jumped from the carriage—evidence of negligence of husband properly excluded because not imputable to plaintiff—evidence held to justify a verdict for plaintiff. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

Contributory negligence of driver of horse encountering automobile on highway. Note, 50 L. R. A. (N. S.) 566.

USE

4168. In general—One deviating from the traveled portion of a highway is not a trespasser so long as he keeps within the confines of the highway. Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

One has the right to drive horses on a public street though they are spirited and unaccustomed to the noises of a city. Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

Use of highways by tractor engines. Note, 131 Am. St. Rep. 532.

4169. Improper use—Question of law—(61) See Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

4171. Pedestrians—(64) Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462 (a requested instruction suggesting that a pedestrian has no right to walk on any part of the street except the sidewalks and the crosswalks at the intersection of streets, held properly denied).

See §§ 4166, 4167f, 4167h.

4173. Fire department—(66) See Erickson v. Great Northern Ry. Co., 117 Minn. 348, 135 N. W. 1129.

4175. Deposit of materials—(69) Note, 19 L. R. A. (N. S.) 507.

4177. Frightening horses—A contractor using a gasolene engine adjacent to a public alley held liable for a runaway caused by noise from the engine. Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

See §§ 4167d, 4167*l*.

OBSTRUCTION

4179. What constitutes—(74) Empey v. Lovell, 117 Minn. 520, 134 N. W. 289 (excavation for watermains—absence of guards); International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395 (street railway operated without authority); Worden v. Bielenberg, 119 Minn. 330, 138 N. W. 314 (excavation in street); Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693 (telephone wires strung over county road so low as to obstruct travel); Painter v. Gunderson, 123 Minn. 323, 143 N. W. 910 (closing county road—plowing it up and setting out trees); State v. Sugarman, 126 Minn. 477, 148 N. W. 466 (persons standing on sidewalk); Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669 (tunnel obstructing a public alley).

4180. Remedies—Private action—An owner of property abutting upon a public alley may maintain an action to restrain and enjoin an unlawful attempt permanently to obstruct the alley and prevent the free use thereof by such abutting owner. In such case the abutting owner has an interest in the use of the alley different in kind and degree from that of the public at large, which equity will protect as against a wrongdoer. Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669.

(76) Painter v. Gunderson, 123 Minn. 323, 143 N. W. 910; 15 Col. L. Rev. 1, 142. See, as to effect of judgment in a private action, Painter v. Gunderson, 123 Minn. 342, 143 N. W. 911.

4181. Criminal prosecutions—In a prosecution for the obstruction of a public highway the state offered evidence tending to show that the locus in quo had been lawfully laid out as a public highway, and also evidence tending to show the establishment of a highway by user under the statute. The proceedings for laying out the highway by the public authorities were void for indefiniteness in the description of the road, and were erroneously received in evidence. Held, since the record does not disclose whether the conviction of defendant was predicated upon the evidence tending to show a lawfully established highway by the public authorities, or upon a highway acquired by user, the latter not conclusively appearing from the evidence, that the judgment of conviction cannot stand, and must be reversed. State v. Hager, 119 Minn. 512, 138 N. W. 935.

Evidence held to justify a conviction for obstructing a street in the city of Duluth with an automobile contrary to an ordinance of that city. Duluth v. Esterly, 115 Minn. 64, 131 N. W. 791.

(83) State v. Hager, 119 Minn. 512, 138 N. W. 935.

RIGHTS OF ABUTTING OWNERS

4182. In general—(85) Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571. See Note, 101 Am. St. Rep. 102.

4184. Right of access—(89) Worden v. Bielenberg, 119 Minn. 330, 138 N. W. 314.

4185. Right to light and air—(91) Note, 41 Am. St. Rep. 323.

HOLIDAYS

4191. What constitutes—What acts prohibited—Thanksgiving day is not a legal holiday, at least in the full sense of the term. Lucke v. Gas Traction Co., 129 Minn. 522, 151 N. W. 273.

A publication of an ordinance on Memorial Day has been sustained. St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

HOMESTEAD

IN GENERAL

4195. Constitutional questions—(19) Gregory Co. v. Cale, 115 Minn. 508, 513, 133 N. W. 175.

4198. Unmarried persons entitled to—(29) Note, 4 L. R. A. (N. S.) 365.

4200. Actual occupancy necessary—(33) See McCauley v. McCauleyville, 111 Minn. 423, 127 N. W. 190 (actual occupancy); Wagner v. Magee, 130 Minn. 162, 153 N. W. 313 (premises not occupied until after the execution of a certain deed).

4204. Size of homestead in cities—Under R. L. 1905, §§ 3452, 3453 (G. S. 1913, §§ 6957, 6958), the homestead exemption is measured by area, and the quantity of land there prescribed may be selected as such though a part is devoted to other uses than that of a home. Lockey v. Lockey, 112 Minn. 512, 128 N. W. 833.

4205. Claim for purchase money—Equitable lien—See Note, 45 Am. St. Rep. 383; 86 Id. 174.

4207. No limitation on use except occupancy as a home—(43) Lockey v. Lockey, 112 Minn. 512, 128 N. W. 833.

4208. Crops grown on homestead—(47) See 32 L. R. A. (N. S.) 577.

TRANSFER AND INCUMBRANCE

4211. Necessity of husband and wife joining in conveyance—Effect of joining—Statute—A contract to convey a right of way to a railroad company is within the statute. Delisha v. Minneapolis etc. Traction Co., 110 Minn. 518, 126 N. W. 276.

A wife, who joins her husband in deeding the homestead, owned by the husband, as security for a loan then made and for future advances to him, binds her homestead right for such advances when made. Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721.

A deed granting a perpetual right of way over a homestead is within the statute and void if not signed by both husband and wife. If any of the statutory requirements are omitted in the execution of an instrument within the statute the defect cannot be cured by the courts. But a conveyance duly executed by both husband and wife may be reformed by correcting a misdescription of the property intended to be conveyed, the mistake being mutual. Lindell v. Peters, 129 Minn. 288, 152 N. W. 648.

(58) Exblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094.

(63) Delisha v. Minneapolis etc. Traction Co., 110 Minn. 518, 126 N. W. 276.

(67) Borgstrom v. Haverty, 112 Minn. 500, 128 N. W. 824.

(71) Delisha v. Minneapolis etc. Traction Co., 110 Minn. 518, 126 N. W. 276.

(74) See Wagner v. Magee, 130 Minn. 162, 153 N. W. 313.

(79) Note, 4 L. R. A. (N. S.) 786; 4 Mich. L. Rev. 402.

(81) Exblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094 (evidence held not to show facts giving rise to an estoppel).

ENFORCEMENT AND PROTECTION OF RIGHT

4212. Selection—(82) Delisha v. Minneapolis etc. Traction Co., 110 Minn. 518, 126 N. W. 276.

4214a. Creditor's election of remedies—Where property, though exempt from the general debts and obligations of the owner, is subject to the payment of a particular debt, the creditor has the election of remedies to subject the same to the payment of his claim: (1) He may proceed in equity, setting up all the facts, and have the amount of the debt decreed a specific lien upon the property; (2) he may proceed by attachment; or (3) by an execution issued upon a judgment in an ordinary action for the recovery of the debt. Gregory Company v. Cale, 115 Minn. 508, 133 N. W. 75.

ABANDONMENT, WAIVER, FORFEITURE AND ESTOPPEL

4215. Removal—Notice—Statute—(89) In re Crocker, 217 Fed. 167 (temporary absence to engage in business until claimant might make money enough to pay off mortgage on homestead). See Note, 102 Am. St. Rep. 388 (abandonment).

4216. Sale or removal—Effect—Statute—Where a husband, in order to induce his wife to join in the sale of the family homestead, agrees that she shall receive the proceeds of the sale, the agreement is valid, and the transaction is not fraudulent as to the creditors of the husband. They have no claim upon the homestead property, and this agreement as to

the disposal of the land and its proceeds is of no concern to them. Schroeder v. Gohde, 123 Minn. 459, 144 N. W. 152.

RIGHTS OF SURVIVING SPOUSE AND CHILDREN

4220. Descent to surviving spouse—Rights of children—The fee of the homestead vests in the children subject only to the life estate of the surviving spouse, and the title of the children to such remainder in fee cannot be waived, impaired or burdened by the surviving spouse either as life tenant or as administrator. The rights of the surviving spouse in the homestead vest and become absolute at the death of the deceased spouse. The statutory provisions for setting it apart to him merely prescribe the procedure for segregating it from the remainder of the estate, and the administrator does not become entitled to possession of the homestead although it has not been so set apart. Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

(15) See Lohlker v. Lohlker, 112 Minn. 273, 127 N. W. 1122 (devise of homestead to wife with provision that certain children should have the right to occupy it with her "until they shall have homes of their own"—will construed—evidence held not to show any abandonment of their rights by the children).

(20, 21) Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

4222. Election of spouse to take under will—Where a testator bequeathed to his wife the balance of his personal property after the payment of his debts and funeral expenses, and after directing the sale of all his lands, and making provision for the payment of debts and certain legacies from the proceeds thereof, ordered that the balance should be invested, and that his wife should be paid a certain sum annually for her support during her lifetime, with certain legacies to his children after her death, the widow's written acceptance of the provisions of the will, duly filed in the probate court, precluded her from claiming the proceeds of the sale of the testator's homestead as being exempt from liability to the payment of a contingent claim duly allowed against the testator's estate. Connelly v. McMahon, 122 Minn. 113, 142 N. W. 16.

See Digest, §§ 10300, 10301.

4224. Exemption from debts of decedent—A testator by his will directed that all his just debts be paid out of his estate, and bequeathed and devised all the rest, residue, and remainder of his estate to his sister. This estate included the homestead of the testator, and he left surviving no wife, or child, or issue of a deceased child. Held, by the residuary devise, the testator disposed of the homestead by his last will, within the meaning of R. L. 1905, § 3647, subd. 3 (G. S. 1913, § 7237). Where a decedent, leaving no surviving spouse, child, or issue of deceased child, disposes of his homestead by his last will, the devisee takes it free from

claims of creditors of the decedent, unless the testator clearly indicates an intention that the homestead shall be liable to the payment of his debts. The general direction by the testator in the will to pay all his just debts out of his estate, followed by the devise of the residue, is not sufficient to indicate such intention. That the homestead of the decedent is not, after his death, occupied as a homestead by a member of his family entitled to occupy it as such, does not affect its character as being exempt from liability for the decedent's debts. Larson v. Curran, 121 Minn. 104, 140 N. W. 337.

A homestead does not form a part of an estate for purposes of administration, so far as creditors are concerned. Neither the land, nor rents and profits derived from it, can be used for satisfying claims against the estate. Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

HOMICIDE

4227. Presumption as to intention, malice and premeditation—(41) Note, 38 L. R. A. (N. S.) 1054.

4238. Provocation—(64) Note, 5 L. R. A. (N. S.) 809.
(68) Note, 4 L. R. A. (N. S.) 154.

4241. Manslaughter in second degree—What constitutes—A medical man, or a person assuming to act as such, will be held guilty of "culpable negligence," within the meaning of G. S. 1913, § 8612, subd. 3, defining manslaughter in the second degree as homicide committed without design to effect death, "by any act, procurement, or culpable negligence" not constituting a higher crime, where he has exhibited gross incompetency or inattention, or wanton indifference to his patient's safety. State v. Lester, 127 Minn. 282, 149 N. W. 297.

4243. Indictment for manslaughter in first degree—Under the statute an indictment may charge murder and also the different degrees of manslaughter. State v. Staples, 126 Minn. 396, 148 N. W. 283.

4244. Indictment for manslaughter in second degree—A parent, who by culpable negligence fails to provide care, nurture, sustenance, and medical assistance to a child wholly incapable of supplying its own wants, and so causes its death, is, under G. S. 1913, § 9143, guilty of manslaughter in the second degree. The indictment upon which defendant was convicted sufficiently charges facts constituting this offence. Repugnant allegations in an indictment, which negative each other, do not vitiate the indictment, if neither of the repugnant allegations is necessary. An allegation of an intent to kill is not necessary in an indictment for manslaughter in the second degree, nor is an allegation that the act or neglect with which the defendant is charged was not done without a design to effect death. The alle-

gations, in an indictment for manslaughter in the second degree, of acts which constitute a more grave degree of homicide, do not vitiate the indictment under our statute, which provides that the same indictment may charge murder and also the different degrees of manslaughter. It was proper to charge acts and omissions constituting this offence in the conjunctive. State v. Staples, 126 Minn. 396, 148 N. W. 283.

An indictment under G. S. 1913, § 8612 (3), need not allege knowledge on defendant's part of probability of consequences from the acts or omissions charged; nor is it necessary to charge defendant's duty in the premises, nor set up a specific standard of duty, nor to allege "culpable" or any other degree of negligence eo nomine, nor set out defendant's acts in any other than general terms and as ultimate facts. An indictment against a physician, under the statute cited, for manslaughter in the second degree, committed in connection with the operation of an X-ray machine, sustained as against a demurrer on the ground that the facts charged were not stated with sufficient certainty to, and did not, constitute a public offence. State v. Lester, 127 Minn. 282, 149 N. W. 297.

4245. Self-defence—In cases of homicide or assault, no burden rests upon defendant to prove that his act was justifiable, because in self-defence; but the jury, to convict, must be satisfied beyond a reasonable doubt that the act was not justifiable on such ground. State v. McPherson, 114 Minn. 498, 131 N. W. 645; State v. McGrath, 119 Minn. 321, 138 N. W. 310.

(80) Note, 78 Am. St. Rep. 717; 109 Id. 804.

(81) State v. McPherson, 114 Minn. 498, 131 N. W. 645. See Note, 2 L. R. A. (N. S.) 49.

(83) Note, 3 L. R. A. (N. S.) 535.

(84) 10 Col. L. Rev. 168.

(86) See Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956; Note, 124 Am. St. Rep. 1018; 3 L. R. A. (N. S.) 351.

4246. Evidence—Admissibility—(89) State v. Findling, 123 Minn. 413, 144 N. W. 142 (homicide—prosecution for crime against nature committed on a young boy—statements of boy to near relative shortly after the crime as to what had occurred—conversation between boy and prosecuting attorney in presence of the accused in which boy pointed out the accused as the guilty person—testimony of young girl to identify the accused); State v. Virgens, 128 Minn. 422, 151 N. W. 190 (regular entries of a catalogue house showing shipment of revolver—manner of speech and appearance of defendant under circumstances where an accusing conscience would be likely to betray evidence of guilt).

(90) Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956 (quarrelsome and violent character of assailant unknown to defendant).

4247. Evidence—Sufficiency—Causal connection—Defendant inflicted knife wounds upon one Miller, one of the wounds being a deep stab which penetrated the left lung. Forty-eight hours after the assault Miller developed pneumonia, and died from this disease a week later. **Held,** the evidence did not leave the cause of death a matter of speculation or conjecture, but was sufficient to justify the conclusion that the pneumonia germ was not inhaled, but entered the lungs on the knife blade of defendant, or through the puncture in the lung made by the knife, and therefore that defendant caused the death, and was guilty of murder. State v. James, 123 Minn. 487, 144 N. W. 216.

(91) State v. Schreiber, 111 Minn. 138, 126 N. W. 536; State v. Potoniec, 117 Minn. 80, 134 N. W. 305; State v. Rusk, 123 Minn. 276, 143 N. W. 782; State v. James, 123 Minn. 487, 144 N. W. 216; State v. Findling, 123 Minn. 413, 144 N. W. 142; State v. Virgens, 128 Minn. 422, 151 N. W. 190.

HOSPITALS

4250a. Liability for negligence—Evidence held not to sustain a charge of negligence in the use of an unclean catheter in treating a patient. Moses v. St. Barnabas Hospital, 130 Minn. 1, 152 N. W. 128.

HUSBAND AND WIFE

IN GENERAL

4257. Necessity of husband joining in wife's deeds—What constitutes a sufficient joinder of husband. Note, 97 Am. St. Rep. 584.

WIFE'S SEPARATE LEGAL EXISTENCE

4258. In general—Married women are liable on implied or quasi contract as if unmarried. Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

(20) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120; Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 523, 130 N. W. 8; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

4259. Her separate property—A husband may be guilty of arson in burning his wife's property. State v. Roth, 117 Minn. 404, 136 N. W. 112. See Note, 21 L. R. A. (N. S.) 27.

(24) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1020.

(31) Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

4261. Earnings of labor—A married woman held entitled to maintain an action for personal injury and to recover damages for loss of earning

capacity as a singer. Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8.

4262. Husband as agent of wife—A wife held liable for the deceit of her husband acting as her agent in the exchange of land. Atherton v. Barber, 112 Minn. 523, 128 N. W. 827.

(37) Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339; Farmers Nat. Bank v. Scheidt, 121 Minn. 248, 141 N. W. 103.

4266. Husband carrying on farm for wife—(42) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1020.

LIABILITIES OF WIFE

4267. Estoppel—(43) Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339. See Note, 57 Am. St. Rep. 169.

4270. On husband's contracts—(47) See Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

LIABILITIES OF HUSBAND

4276. On contracts of wife for necessaries—(60) See Note, 47 L. R. A. (N. S.) 279; 98 Am. St. Rep. 627.

INCHOATE INTEREST IN EACH OTHER'S REALTY

4279. Nature—The statutes of this state relating to the reciprocal rights of husband and wife in each other's property show an intention to secure equality between them and protection of each from the acts of the other. Boeing v. Owsley, 122 Minn. 190, 202, 142 N. W. 129.

Under a contract for the sale of lands, by the terms of which the vendee pays part of the purchase price, and covenants to pay the deferred payments and taxes and assessments, and has the right of possession, and enters and makes improvements, the vendee has an equitable title, to which the wife's statutory marital right attaches; and this is so, though the contract provides that the vendor could convey to the vendee's assignees, upon the surrender of the contract, regardless of any agreement or relation between the vendor and others taking from or through him. The plaintiff, the wife of the vendee in such a contract, sued the defendant, the vendor, upon the death of her husband, claiming that her husband and the defendant had conspired to defraud her of her marital right by canceling the contract in which the vendee was in default and conveying directly to a purchaser whom the vendee had secured. Held that, if the plaintiff could maintain an action at law to recover damages, she must show that the lands had passed to innocent purchasers. Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 222.

A husband and wife occupy a fiduciary relation toward each other as respects this statutory interest in each other's property. State v. Probate Court, 129 Minn. 442, 152 N. W. 845.

(74) Interest subject to purchase money mortgage or vendor's lien. Note, 52 L. R. A. (N. S.) 540. See Digest, § 6209.

(75) Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051; Northwestern Trust Co. v. Ryan, 115 Minn. 143, 132 N. W. 202; Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571.

(82) See Herberger v. Zion, 129 Minn. 217, 152 N. W. 268.

4280. Loss—Transfers in fraud of other spouse—A wife may lose her expectancy by the cancelation of an executory contract for the sale of realty. Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 222.

A husband may transfer his personal property as a gift under such circumstances as to constitute a fraud upon his wife. Smith v. Wold, 125 Minn. 190, 145 N. W. 1067 (certain gifts made by a husband, in part directly and in part through a trust deed, to children of a former marriage, held not fraudulent). See 26 Harv. L. Rev. 86 (gifts causa mortis).

CONTRACTS AND CONVEYANCES BETWEEN

4281. Contracts—In general—A promise by the husband to make a payment to his wife, in discharge of his obligation to provide for her support after a divorce granted to her, not entered into to facilitate the granting of the divorce, is based on a consideration, and is valid. The fact that such agreement is not embodied in the divorce decree subjects it to the closest scrutiny to determine that it was not made to facilitate the divorce, but does not render it invalid, if not in conflict with the decree. Nilson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

4282. As to realty—A husband may assign a real estate mortgage to his wife. Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051.

A husband held forbidden by the statute to contract with a mortgagee of property of his wife to put the mortgagee in possession with the right to collect the rents from a tenant. Sutton v. Brekke, 117 Minn. 519, 134 N. W. 289.

The statute does not forbid the introduction of parol evidence to prove that a wife is the owner of realty and that her husband acted in relation thereto with her authority. Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862.

A written consent by a husband to the devise by her of her realty is valid though given in furtherance of a void written agreement between husband and wife, by which each, in terms, released all interest in the other's property, the wife having performed her part of the agreement. Erickson v. Robertson, 116 Minn. 90, 133 N. W. 164.

A husband cannot make a valid contract for the sale of his wife's land either as her agent or otherwise, and a contract made by him is not binding upon her unless she subsequently adopts and confirms it. Baker v. Brundage, 131 Minn. —, 154 N. W. 1086.

4283. Separation agreements—(8) Note, 82 Am. St. Rep. 859; 27 Harv. L. Rev. 684.

4285. Antenuptial contracts—(10) Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812. See Slingerland v. Slingerland, 115 Minn. 270, 132 N. W. 326 (action to set aside for fraud); State v. Probate Court, 129 Minn. 442, 152 N. W. 845 (duty of full disclosure).

4286. Wife as agent of husband—(11) Sinclair v. Fitzpatrick, 127 Minn. 530, 149 N. W. 1070 (wife held out by husband as his agent in ordering alterations in buildings on their homestead).

ACTIONS

4288. When wife may sue husband—(15) See Merriam v. Merriam, 127 Minn. 21, 148 N. W. 478; Note, 77 Am. St. Rep. 228.

(16) See Thompson v. Thompson, 218 U. S. 611; Note, 52 L. R. A. (N. S.) 185, 189; 24 Harv. L. Rev. 403; 28 Id. 109.

(17) See Cisewski v. Cisewski, 129 Minn. 284, 152 N. W. 642.

4289. Actions by or against wife—Necessity of joining husband—In an action for forcible entry and unlawful detainer, brought by a married woman to recover possession of her own property, the husband is not a necessary party. Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785.

(18) Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8.

4289a. Actions by or against husband—Necessity of joining wife—In an action against a husband his wife is not a necessary party solely by reason of her contingent statutory interest in his realty. Stitt v. Smith, 102 Minn. 253, 133 N. W. 632. See Leonard v. Green, 34 Minn. 137, 24 N. W. 915; Williamson v. Selden, 53 Minn. 73, 54 N. W. 1055; Tatum v. Roberts, 59 Minn. 52, 60 N. W. 848.

If a wife is not made a party to an action to foreclose a mortgage on her husband's property her equity of redemption will be unaffected by the judgment and sale. Spalti v. Blumer, 56 Minn. 523, 58 N. W. 156; Northwestern Trust Co. v. Ryan, 115 Minn. 143, 132 N. W. 202.

Though a wife is not generally a necessary party to an action to quiet title to her husband's realty, if she is made a party she may assert and defend therein her contingent, statutory interest. Minneapolis etc. Ry. Co. v. Lund, 91 Minn. 45, 97 N. W. 452.

A father who is supporting the family may maintain an action for

loss of services of a minor child without joining the mother as a party plaintiff. Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976.

4289b. Reformation of instrument against wife—A husband entered into an executory contract for the purchase of certain land. The wife did not join therein and was not a party to the same. In an action brought by the vendor against both husband and wife to reform the contract and make it conform to that actually entered into, held, that the wife cannot resist such reformation on the ground that no mistake was shown on her part. She was not a party to the contract, and whatever rights she acquired to the land are subject to the contract actually entered into by the husband. Herberger v. Zion, 129 Minn. 217, 152 N. W. 268.

4293. Actions by wife for personal injury—(27) Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8.

4294. Actions by wife for alienation of husband's affections—(30) Weber v. Weber, 116 Minn. 494, 134 N. W. 124 (statements of plaintiff to a third person in the hearing of the alienated spouse held inadmissible though not contradicted by the latter—evidence held sufficient to require submission of case to jury). See Note, 46 Am. St. Rep. 472.

4295. Actions by husband for alienation of wife's affections—An affianced husband cannot sue for the seduction of his affianced wife or for the alienation of her affections. Davis v. Condit, 124 Minn. 365, 144 N. W. 1089.

4296. Actions by husband for injuries to wife—In an action by a husband for personal injury to his wife damages for loss of services which necessarily result from the nature of the injury may be recovered under a general allegation of damages. Damages for the mental anxiety or injured feeling of the husband, if recoverable at all, are to be allowed by the jury as matter of aggravation, upon consideration of the facts and circumstances of the case, and not upon the statements of witnesses as to the amount of such damages. Stone v. Evans, 32 Minn. 243, 20 N. W. 149.

(34) Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8.

4297. Action by wife for criminal conversation—(37) See 26 Harv. L. Rev. 74.

4298a. Action by wife for loss of consortium—See 26 Harv. L. Rev. 12.

IMPLIED OR QUASI CONTRACTS

4300. Definition and nature—(45) Anderson v. Amidon, 114 Minn. 202, 130 N. W. 1002 (the law will imply a contract on the part of a member of a club to pay dues and assessments as provided in the articles of association); Hertzog v. Hertzog, 29 Penn. 465 (nature of quasi contracts). See Woodward, Quasi Contracts, §§ 1–9; 21 Yale L. Journal, 533; Dunnell, Minn. Pl. 2 ed. §§ 528–534.

(46) See Manthey v. Schueler, 126 Minn. 87, 147 N. W. 824 (statutory obligation to support pauper relatives classified as quasi-contractual).

4301. Express contract excludes implied contract—An express agreement controls to the exclusion of an implied agreement with reference to the same subject-matter; but this rule does not apply where the implied agreement is based upon the subsequent conduct of the parties, not covered by the express contract. Efron v. Stees, 113 Minn. 242, 129 N. W. 374.

(47) See Kruta v. Lough, 131 Minn. —, 154 N. W. 514; Dunnell, Minn. Pl. 2 ed. §§ 532, 534.

4304. Money paid, or goods furnished, or services rendered under abandoned contract—(50) See Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 142 N. W. 253; Dunnell, Minn. Pl. 2 ed. § 534.

4305. Money paid for another in cases of emergency—(51) See 24 Harv. L. Rev. 583.

4308. Waiving tort and suing on implied contract—(54) See Dunnell, Minn. Pl. 2 ed. §§ 183–194; Woodward, Quasi Contracts, §§ 270–300.

IMPROVEMENTS

OCCUPYING CLAIMANTS' ACT

4309. Definition and nature—(56) Note, 81 Am. St. Rep. 164.

4310a. Application of statutes—Estoppel—The provisions of the occupying claimant's act are inapplicable where the owner of the fee is estopped from asserting his ownership. Macomber v. Kinney, 114 Minn. 146, 160, 128 N. W. 1001.

4311. Tenant for life—(61) Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

4319. When taxes must have been paid—(87) See G. S. 1913, § 2191. The statement of the text refers to occupants under unofficial deeds. A more liberal rule probably applies to occupants under official deeds.

INCEST

4331. What constitutes—Statutes—See Note, 111 Am. St. Rep. 19.

4331a. Evidence—Admissibility—Evidence of sexual intercourse prior to the time relied upon for conviction held properly admitted. State v. Wallen, 123 Minn. 128, 143 N. W. 119.

4331b. Evidence—Sufficiency—Evidence held sufficient to justify a verdict of guilty. State v. Wallen, 123 Minn. 128, 143 N. W. 119.

INCOMPETENTS

4332. Guardians—A proceeding for the appointment of a guardian is not adversary in nature but rather one by the state in its character of parens patriæ and the manner and method of determining the facts rests in the sound discretion of the trial court, controlled, in a general way, by the rules of ordinary judicial procedure. The statutes providing for the cross-examination of an adverse party have no application to the proceeding; yet the court may require the alleged incompetent to submit to examination for the purpose of testing his or her mental condition. Prokosch v. Brust, 128 Minn. 324, 151 N. W. 130.

Under G. S. 1913, § 7433, it is not necessary, in order to confer jurisdiction of the subject-matter, that a petition for the appointment of a guardian state that it is made by the county board, or by a relative or friend of the incompetent. It is sufficient if it be so made in fact. It does not affirmatively appear that it was not so made in fact. It is there-

fore presumed that the court had jurisdiction of the subject-matter. Any defects in the respect mentioned or in the facts set forth in the petition are waived, if not taken advantage of on the trial. A finding that the person for whom a guardian was asked was, by reason of old age and the loss and imperfection of mental faculties, incompetent to have the care and management of her person and estate, held sustained by the evidence. There was no abuse of discretion in selecting as guardians the persons appointed, rather than others suggested by the incompetent. Wilkowske v. Lynch, 124 Minn. 492, 145 N. W. 378.

A judgment in proceedings for the appointment of a guardian of an incompetent person is admissible in evidence, but not conclusive, in any litigation, to prove the mental condition of the person at the time the judgment is rendered, or at any past time during which the judgment finds the person incompetent. McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

An action by a guardian in behalf of a ward should be entitled in the name of the ward, but a defect in this regard may be corrected by amendment. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

(17) Hanson v. Kalstarud, 114 Minn. 489, 131 N. W. 477 (finding of incompetency sustained); Prokosch v. Brust, 128 Minn. 324, 151 N. W. 130 (finding of incompetency sustained—held proper under the circumstances to appoint son as guardian).

INDEMNITY

4335. Breach—Evidence held to justify a finding that a contractor, whose performance the defendant had guaranteed by its indemnity bond, had defaulted. Butts v. Pacific Surety Co., 117 Minn. 70, 134 N. W. 306.

4337. Particular contracts construed—A contract to indemnify against loss from negligence of an express agent. Great Northern Express Co. v. National Surety Co., 113 Minn. 162, 129 N. W. 127. See § 4875d.

4341. Judgment against indemnitee—Effect on indemnitor—(44) Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715; Patterson v. Adan, 119 Minn. 308, 138 N. W. 281; Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355. See Digest, § 5176.

4343. Fidelity bonds—(47) Gamble-Robinson Co. v. Mass. Bonding & Ins. Co., 113 Minn. 38, 129 N. W. 131; Great Northern Express Co. v. National Surety Co., 113 Minn. 162, 129 N. W. 127. See Digest, § 9105.

4344. Parties—One doing work for a principal contractor held not entitled to sue on an indemnity bond against mechanics' liens given to

the owner by a surety company and the principal contractor. Moore **v. Mann, 1**30 Minn. 318, 153 N. W. 609.

4345. Pleading—See Dunnell, Minn. Pl. 2 ed. § 676.

IDENTIFICATION—See Evidence, 3245, 3249; Criminal Law, **2**468d.

INDETERMINATE SENTENCES—See Criminal Law, 2503a.

INDIANS

4348. White Earth reservation—Operation of state laws—The probate **courts of this** state have no jurisdiction to determine heirship and de**scent of land** allotted to a Chippewa Indian upon the White Earth res**ervation, under** the acts of Congress of February 8, 1887 (24 Stat. 388, **c. 119) and** January 14, 1889 (25 Stat. 642, c. 24), where the allottee **dies before** the approval of his allotment. Holmes v. Praun, 130 Minn. **487, 153 N**. W. 951. See Vachon v. Nichols-Chisholm Lumber Co., **126 Minn.** 303, 144 N. W. 223, 148 N. W. 288.

4351. Deeds—Right of mixed-blood Chippewa Indian allottee of the **White Earth** reservation to convey allotment—effect of Clapp amend**ment—effect** of death of Indian—issuance of patent after his death—**right of action** in administrator of Indian against grantee on contract **to pay balance** of purchase money after issuance and delivery of pat**ent. Vachon** v. Nichols-Chisholm Lumber Co., 126 Minn. 303, 144 N. **W. 223, 148** N. W. 288.

4352a. Contracts—Validity—Fraud—Action to recover $2,000 from **the estate** of O-bah-baum, an Indian woman, upon a written contract **whereby she** promised to pay the plaintiff for his services in prosecut**ing her claim** against the United States one-half of the amount received **thereon.** Defence, that the contract was obtained by fraud, and that the **plaintiff was** prohibited by section 190, Rev. St. U. S. 1878 (U. S. Comp. **St. 1901, p.** 95), from prosecuting the claim. Held, that the verdict for **the defendant** is sustained by the evidence, and that the trial court made **no reversible** errors, either in its charge to the jury or in refusing re**quested instructions.** Van Metre v. Nunn, 116 Minn. 444, 133 N. W. **1012.**

4353a. Sale of lands—Exemption of proceeds—Action, in the nature **of a creditors'** bill, to have satisfied a judgment out of money arising **from the sale** of his land by a half-blood Chippewa Indian, which the **plaintiffs alleged** had been transferred colorably to defraud creditors. **Findings of** fact and conclusions of law in favor of plaintiffs. Held,

that the money was not exempt from execution, that the facts found are sustained by the evidence, and the conclusion of law by the facts, and that there were no reversible errors in the rulings of the court as to the admission of evidence. Stephenson v. Lohn, 115 Minn. 166, 131 N. W. 1018.

INDICTMENT

FINDING AND PRESENTMENT

4357. Presentment—Presumption—(78) Note, 26 L. R. A. (N. S.) 683.

CONSTRUCTION AND SUFFICIENCY IN GENERAL

4359. General tests of sufficiency—(83) State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

(85) State v. Lester, 127 Minn. 282, 149 N. W. 297.

4360. Certainty—(89) State v. Mayo, 118 Minn. 336, 136 N. W. 849; Bartell v. United States, 227 U. S. 427. See State v. Smith, 119 Minn. 107, 137 N. W. 295 (indictment for perjury held sufficiently definite).

(90) State v. Preuss, 112 Minn. 108, 127 N. W. 438; State v. Stickney, 118 Minn. 64, 136 N. W. 419.

4365. Formal defects disregarded—Statute—Technical form is not essential. Mere verbal or grammatical inaccuracies do not render an indictment demurrable. State v. Sharp, 121 Minn. 381, 141 N. W. 526.

Under the statute an indictment should be held sufficient if it fairly advises the accused of the charge made against him. State v. Staples, 126 Minn. 396, 148 N. W. 283.

(15) State v. Preuss, 112 Minn. 108, 127 N. W. 438; State v. Sharp, 121 Minn. 381, 141 N. W. 526; State v. Amos, 122 Minn. 479, 142 N. W. 801; State v. Staples, 126 Minn. 396, 148 N. W. 283; State v. Lester, 127 Minn. 282, 149 N. W. 297.

4367. Misnaming offence—It is immaterial that an indictment for larceny in the first degree designates the offence as grand larceny in the second degree. State v. Snyder, 113 Minn. 244, 129 N. W. 375.

MODE OF CHARGING OFFENCE

4374. Alleging date of offence—(48, 49) State v. Gerber, 111 Minn. 132, 126 N. W. 482; State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

(53) State v. Gerber, 111 Minn. 132, 126 N. W. 482; State v. Schueller, 120 Minn. 26, 138 N. W. 937; State v. Wallen, 123 Minn. 128, 143 N. W. 119; State v. Dlugi, 123 Minn. 392, 143 N. W. 971; State v. Dufour, 123 Minn. 451, 143 N. W. 1126; State v. Flockey, 128 Minn. 40, 150 N. W. 168. See Digest, § 4427.

4375. Matter of inducement—(55) State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

4377. No particular form of words necessary—(62) State v. Snyder, 113 Minn. 244, 129 N. W. 375.

(64, 65) State v. Sharp, 121 Minn. 381, 141 N. W. 526.

4378. Use of technical and composite words—An allegation that defendant "did utter, dispose of, and put off as true," held sufficient. State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

4379. Following language of statute or ordinance—(74) State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068; State v. Mayo, 118 Minn. 336, 136 N. W. 849.

4380. Negativing exceptions—It is not necessary to negative exceptions which, by some other statute, might render the crime charged harmless. State v. Seeling, 126 Minn. 386, 148 N. W. 458.

(81) State v. Mayo, 118 Minn. 336, 136 N. W. 849 (indictment held to sufficiently negative exception).

(83) State v. Schmidt, 111 Minn. 180, 126 N. W. 487.

4382. Every essential element of the offence must be alleged—(89) State v. Lester, 127 Minn. 282, 149 N. W. 297.

4384. Ultimate and not evidentiary facts to be alleged—(91) State v. Bierbauer, 111 Minn. 129, 126 N. W. 406.

4387. Conjunctive and disjunctive allegations—(95) State v. Staples, 126 Minn. 396, 148 N. W. 283.

(97) See Note, 51 L. R. A. (N. S.) 133.

4388. Facts judicially noticed—(98) State v. Lester, 127 Minn. 282, 149 N. W. 297.

4395. Repugnancy—Repugnant allegations in an indictment which negative each other do not vitiate the indictment if neither of the allegations is necessary. State v. Staples, 126 Minn. 396, 148 N. W. 283.

(11) See State v. Stickney, 118 Minn. 64, 136 N. W. 419 (indictment held not repugnant).

DUPLICITY

4409. Different degrees of same offence—(47) State v. Staples, 126 Minn. 396, 148 N. W. 283.

4411. Doubt as to class of offence—Statute—(49) State v. Staples, 126 Minn. 396, 148 N. W. 283.

ELECTION BY STATE

4414. In general—(72) State v. Schueller, 120 Minn. 26, 138 N. W. 937.

DEMURRER

4419. Waiver by failing to demur—The objection that an indictment does not state an offence may be made on the trial. A refusal to allow a defendant to demur on the trial held not prejudicial. State v. Roth, 117 Minn. 404, 136 N. W. 12.

SETTING ASIDE ON MOTION

4420. Statutory grounds—That third parties are improperly present with the grand jurors while the charge embraced in an indictment is under consideration is a ground for setting it aside. State v. Slocum, 111 Minn. 328, 126 N. W. 1096. See 28 Harv. L. Rev. 326 (effect of presence of an official stenographer).

4421. Statutory grounds not exclusive—In a prosecution for adultery, if no prosecution has been commenced before an examining magistrate, and the indictment shows that the offence was committed more than one year before the return thereof, a motion to quash will lie. State v. Dlugi, 123 Minn. 392, 143 N. W. 971.

Improper evidence as ground. Note, 47 L. R. A. (N. S.) 1207; 28 Harv. L. Rev. 326.

4422. Held not ground for setting aside indictment—The publication of the facts concerning a pending indictment prior to the time it is framed, and before the accused is arraigned, and the exclusion by the jurors of the county attorney from the grand jury room, do not constitute sufficient grounds for quashing an indictment, in the absence of a showing that the substantial rights of the accused were violated. State v. Slocum, 111 Minn. 328, 126 N. W. 1096.

4422a. Inspection of testimony for purposes of motion—A defendant in a criminal action is not entitled to inspection of testimony furnished the county attorney by the state fire marshal, under the provisions of chapter 203, Laws 1911, for the purpose of making a motion to quash the indictment. State v. Steele, 117 Minn. 384, 135 N. W. 1128.

OBJECTIONS ON THE TRIAL

4426. In general—(16) See Mankato v. Olger, 126 Minn. 521, 148 N. W. 471 (failure of judge to indorse on complaint an order for a warrant).

VARIANCE

4428. Held immaterial—A variance as to the form of money on a charge of obtaining money by fraudulent representations. State v. Cary, 128 Minn. 481, 151 N. W. 186.

INFANTS

IN GENERAL

4433a. State control—The state, as parens patriæ, has the power to assume or provide for the custody and control of a child upon the sole ground of the financial inability of the parent to support it, whenever the breach of the parental trust thus involved constitutes a menace to the fundamental welfare of the child. State v. Klasen, 123 Minn. 382, 143 N. W. 984.

CONTRACTS

4441. Deeds—An infant may repudiate an executory land contract on coming of age. Mogren v. Finley, 112 Minn. 453, 128 N. W. 828.
(69) Note, 51 L. R. A. (N. S.) 28.

4443. Executed personal contracts—(77) Klaus v. A. C. Thompson Auto & Buggy Co., 131 Minn. —, 154 N. W. 508 (purchase of automobile). See Woodward, Quasi Contracts, § 69; Note, 47 L. R. A. (N. S.) 543 (infants as lessees).

4446. Time of disaffirmance—(88) Note, 51 L. R. A. (N. S.) 28.

4449. Estoppel—(94) Note, 36 L. R. A. (N. S.) 33.

GUARDIAN AD LITEM

4453. Necessity of appointing a guardian ad litem—(6) See Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172 (conflict of laws).

4454. Effect of infant appearing without guardian—(12) See Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172.

4455. Guardian not a party—(15–18) Note, 97 Am. St. Rep. 995 (powers and duties of guardians ad litem).

4456. Objection to competency of guardian—Who shall represent a minor in an action in this state is a matter wholly of procedure, and no part of the cause of action of such minor. Therefore the laws of this state govern as to this question, and not the laws of the domicil of such minor or his parents. Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172.

DEPENDENT CHILDREN

4466a. Custody—Where a child adjudged by the juvenile court to be dependent within Laws 1905, c. 285, and committed to the care of an eleemosynary association, leaves the home of persons to whom its cus-

tody is given by the association for sufficient cause, and finds a home with other persons, the prime consideration on habeas corpus by the association to recover custody, is the child's welfare and not the legal right to custody. State v. White, 123 Minn. 508, 144 N. W. 157.

4466b. Mother's pensions—A child dependent upon the public for support is within the terms of Laws 1913, c. 260, and hence within Laws 1913, c. 130, though the sole reason of such dependency is the financial inability of its parent to support it, and though there is neither delinquency on the part of the child nor other unfitness on the part of the parent. The general statutory system of providing for the poor neither curtails the power of the Legislature to enact such legislation as that contained in Laws 1913, c. 130, known as the "Mothers' Pension Law," nor prevents its enforcement. The relief provided for by chapter 130 is not a matter of purely local municipal concern, and its provisions are operative in a county wherein the town system of caring for the poor prevails, as well as elsewhere, and also in a city in such county, notwithstanding that it maintains its own pauper system. The probate court held, on the facts, properly to have exercised its power to grant relief under chapter 130. There was no error or impropriety in entertaining a joint application for relief under the statute in behalf of several children of the same parents residing with their mother. State v. Klasen, 123 Minn. 382, 143 N. W. 984.

INJUNCTION

IN GENERAL

4468. Mandatory injunctions—(34) Aubol v. Grand Forks Lumber Co., 131 Minn. —, 154 N. W. 968.

4469. Rights must be clear—The right to be protected by injunction must already exist. A court of equity cannot create a right and then protect it by injunction. Board v. Belland, 113 Minn. 292, 129 N. W. 389.

4470. Injury must be real and substantial—One reason why courts should not grant an injunction except in a clear case is that the defendant is thereby deprived of a right to trial by jury. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

4471. Injury must be irreparable—The mere fact that plaintiff is compelled to wait upon the pleasure of the defendant to bring suit, both as to time and place, does not raise any presumption of irreparable injury. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

(41) See Lead v. Inch, 116 Minn. 467, 134 N. W. 218 (what constitutes irreparable injury in case of a nuisance).

(42) Jordan v. Leonard, 119 Minn. 162, 137 N. W. 740.

4472. Adequate remedy at law—Where a party, if his theory of the controversy is correct, has a good defence at law to a purely legal demand, he should ordinarily be left to that means of defence, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

(43) International Falls v. Minn. D. & W. Ry. Co., 117 Minn. 14, 134 N. W. 302; Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

(44) Aubol v. Grand Forks Lumber Co., 131 Minn. —, 154 N. W. 968.

(47) Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

(48) St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262. See Lead v. Inch, 116 Minn. 467, 134 N. W. 218.

See Digest, §§ 2839, 3137.

4473. Prevention of multiplicity of actions—The sole ground for enjoining defendants from suing being to avoid a multiplicity of suits, the court may consider the number of suits which may be avoided, the statutory provisions for reducing this number, the efficiency of such provisions for giving plaintiffs adequate relief, the convenience and pecuniary loss of the parties, the apparent as well as anticipated issues between the different parties, and the importance of preserving to each the right of a jury trial, in determining whether jurisdiction should be entertained or refused. Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423.

(52) Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182; Aubol v. Grand Forks Lumber Co., 131 Minn. —, 154 N. W. 968.

4473a. Inconvenience to public or other individuals—An injunction may be denied on the ground that its issuance would result in inconvenience to the public. St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262; McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416. See 28 Harv. L. Rev. 110, 208.

A court of equity may consider the convenience and interests of others than the litigants in determining whether to grant an injunction. See 28 Harv. L. Rev. 110.

4474. Change of conditions after commencement of action—An injunction may be granted though the defendant has discontinued the wrongful acts since the commencement of the action. State v. Minneapolis & St. L. R. Co., 115 Minn. 116, 122, 131 N. W. 1075; Archer v. Greenville Sand & Gravel Co., 233 U. S. 60.

SUBJECTS OF PROTECTION AND RELIEF

4476. Trespass to realty—An injunction may be granted against a continuing trespass though it is sought only after final adjudication and the trespass has in the meanwhile been discontinued. There is no loss of rights or remedies because a plaintiff does not ask for immediate relief but endures the wrong pending the litigation and until final adjudication. Archer v. Greenville Sand & Gravel Co., 233 U. S. 60.

An injunction against a continuing trespass may be denied where the damages are nominal and the injunction would be a serious inconvenience to the defendant and the public. McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416. See 28 Harv. L. Rev. 209.

(57) Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094; Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311 (embankment on railroad right of way from which, at every heavy rainfall, destructive quantities of sand were cast upon the adjoining land of plaintiff); Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669; Draheim v. Fell, 130 Minn. 535, 153 N. W. 513. See Note, 13 L. R. A. (N. S.) 173; 21 Id. 417; 43 Id. 262 (trespass to cut trees).

(60) Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094.

4477. Other actions—The mere fact that plaintiff is compelled to wait upon the pleasure of the defendant to bring suit, both as to the time and place, does not raise any presumption of irreparable injury. Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

(64) Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

4477a. Enforcement of judgments—Facts held not to warrant the court in aiding a surety by restraining the enforcement of a judgment, pending an action by the surety to compel the principal debtor to pay the debt. U. S. Fidelity & Guaranty Co. v. Conn. Mut. Life Ins. Co., 126 Minn. 528, 148 N. W. 306.

4478. Foreign actions and proceedings—The courts of a state may restrain a citizen of that state from prosecuting a suit against another citizen of the same state in the courts of another state, if necessary to prevent an inequitable advantage; but litigants are seldom restricted to the courts of their own state, and, to justify enjoining the prosecution of a foreign suit, begun before any proceedings were taken in the home courts, it must appear that the foreign suit will result in evading the effect of some local law, or in securing some other inequitable advantage, or in imposing some inequitable disadvantage. Freick v. Hinkly, 122 Minn. 24, 141 N. W. 1096.

Judgment was entered in a court in Minnesota in favor of the plaintiff, the wife of the defendant, in an equitable action for separate sup-

port. The defendant, having become a resident and citizen of Illinois, brought an action for divorce against the plaintiff in a court of that state. Held, that the trial court did not err in denying the plaintiff's application for a temporary injunction restraining defendant from proceeding with his action for divorce in Illinois. Merriam v. Merriam, 127 Minn. 21, 148 N. W. 478.

(65) Note, 21 L. R. A. (N. S.) 71; 25 Id. 267; 26 Harv. L. Rev. 347; 27 Id. 91.

4478a. Misuse of highways—An injunction, enjoining a house mover from interfering with electric wires in a street except upon certain conditions, held proper. Edison Electric Light & Power Co. v. Blomquist, 110 Minn. 163, 124 N. W. 969, 125 N. W. 895.

4479. Contracts—Injunctions are freely granted to prevent the violation of negative covenants. Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415.

4479a. Public service corporations—Rates—Discrimination—While in a proper action the reasonableness of an established rate may be the subject of judicial investigation and adjudication, courts are without authority to fix by injunction, or otherwise, rates for public service corporations. For practical reasons courts ought not to entertain suits at the instance of individual consumers to enjoin a public service corporation from placing in effect a schedule of rates which does not exceed the maximum fixed by the proper legislative body. The remedy of consumers for discrimination in rates by a public service corporation is ordinarily an action at law for damages, and not by injunction. The complaint of the interveners fails to state a cause of action for relief by injunction. St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262.

4480. Municipal affairs—Equity will not enjoin the payment of a meritorious claim by a municipality though it is illegal. Farmer v. St. Paul, 65 Minn. 176, 67 N. W. 990; Jackson v. Board of Education, 112 Minn. 167, 174, 127 N. W. 569; White v. Chatfield, 116 Minn. 371, 133 N. W. 962. See Note, 36 L. R. A. (N. S.) 1.

A general taxpayer held not entitled to enjoin a city from paying for the construction of certain improvements at the time and in the manner stipulated in its contracts. State v. Ely, 129 Minn. 40, 151 N. W. 545.

Municipal officers will not be enjoined from exercising a fair and legal discretion in granting or revoking licenses for theaters and shows. Bainbridge v. Minneapolis, 131 Minn. —, 154 N. W. 964.

(74–79) Arpin v. Thief River Falls, 122 Minn. 34, 141 N. W. 833.

(77) Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66. See Tiedt v. Argyle, 129 Minn. 259, 152 N. W. 412 (when equity will enjoin a mu-

nicipality from paying a landowner for the opening of a street across his property—requisites of complaint).

4482. Other courts—Administration proceedings—(82) See Brown v. Strom, 113 Minn. 1, 129 N. W. 136 (held competent for the district court, in order to preserve the property in statu quo, to restrain the executor as an individual and other stockholders and the bank from disposing of shares of stock in the bank involved in the proper administration of an estate).

4482a. Enactment of ordinances—An action to enjoin the enactment of a municipal ordinance cannot be maintained, except where by the mere enactment irreparable damage to persons affected will immediately follow, cause a multiplicity of suits, or violate existing contract rights. Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131; Sullivan v. East Grand Forks, 131 Minn. —, 155 N. W. 397; Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728. See Note, 2 L. R. A. (N. S.) 152.

Action to restrain a city council from passing an ordinance, over the veto of a mayor, granting a franchise to defendant to construct a telephone exchange. A restraining order was granted by a court commissioner. After the court set aside this order the ordinance was passed, accepted by defendant and the work of construction begun. Thereafter plaintiffs appealed from an order sustaining defendant's demurrer to the complaint. Appeal dismissed as presenting a moot question. Hansen v. N. W. Tel. Exchange Co., 127 Minn. 522, 149 N. W. 131.

4483. Enforcement of ordinances—In general—The enforcement of void municipal ordinances may be restrained. Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445. See Note, 118 Am. St. Rep. 372.

Equity may enjoin public officers from taking action injurious to property rights under a void ordinance. Greene v. Mayor, 219 Mass. 121, 106 N. E. 573.

4483a. Enforcement of criminal statutes and ordinances—Criminal statutes and ordinances cannot be enforced by injunction. Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417.

4483b. Criminal prosecutions—It is well settled that a court of equity will not, by injunction, restrain the institution of criminal prosecutions, unless the prosecution involves some trespass upon property, or invasion of property rights, which will cause irreparable injury. In some extreme cases, where it is apparent that the maintenance of the prosecution may result in the destruction of property to the injury of the defendant, the fact that a criminal prosecution is involved in the proceeding will not, of itself, prevent a court of equity from granting relief. But in every case the probable, and, we think, direct, injury to the property must be

shown, entirely distinct from the proceedings to punish personally for the commission of the crime. Such cases are considered as exceptions to the general rule, and are based upon the theory that it would be inequitable to permit the infliction of irreparable injury pending judicial determination whether or not a crime had been committed, or that from the circumstances involved the property of the one prosecuted cannot be protected by the defence he may interpose to the accusation. Cobb v. French, 111 Minn. 429, 127 N. W. 415; Nelson v. Minneapolis, 112 Minn. 16, 18, 127 N. W. 445; Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131; Milton Dairy Co. v. Great Northern Ry. Co., 124 Minn. 239, 144 N. W. 764; Truax v. Raich, 239 U. S. 33. See Note, 21 L. R. A. (N. S.) 84; 25 Id. 193; 34 Id. 454; 23 Harv. L. Rev. 469; 27 Id. 668.

4486. Right to public office—(89) Schieffelin v. Komfort, 212 N. Y. 520, 106 N. E. 675. See 27 Harv. L. Rev. 684.

(90) See 25 Harv. L. Rev. 740 (injunction against claimant acquiring possession of office forcibly).

4488. Enforcement of unconstitutional state statutes—Powers of federal courts—A federal court with jurisdiction may enjoin the enforcement of a statute which deprives a carrier of a fair and reasonable compensation for services, or which imposes excessive fines or penalties for its violation and thereby deters or prevents the carrier from applying to the courts. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

(92) See Cobb v. French, 111 Minn. 429, 127 N. W. 415; Milton Dairy Co. v. Great Northern Ry. Co., 124 Minn. 239, 144 N. W. 764.

TEMPORARY INJUNCTIONS

4489. Nature and object—(93) Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66 (object to maintain the status quo until the action can be heard and determined on the merits). See State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951 (Laws 1913, c. 562, for the suppression of houses of prostitution, does not contemplate a determination of the rights of defendants to personal property used in the house, on application for a temporary injunction).

4490. When authorized—Discretionary—(95) Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66; Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787; Kelling v. Edwards, 116 Minn. 484, 134 N. W. 221; Dahlberg v. Lundgren, 118 Minn. 219, 136 N. W. 742; Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728; Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423; Velie v. Richardson, 126 Minn. 334, 148 N. W. 286; Potter v. Engler, 131 Minn. —, 153 N. W. 1088; Cornell v. Upper Michigan Land Co., 131 Minn. —, 155 N. W. 99.

4492. Basis of application—Affidavits—Complaint—Normally the facts justifying a temporary injunction are presented by affidavit. Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787.

Where the verified statements of fact submitted on a motion for a temporary injunction are conflicting, whether such statements are contained in affidavits or pleadings, the court may decide what facts are made to appear thereby, for the purpose of determining whether sufficient grounds exist for a temporary injunction. Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787.

(99) See National Council v. Ruder, 126 Minn. 154, 147 N. W. 959 (application based on the records, files and complaint).

4495. When equity denied—The rule that a temporary injunction will not issue if an answer is filed denying the equities of the complaint, would seem to have arisen where the practice prevailed of granting or dissolving temporary injunctions solely upon the bill and answer. The injunction thus depending on the pleadings, its issuance would be governed largely by rules of pleading. But where, by statute, the basis of the writ is an affidavit, the due issuance of the injunction depends on proof of facts. The complaint and answer, as pleadings, determine whether the action is one in which an injunction may issue; but the complaint and answer, like other verified statements, directly support or oppose the motion for the injunction as affidavits, not as pleadings. Therefore, in the allowance or disallowance of a temporary injunction in a proper case after answer, the controlling consideration is the sufficiency of the answer to negative the equities of the complaint as a matter of proof, rather than as a matter of pleading. Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787.

The rule that, when the equities of the complaint are fully and positively denied under oath by the answer, a temporary injunction should not be granted, is not an inflexible one, and does not apply where it appears probable that the material allegations of the complaint will on a final hearing turn out to be true. Cornell v. Upper Michigan Land Co., 131 Minn. —, 155 N. W. 99.

(3) Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787.

4496a. Order allowing—Validity—Held not a ground for reversing an order granting a temporary injunction restraining defendant from transferring certain notes given for deferred payments on land contracts that a past-due note was included in the operation of the injunction. Cornell v. Upper Michigan Land Co., 131 Minn. —, 155 N. W. 99.

4498. Dissolution on motion—(14) Twitchell v. Cummings, 128 Minn. 391, 151 N. W. 139. See Digest, § 4490.

4499. Bond—(18) Note, 16 L. R. A. (N. S.) 1.

4499a. Parties—An action to enjoin the removal of standing timber sold by the United States from certain lands, the title to which was in the United States, held not maintainable unless the United States became a party. Potter v. Engler, 131 Minn. —, 153 N. W. 1088.

PROCEDURE

4500. Pleading—In general—A general allegation of discrimination in the rates of a public service corporation is insufficient. The facts showing discrimination must be alleged. St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262.

(23) Tiedt v. Argyle, 129 Minn. 259, 152 N. W. 412.

(25) Bankers Reserve Life Co. v. Omberson, 123 Minn. 285, 143 N. W. 735.

(26) Cobb v. French, 111 Minn. 429, 127 N. W. 415.

4502. Cross-complaint—In a proper case a defendant may seek an injunction against the plaintiff by means of a cross-complaint. Pine Tree Lumber Co. v. McKinley, 83 Minn. 419, 86 N. W. 414.

4502a. Answer—The defendant has twenty days in which to answer. J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 124 N. W. 828.

4502b. Counterclaim—Trespass—Disputed boundaries—In an action to enjoin a trespass upon land of the plaintiff, the defendant may plead and prove as a counterclaim that the alleged claim of trespass rests upon a disputed boundary line between the parties, and have the true line determined by the court. Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131.

4502c. Burden of proof—One who seeks an injunction has the burden of presenting facts to justify its issuance. Freick v. Hinkly, 122 Minn. 24, 141 N. W. 1096.

4502d. Judgment—Relief allowable—In an action for an injunction against the obstruction of a private drain held improper to award specific performance of the defendant's parol agreement to construct a system of tile drainage upon his land in place of an existing system of open drainage. Schuette v. Sutter, 128 Minn. 150, 150 N. W. 622.

VIOLATION

4504. Punishment as for contempt—(31) State v. District Court, 113 Minn. 304, 129 N. W. 583 (defendant restrained from constructing a ditch and thereby lowering the waters of a meandered lake—held proper to require him to purge himself of contempt by filling up a ditch which he had constructed contrary to the injunction); Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383. See Simons v.

Munch, 127 Minn. 266, 149 N. W. 304 (injunction against interfering with natural flow of water in a river—evidence held not to show such interference); Digest, § 1703.

4505. Justification—That a person violating an injunction acted in good faith is no justification. State v. District Court, 113 Minn. 304, 129 N. W. 583.

Want of jurisdiction in the court issuing an injunction justifies one in refusing to obey it. An injunctional order made by the juvenile court of Minneapolis, forbidding the marriage of a girl of the age of fifteen years, without the written consent of her parents, held void and its disobedience not a contempt of court. State v. District Court, 118 Minn. 170, 136 N. W. 746.

Proceedings for civil contempt fall with the reversal of the order which was disobeyed. Red River Potato Growers Assn. v. Bernardy, 128 Minn. 153, 150 N. W. 383.

INNKEEPERS

4508. Who is a guest—(37) See 8 Col. L. Rev. 230.

4509. Refusal to entertain—Grounds for refusing to accept or serve one as a guest. Note, 52 L. R. A. (N. S.) 740.

4513. Liability for personal injuries—Liability for torts of servant committed for his own purposes. See Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 212, 127 N. W. 926.

(52) See 7 Col. L. Rev. 553.

INSANE PERSONS

IN GENERAL

4516. Presumptions—(57) Ledy v. National Council, 129 Minn. 137, 151 N. W. 905.

(58) See Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

4517. Evidence of insanity—A judgment in proceedings for the appointment of a guardian of an incompetent person is admissible in evidence, but not conclusive, in any litigation, to prove the mental condition of the person at the time the judgment is rendered, or at any past time during which the judgment finds the person incompetent. McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

The fact that a person commits suicide is not alone sufficient to establish insanity. Ledy v. National Council, 129 Minn. 137, 151 N. W. 905.

An adjudication of insanity and commitment to a public insane asylum

is evidence of insanity. Woodville v. Morrill, 130 Minn. 92, 153 N. W. **131.** See Knox v. Haug, 48 Minn. 58, 50 N. W. 934; Scnaps v. Lehner, **54 Minn.** 208, 211, 55 N. W. 911; Longbotham v. Longbotham, 119 **Minn.** 139, 137 N. W. 387.

CONTRACTS

4519. Mental capacity to contract—Evidence—(64) See Longbotham **v. Longbotham**, 119 Minn. 139, 137 N. W. 387; McAllister v. Rowland, **124 Minn.** 27, 144 N. W. 412.

4522. Executed contracts—When voidable—(68) See 14 Col. L. Rev. **674.**

COMMITMENT

4523. Procedure—On the examination it is proper for the court to ex**amine the** party on oath or otherwise with a view to determine his ment**al condition.** The statute providing for the examination of an adverse **party as** upon cross-examination is not applicable. The proceeding is **not adversary.** The manner of determining the facts rests largely in the **discretion** of the court, subject to the general principles of judicial pro**cedure.** See Prokosch v. Brust, 128 Minn. 324, 151 N. W. 130.

(75) Note, 43 Am. St. Rep. 531.

See §§ 4517, 4519.

4523a. Commitment after acquittal—Discharge—Petitioner was tried **in 1904** for crime, acquitted on the ground of insanity at the time the **act was** committed, and sentenced to be committed to a state hospital **for the** insane until legally discharged, under G. S. 1894, § 7344. Held, **that chapter** 358, Laws 1907 (G. S. 1913, § 9218), providing that a per**son so** acquitted and committed shall not be liberated, except upon the **order of** the court committing him and until the superintendent of the **hospital** shall certify in writing to the court that, in his opinion, such **person is** wholly recovered and that no person will be endangered by his **discharge,** is not retroactive, and does not apply to commitments made **prior to** its passage. Northfoss v. Welch, 116 Minn. 62, 133 N. W. 82.

Where a person committed to an insane hospital under G. S. 1894, § **7344 (G.** S. 1913, § 9218), recovers his sanity in fact and in the opinion **of the** superintendent of the hospital, he is entitled to be discharged **therefrom,** and his further detention is illegal. Where, in such a case, **the superintendent** refuses to discharge such person, habeas corpus is **a proper** remedy. Northfoss v. Welch, 116 Minn. 62, 133 N. W. 82.

GUARDIANS

4524. Appointment—Procedure—The proceeding is not adversary in **nature,** but rather one by the state in its character of parens patriae, and **the method** of determining the facts rests largely in the discretion of

the trial court, subject, in a general way, to the rules of ordinary judicial procedure. On the examination it is proper for the court to examine the party on oath or otherwise, with a view to determine his mental condition. The statute providing for the examination of an adverse party as upon cross-examination is not applicable. See Prokosch v. Brust, 128 Minn. 324, 151 N. W. 130.

(80) See Digest, § 4332.

4526a. Compromise of ward's claims—Fraud—An improvident and fraudulent settlement by a guardian of his ward's cause of action, though approved by the court in which the action is pending, may be vacated and set aside upon a showing of the facts, even though the defendant in the action be not affirmatively shown to have participated in the fraud. Dasich v. Le Rue Mining Co., 126 Minn. 194, 148 N. W. 45. See Note, 21 L. R. A. (N. S.) 338.

ACTIONS

4531. Service of process on insane persons—See Note, 130 Am. St. Rep. 841.

INSOLVENCY

PREFERENCES

4604. Voidable—Not void—How avoided—(56) Crookston State Bank v. Lee, 124 Minn. 112, 144 N. W. 433.

INSURANCE

IN GENERAL

4640. Definition and nature—A fire insurance policy is a mere personal contract of indemnity against a loss from fire by the insured. It does not attach to the property or go with it as an incident. Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates. General nature of insurance considered. German Alliance Ins. Co. v. Kansas, 233 U. S. 389. See 28 Harv. L. Rev. 84.

(21) What constitutes insurance. Note, 47 L. R. A. (N. S.) 290. See Physician's D. Co. v. Cooper, 188 Fed. 832.

(23, 24) German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

(25) Grigsby v. Russell, 222 U. S. 149; 24 Harv. L. Rev. 228.

4641. Insurable interest—The issuance of a policy is prima facie evidence that the insured has an insurable interest therein. Proof of loss is

not evidence of such interest. Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

A partnership has an insurable interest in the life of a partner. Whether a corporation has an insurable interest in the life of a stockholder is an open question. Rahders, Merritt & Hagler v. People's Bank, 113 Minn. 496, 130 N. W. 16.

Where a person procures insurance upon the life of another, it is the general rule that he must prove an insurable interest in such life in order to recover upon such policy; but, where a person insures his own life and appoints another to receive the proceeds of such insurance, the appointee establishes a prima facie right to recover by proving the contract of insurance and the happening of the event upon which it is to become payable. If facts exist which preclude such recovery, they are matters of defence. Christenson v. Madson, 127 Minn. 225, 149 N. W. 288.

One having a lien on property has an insurable interest therein. Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

(28) Rahders, Merritt & Hagler v. People's Bank, 113 Minn. 496, 130 N. W. 16; Grigsby v. Russell, 222 U. S. 149.

See Note, 104 Am. St. Rep. 988 (whether a husband has an insurable interest in his wife's property); 128 Am. St. Rep. 302.

4645. Recovery of premiums paid—(35) See National Council v. Garber, 131 Minn. —, 154 N. W. 512. See, § 4695.

4645a. Loans by insurer on policy—Evidence held to sustain a finding that the lowest value of a paid-up life insurance policy pledged to the insurer to secure the payment of a loan, was $1,986.25; held also that the pledge agreement stipulating that, in case of default in the payment of the loan, the policy might be canceled or forfeited by the pledgee for a sum more than $500 less than such value is invalid, and a cancelation attempted under such agreement is ineffective. When such abortive cancelation is attempted but not ratified, the insured is not limited to an action as for conversion, but has the option to proceed on the assumption that the policy is in full force and effect. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

THE CONTRACT

4646. The policy the contract—Attaching application—(36) Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081 (contents of application to be attached—the statute refers to statements made by an applicant relating to his history, habits or health, of the character usually asked, answered, put in writing, and signed by an applicant for insurance, whether made fraudulently or honestly).

4646a. Consideration—The premiums paid by the insured constitute the consideration on his part, and the risk of incurring liability assumed by the insurer constitutes the consideration on his part. National Council v. Garber, 131 Minn. —, 154 N. W. 512.

4647. Oral contracts—(42) Megaarden v. Hartman Furniture & Carpet Co., 114 Minn. 224, 130 N. W. 1027; Reiter v. National Council, 131 Minn. —, 154 N. W. 665. See § 4822.

4649. Parties—Misnomer—Where a policy was issued to a partnership which subsequently dissolved, and the members formed a corporation and continued the business, and thereafter the policy was renewed in the name of the firm, the misnomer was held not to defeat a recovery by the corporation on the policy for a subsequent loss. Lenning v. Retail Merchants Mutual Fire Ins. Co., 129 Minn. 66, 151 N. W. 425.

4654. Delivery of policy—Delivery to an agent of the insurer is generally a delivery to the applicant. It is immaterial that the agent receiving the delivery is not the agent who procured the application. Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 N. W. 861. See 25 Harv. L. Rev. 292.

If an answer admits the execution of the policy it is immaterial that the evidence does not show a delivery. Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

A finding of delivery sustained. Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

(51) Gardner v. United Surety Co., 110 Minn. 291, 125 N. W. 264. See Note, 138 Am. St. Rep. 29.

4656. Ordinance as part of contract—(57) See Oppenheim v. Fireman's Fund Ins. Co., 119 Minn. 417, 138 N. W. 777.

4659. Construction—Recognition needs be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present-day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281.

In case of doubt the preliminary negotiations of the parties may be resorted to for the purpose of ascertaining the meaning of the language used. Mather v. London Guarantee & Accident Co., 125 Minn. 186, 145 N. W. 963.

(60) George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12; Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 83, 131 N. W. 1067; Cook v. Modern Brotherhood, 114 Minn. 299, 131

N. W. 334; Rudd v. Great Eastern Casualty & Indemnity Co., 114 Minn. 512, 131 N. W. 633; Patterson v. Adan, 119 Minn. 308, 138 N. W. 281; Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395; Mather v. London Guarantee & Accident Co., 125 Minn. 186, 145 N. W. 963; Geronime v. German Roman Catholic Aid Assn., 127 Minn. 247, 149 N. W. 291.

(66) George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12; Mady v. Switchmen's Union, 116 Minn. 147, 133 N. W. 472; Geronime v. German Roman Catholic Aid Assn., 127 Minn. 247, 149 N. W. 291.

WARRANTIES AND REPRESENTATIONS

4663. Definitions and distinctions—(76) Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218.

4664. Representations basis of contract—(78) O'Connor v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454.

4665. Statutory regulation—Under Laws 1907, c. 220, 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. Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218.

(79) Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081 (what statements are to be attached).

4666. Test of materiality—(83) See Gruber v. German Roman Catholic Aid Society, 113 Minn. 340, 129 N. W. 581.

4669. Representations as to health—(87) Gruber v. German Roman Catholic Aid Society, 113 Minn. 340, 129 N. W. 581.

4670. Concealment—Incomplete answers—(89) O'Connor v. Modern Woodman, 110 Minn. 18, 124 N. W. 454.

4673. Effect of misrepresentation—(92) Silverstein v. Knights and Ladies of Security, 129 Minn. 340, 152 N. W. 724.

4674. Effect of various representations—Whether there was any false warranty in stating that a building was a private residence, held a question for the jury. Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622.

Representations as to having submitted to surgical operations. Silverstein v. Knights & Ladies of Security, 129 Minn. 340, 152 N. W. 724.

(6) Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081.

(8) Marcus v. National Council, 123 Minn. 145, 143 N. W. 265; Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404.

(96) O'Connor v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454.

(98) Gruber v. German Roman Catholic Aid Society, 113 Minn. 340, 129 N. W. 581; Silverstein v. Knights & Ladies of Security, 129 Minn. 340, 152 N. W. 724.

WAIVER, ESTOPPEL AND ELECTION

4675. Definitions and distinctions—(9) Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946; Coppoletti v. Citizens Ins. Co., 123 Minn. 325, 143 N. W. 787. See Bemis v. Pacific Casualty Co., 125 Minn. 54, 58, 145 N. W. 622 (distinction between a waiver and an estoppel pointed out).

4676. Waiver—What constitutes—In general—(11) Mann v. Employers Liability Assurance Corp., 123 Minn. 305, 143 N. W. 794; Coppoletti v. Citizens Ins. Co., 123 Minn. 325, 143 N. W. 787; Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650. See Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 58, 145 N. W. 622 (facts held not to constitute a waiver—distinction between a waiver and an estoppel pointed out).

4677. Stipulations against waiver—A provision in the by-laws of a benefit society against a waiver by any subordinate council or officer of the society held invalid. Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728.

There may be a waiver under a statutory form of policy. Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

See Note, 13 L. R. A. (N. S.) 827; 107 Am. St. Rep. 99.

4680. Silence or non-action—(17) Note, 25 L. R. A. (N. S.) 1.

4683. Failure to return premiums, assessments, etc.—(22) See Johnson v. Retail Merchants Mutual Fire Ins. Co., 112 Minn. 418, 128 N. W. 462; Digest, § 4841.

4684. Acceptance of premiums, etc.—(25) James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582. See Davis v. National Casualty Co., 115 Minn. 125, 131 N. W. 1013 (waiver of objection that contract was ultra vires by receiving and retaining benefits).

4686. Conduct after forfeiture—The indorsement on the policy by the company of a gasolene permit and the sending out of a statement of the premium due, together with a letter demanding immediate settlement, did not necessarily constitute a waiver of the default occasioned by the non-payment of the premium. Johnson v. Retail Merchants Mutual Fire Ins. Co., 112 Minn. 418, 128 N. W. 462.

(27) Coppoletti v. Citizens Ins. Co., 123 Minn. 325, 143 N. W. 787; Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

4686a. By denial of liability—A denial by the insured of liability under a fire policy is a waiver of the condition making arbitration a condition precedent to an action to recover a loss. Butler Bros. v. American Fidelity Co., 120 Minn. 157, 167, 139 N. W. 355.

An absolute denial of liability and a refusal to pay are a waiver of a default or delay in giving notice or making proof of injury or loss. Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395; Johnson v. Bankers Mutual Casualty Ins. Co., 129 Minn. 18, 151 N. W. 413. See Digest, § 4733.

ASSIGNMENT OF POLICY

4692. Fire policy—An assignment of a claim for damages to personal property by fire to the plaintiffs, who, as insurers of the said property, paid the loss to the owners, held not based upon the policy pursuant to which such payment was made, and hence not affected by any illegality which may have existed in the policy. Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275.

4693. Life policy—An insurance contract, which has been issued and carried in good faith upon the life of a partner may be assigned by the firm to a corporation organized for the purpose of succeeding to the business of the firm. An assignment by the beneficiary of a life policy may be made by parol, no objection being interposed by the insurer. Rahders, Merritt & Hagler v. People's Bank, 113 Minn. 496, 130 N. W. 16.

(42) Rahders, Merritt & Hagler v. People's Bank, 113 Minn. 496, 130 N. W. 16.

See Note, 87 Am. St. Rep. 484; 3 L. R. A. (N. S.) 935.

CANCELATION AND RESCISSION

4694. When cancelation authorized—Necessity of notice to insured. Note, 50 L. R. A. (N. S.) 35.

4695. Return of premiums on cancelation—If the contract went into effect, whereby the risk attached, the insurer is entitled to premiums for the period the contract was in force. If the contract never went into effect and for that reason the insurer ran no risk of incurring liability, he is not entitled to retain the premiums unless intentional fraud on the part of the insured was what prevented the contract going into effect. If the contract is rendered void by intentional fraud on the part of the insured, he is not entitled to a return of the premiums. Where the insurer brings an action to cancel the contract as void ab initio for the rea-

son that a warranty made by the insured is false, and in such action the insured shows that he made the warranty in good faith without intent to defraud, the court may require the return of the premiums as a condition to the cancelation of the contract. Plaintiff brought this action to have the contract of insurance declared annulled, and the trial court ordered judgment declaring it annulled on condition that plaintiff return the premiums. The findings of fact show that defendant became a member of the society in 1906, and was lawfully expelled therefrom and his contract thereby annulled in 1910. So far as the findings disclose, the contract was in force until such expulsion, and consequently it was error to require a return of the premiums theretofore paid. National Council v. Garber, 131 Minn. 46, 154 N. W. 512.

4696a. Wrongful cancelation—Election of remedies—Where an insurance policy is wrongfully canceled by the company, the insured has an election to proceed as for conversion or upon the policy as if it were in full force. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

REINSURANCE

4697. Nature—(55) Allemania Fire Ins. Co. v. Firemen's Ins. Co., 209 U. S. 326. See Austin v. National Casualty Co., 125 Minn. 390, 147 N. W. 281 (contract to obtain a consolidation of insurance companies and reinsurance); § 4722a.

See Note, 8 L. R. A. (N. S.) 844; 44 Id. 317; 45 Am. St. Rep. 442; 28 Harv. L. Rev. 302, 522.

INSURANCE AGENTS AND BROKERS

4701. Brokers—An agreement by defendant to procure insurance for plaintiff held to constitute defendant a real estate broker. Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148.

(59) Note, 38 L. R. A. (N. S.) 614.

(61) See Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148 (evidence held to show contract to insure—authority and duty of broker where building not yet rated—duty to have it rated—reasonable diligence—instructions as to duties and liabilities of broker erroneous and prejudicial).

4704. Authority—In general—By virtue of statute an insurance agent is the agent of the insurer for the purpose of collecting or securing the premiums, regardless of the contract or policy. G. S. 1913, § 3607; Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

A finding that the local agent of defendant, a life insurance company, employed by it to solicit written applications for insurance, had neither express nor apparent authority to conclude an oral insurance contract to be in force until the application obtained by him had been passed upon

by defendant, held justified by the evidence. Hertz v. Security Mut. Ins. Co., 131 Minn. —, 154 N. W. 745.

(68) Hertz v. Security Mut. Ins. Co., 131 Minn. —, 154 N. W. 745.

4708. Fact of agency—Sufficiency of evidence—(81) Wondra v. National Life Ins. Co., 126 Minn. 136, 147 N. W. 961.

4709. Notice to agent notice to company—Knowledge of an agent of an insurance company, through whom the insurance is effected, of the actual situation of the property to be insured, is the knowledge of the company, and estops it from asserting that the property so situated is not insured. Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622.

(83) Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622.

4715. Agency contract—Sale of company—Action for damages—(94) Israel v. N. W. Nat. Life Ins. Co., 111 Minn. 404, 127 N. W. 187. See 5 Mich. L. Rev. 133.

4717. Preparing applications—(96) Norman v. Kelso Farmers Mutual Fire Ins. Co., 114 Minn. 49, 130 N. W. 13; Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622.

(98) Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850.

4717a. Contracts to procure insurance—Breach—An action held to be one for breach of contract to procure insurance and not for negligence. Verdict for plaintiff on the theory of negligence erroneous. Gardner v. Hermann, 116 Minn. 161, 133 N. W. 558.

Action for breach of contract to procure insurance. Evidence held to show a contract. Authority and duty of agent under contract defined. Building not yet rated. Duty of agent to have it rated. Instructions as to duty of agent in the premises held erroneous and prejudicial. Evidence held sufficient to take the case to the jury as to the performance of the contract by the agent. Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148.

INSURANCE COMPANIES

4721. Ultra vires contracts—(8) Davis v. National Casualty Co., 115 Minn. 125, 131 N. W. 1013.

4722a. Consolidation and reinsurance—Provision is made by statute for the approval by a commission of a plan for the consolidation of companies doing certain kinds of business and for reinsurance. The failure to secure such approval of a plan has been held to defeat the right of a party to compensation under a contract to secure a consolidation and reinsurance. G. S. 1913, §§ 3516–3521; Austin v. National Casualty Co., 125 Minn. 390, 147 N. W. 281.

FOREIGN INSURANCE COMPANIES

4725. Service of process—A written admission of service of process issued against a foreign insurance company, by the state insurance commissioner, upon whom in such cases service may be made under the statute, confers jurisdiction on the court. The provisions of the statute requiring the insurance commissioner to forward copies of any processes served upon him to the corporation at its home office is no part of the service, but a mere duty imposed by the statute upon the insurance commissioner after service has been made upon him. The manner of service of process on foreign fraternal benefit associations, prescribed by Laws 1907, c. 345, § 19, is applicable to mandamus proceedings and valid. State v. Brotherhood of American Yeomen, 111 Minn. 39, 126 N. W. 404.

The provisions of chapter 155, Laws 1907, which require foreign insurance companies doing business in this state to appoint the insurance commissioner as their lawful attorney, upon whom legal process may be served, apply to an action brought by the state to collect taxes claimed to be due under chapter 420, Laws 1907. In an action to recover from a foreign insurance company the amount of the tax claimed to be due under the retaliation law (chapter 420, Laws 1907), the state is the real party in interest, and the insurance commissioner is not, by virtue of his official position, incapacitated from representing the corporation for the purpose of accepting service. The requirement of the statute that foreign insurance companies shall appoint the insurance commissioner as their attorney, with power to accept service of legal process, is not in contravention of the federal constitution. State v. Queen City Fire Ins. Co., 114 Minn. 471, 131 N. W. 628.

See § 7814a.

INSOLVENT COMPANIES

4730. Mutual companies—Assessment of members—A judgment of another court assessed policy holders in a mutual insurance company, and provided that the receiver should bring suit to recover the assessments unpaid when thirty days after notice had expired. Held, that the provisions requiring notice and giving time thereafter for payment without suit were merely steps in the remedy and no part of the cause of action. It appearing conclusively from the complaints that these actions were commenced more than six years after the judgment in question was rendered, it appears conclusively that the actions are barred by the statute of limitations, and demurrers were properly sustained. Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 131 N. W. 855.

A decree that an "assessment shall be made" against all policy holders, which determines the unpaid liabilities according to their accrual by quarterly periods, and fixes the percentage of assessment against every

policy in force during the respective periods, is an assessment, and not an order for an assessment. Defendant was liable to assessment on only one policy. The notice stated separately and correctly the amount for which he was liable on this policy, except that it did not give him credit for payments made. It erroneously stated that he was liable to assessment on other policies, and demanded payment for an aggregate sum which was largely excessive. There was nothing to indicate that defendant was prejudiced or misled, and the notice was not for this reason void. A notice which requires payment in a shorter time than the decree provides is not for that reason void, where a copy of the decree accompanies the notice. The notice of assessment was given by registered mail. This complied with the provision of the decree requiring "due notice." It also complied with the by-laws of the company. There was no proof of any statute of Ohio bearing on this question. The manner of giving notice was sufficient. The by-laws of the company provide that no member shall be liable, except to the extent of his deposit note. Defendant's note was $687.50. It had paid $302.50 before the assessment by the court. The court made an assessment of 86.0003 per cent. of the face of the note. If no credit is given for payments made, defendant's assessment will far exceed its liability. Held, defendant is entitled to credit on the assessment for the amount paid. Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N. W. 117.

4731. Action for assessment—Complaint—A complaint for an assessment held demurrable because it showed on its face that the action was barred by the statute of limitations. Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 131 N. W. 855.

ACTIONS

4732. Limitation of actions—An action on a benefit certificate, brought more than six years after it might have been brought, held not barred, the division secretary of the society having failed to make proof of death as required by the constitution and by-laws of the society. Kelly v. Ancient Order, 113 Minn. 355, 129 N. W. 846. See 24 Harv. L. Rev. 676.

Contract stipulations limiting the time within which an action may be brought thereon, when not unreasonable, are valid, though the period fixed be at variance with the statutory limitations. Where, in an insurance contract, such a stipulation is coupled with a further provision by which, after the loss occurs, the right to commence the action is suspended for an indefinite period, the duration of which depends upon some action to be taken by the insurance company, and over which the insured has no control, the limitation period commences to run from the time the suspension of the right to sue has terminated. Stewart v. National Council, 125 Minn. 512, 147 N. W. 651.

A beneficiary certificate provided that no action upon it should be

brought until proofs of death and of claimant's claim have been filed and passed upon by the executive committee of the order, nor unless brought within one year from the date of such action by the committee. Where the wrongful act of defendant dispenses with such proofs and there is accordingly no action by the committee, the contract provision has no application. Denial of liability in a pleading in a former action did not operate to set the contract limitation in motion. Dechter v. National Council, 130 Minn. 329, 153 N. W. 742.

(43) Ruder v. National Council, 124 Minn. 431, 145 N. W. 118 (G. S. 1913, § 3544, inapplicable to actions on benefit certificate issued before its enactment—by-law limiting time of action not binding).

4733. Time before action may be brought after loss—(44) Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395 (defendant being under obligation to make monthly payments of indemnity and having waived formal notice of the injury or proof of disability, held that the action was not prematurely brought, notwithstanding a provision of the policy that no action could be commenced thereon until after the proofs have been furnished); Wondra v. National Life Ins. Co., 126 Minn. 136, 147 N. W. 961 (denial of liability by the insurer held a waiver of the provision); Dechter v. National Council, 130 Minn. 329, 153 N. W. 742 (id.).

4735. Complaint—An allegation that a policy was executed imports its delivery. Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

(55) See Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

(65) Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524 (complaint on fire policy sustained—other insurance); Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250 (in a complaint on a life policy matured by the death of the insured it is not necessary to plead or prove payment or tender of a loan as security for which the policy was pledged to the insurer—all such indebtedness may be interposed by the insurer as a counterclaim or setoff—allegations in reference to agreed surrender value and the actual value of the policy held to present questions of fact).

See Digest, § 4853.

4736. Answer—New matter—Facts giving rise to an estoppel in pais need not be specially pleaded. Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622.

See Dunnell, Minn. Pl. 2 ed. § 685.

4737. Issues—Variance—(72) James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582 (waiver of strict compliance with policy as to prompt payment of premiums not in issue under pleadings but litigated by consent).

4738. Burden of proof—Burden of proof as to delivery of policy and insurable interest. See Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

Burden of proving non-payment of premium held on the insurer. James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582.

Burden of proving that a misrepresentation was material, and increased the risk, and was made to deceive and defraud, held on the insurer. Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218.

In an action on an accident policy the burden of proving intoxication of the insured at the time of the accident held on the insurer. Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180.

(78) Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1.

(82) Ibs v. Hartford Life Ins. Co., 119 Minn. 113, 137 N. W. 289; Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404.

4740. Law and fact—Whether an alleged injury was visible held a question of fact for the jury. Peterson v. Locomotive Engineers etc. Assn., 123 Minn. 505, 144 N. W. 160.

Whether there was a false warranty in stating that a building was a private residence held a question for the jury. Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622.

Whether the first premium is paid and the policy delivered to and received by the insured are questions for the jury, unless the evidence is conclusive. Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

Whether an application failed to disclose a prior serious or permanent illness held a question for the jury. Gruber v. German Roman Catholic Aid Society, 113 Minn. 340, 129 N. W. 581.

Whether death was caused by accidental means, whether there appeared on the body of the insured external evidence of the injury, whether he paid the last premium when due, whether there had been a waiver as to the time of paying a premium, held questions for the jury. James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582.

Whether the insured was drunk when run over and killed by a train held a question for the jury. Hegna v. Modern Brotherhood, 118 Minn. 368, 136 N. W. 1035.

Whether the insured came to her death from injuries caused by the burning of a building while she was therein held a question for the jury. Kleis v. Travelers Ins. Co., 118 Minn. 422, 136 N. W. 1101.

(88, 94) Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218.

4741. Evidence—Admissibility—(98) Ruder v. National Council, 124 Minn. 431, 145 N. W. 118 (proof of mailing of dues—presumption of receipt of letter duly mailed); Kulberg v. Supreme Ruling, 126 Minn. 494,

148 N. W. 299 (benefit certificate); Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180 (issue as to intoxication of insured at time of accident—evidence tending to cast doubt on defendant's theory of intoxication).

(99) Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081 (statements made by the applicant in a writing, a copy of which was not indorsed on or attached to the policy—affidavit of undertaker—affidavit of physician); Peterson v. Prudential Ins. Co., 115 Minn. 232, 132 N. W. 277 (opinion of a witness as to the sanity of the insured); James v. Merchants Life & Casualty Co., 118 Minn. 146, 132 N. W. 582 (action on accident policy—drinking habits of insured); Ruder v. National Council, 124 Minn. 431, 145 N. W. 118 (declarations of deceased to effect that he did not intend to pay assessments in future); Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806 (by-law—printed copy offered in evidence not properly authenticated—no offer to prove that by-law was in force at a time when it could be material); Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. —, 154 N. W. 515 (prior conversations and negotiations between soliciting agents and insured); Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806 (by-law not properly authenticated and no offer to prove that it was in force at a time when it could be material to the issues involved).

4741a. Evidence—Sufficiency—Death of insured—The evidence of the disappearance of the insured, of his continued absence for more than seven years, and of the inquiry and search for him was such that it sustains the finding of the jury that he was dead. Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806.

Evidence held to justify a verdict for plaintiff on a hail insurance policy. Johnson v. Minn. Farmers Mutual Ins. Co., 128 Minn. 1, 150 N. W. 174.

MUTUAL INSURANCE

4753. Assessments—Where a life insurance company has in its possession or under its control money belonging to the insured, and which the policy provides shall be applied in reduction of dues and assessments, before the company can be heard to declare a forfeiture for the non-payment of dues, it must account for and so apply such money. In an action upon an insurance policy, it is held that a prima facie valid excuse for an apparent default in the payment of certain dues and assessments was shown by the evidence, and that the court erred in dismissing the action at the close of plaintiff's case. Ibs v. Hartford Life Ins. Co., 119 Minn. 113, 137 N. W. 289.

In an action on an assessment it is a good defence that the defendant was induced to make application for the insurance by the fraudulent representations of the agent of the company. Minnesota Farmers Mu-

tual Ins. Co. v. Djonne, 127 Minn. 274, 149 N. W. 371 (findings of fraud sustained).

(17) Minnesota Farmers Mutual Ins. Co. v. Landkammer, 126 Minn. 245, 148 N. W. 305.

See Digest, § 4730.

4756. Wrongful cancelation of policy—Damages—(22) See 8 Col. L. Rev. 230.

FIRE INSURANCE

IN GENERAL

4759. The standard policy—(26) Oppenheim v. Fireman's Fund Ins. Co., 119 Minn. 417, 138 N. W. 777.

4760a. Coinsurance—Concurrent insurance—Definitions—There is a wide distinction between "coinsurance" and "concurrent insurance." The latter term has been used from time immemorial to designate insurance placed in other companies covering the same risk. The standard policy permits concurrent insurance, and it was permitted in the policy in this case. We venture to say that it is rare indeed that there is not concurrent insurance whenever the risk is a large one. Coinsurance, on the other hand, is a creature of modern invention, at least in this state. When the standard policy law was enacted, and for a long time thereafter, it was expressly provided that there should be no coinsurance or other clause in the policy which would reduce the amount payable to the insured in the event of loss to less than the amount of the loss, so long as there was insurance to cover the same. In 1903 a coinsurance clause was permitted at the option of the insured, where the total insurance was not less than $25,000 on one risk. Since then, while there has always been in the insurance laws a provision forbidding the insertion in a policy of a condition limiting the amount to be paid in case of a total loss on buildings to less than the amount of insurance on the same, a coinsurance clause has been permitted. It is clearly the settled policy of the state to avoid controversy over the amount of a loss in case of a total loss on buildings. To adopt the rule contended for by the defendant would be to create this controversy in every case where the risk was over $20,000, and the coinsurance clause was attached, no matter whether the actual insurance maintained was under or over the amount which by the terms of the coinsurance clause the insured is required to carry. We hold that there is no "coinsurance" where the insured does not bear a proportion of the risk himself. When he procures concurrent insurance, and the total amount of all the policies on the property is equal to or greater than the amount which the insured agrees to carry, there is no coinsurance, and the insurable value stated in the policy is the only basis for determining the amount to be paid in case of a total

loss on buildings. Oppenheim v. Fireman's Fund Ins. Co., 119 Minn. 417, 138 N. W. 777. See Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. —, 154 N. W. 515.

The law looks with disfavor on provisions for coinsurance. Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. —, 154 N. W. 515.

THE INSURED PROPERTY

4761. Description—(31, 32, 36) See Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. —, 154 N. W. 515.

(40) Park Rapids Lumber Co. v. Aetna Ins. Co., 129 Minn. 328, 152 N. W. 732 (lumber-yards connected with a sawmill).

CONDITIONS

4763. Clear space—A "clear space" clause in a policy may be considered in determining what property was covered by the policy. Park Rapids Lumber Co. v. Aetna Ins. Co., 129 Minn. 328, 152 N. W. 732.

4766. Other insurance—(50) See 6 Mich. L. Rev. 178.

(52) Coppoletti v. Citizens Ins. Co., 123 Minn. 325, 143 N. W. 787 (procuring additional insurance, unless consented to, ipso facto avoids the policy, and the mere failure to cancel the policy after knowledge of such insurance does not justify an inference that the insurer has elected to continue the policy in force).

(57) Coppoletti v. Citizens Ins. Co., 123 Minn. 325, 143 N. W. 787.

4768. Vacancy—A mere temporary absence of the occupants of a dwelling house, with the intention to return, does not render the house "vacant," if the premises are left in their usual condition. Kampen v. Farmers Mutual Fire Ins. Co., 116 Minn. 68, 133 N. W. 163.

4769. Increased risk—See Note, 66 Am. St. Rep. 691.

4775. Title of insured—On an issue as to the title to the insured property, the question being whether plaintiffs had purchased from the interveners, prior to its execution, the personal property described in a certain lease of realty, held that the jury was authorized by the instructions to take the lease into consideration in determining that question. Fink v. United American Fire Ins. Co., 114 Minn. 177, 130 N. W. 944.

4778. Fraud and false swearing—(10) Hodge v. Franklin Ins. Co., 111 Minn. 321, 126 N. W. 1098.

LOSS

4780. Total loss—(13) Oppenheim v. Fireman's Fund Ins. Co., 119 Minn. 417, 138 N. W. 777.

4781. When loss "direct result" of fire—See 10 Col. L. Rev. 58; 24 Harv. L. Rev. 119; Note, 36 Am. St. Rep. 852; 133 Id. 1087.

4781a. Amount—Evidence—There was evidence tending to show a depreciation in value of the insured property between the date of purchase and the time of the fire. Plaintiff claimed that there was no such depreciation, and tendered evidence of the amount of the loss upon that basis. Held, that the evidence was competent, and the admission thereof was not error. If there was, in fact, a depreciation in value, defendants had the right to a submission of the question to the jury for consideration in determining the amount of plaintiff's loss; but no request to so submit the question was made. There was therefore no error upon the issue of the measure of plaintiff's recovery. Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650.

4781b. Removal of damaged goods—Plaintiff did not forfeit its rights under the policies by removing and disposing of the damaged goods, having first given defendants a reasonable opportunity to examine the same, of which opportunity advantage was taken by them. Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650.

NOTICE AND PROOF OF LOSS

4782. Condition precedent—Substantial compliance—Proofs of loss are not evidence for the insured that he had an insurable interest in the property at the time of the loss, but are evidence, if sufficient in form and substance, to show compliance with the clause of the policy requiring such proofs. Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

4787. Time of furnishing—(23) See 24 Harv. L. Rev. 580 ("immediate notice").

(24) Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524.

(27) See Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

4789. Waiver—An absolute denial of liability and a refusal to pay are a waiver of a default or delay in making proof of loss. See Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395; § 4686a.

ADJUSTMENT OF LOSS

4791. Effect—(44) See Shanahan v. Rochester German Ins. Co., 126 Minn. 373, 148 N. W. 269 (action held based on compromise and settlement and not on policy—evidence held to justify finding of compromise and settlement).

ARBITRATION

4793. Condition precedent to action—Waiver—If the actual loss is proved to be greater than the amount of the insurance, a reference to

arbitrators is not a condition precedent to recovery; but if the actual loss is less than the amount of the insurance, such reference is a condition precedent to recovery. Oppenheim v. Fireman's Fund Ins. Co., 119 Minn. 417, 138 N. W. 777.

(46) See Stewart v. National Council, 125 Minn. 512, 147 N. W. 651; Note, 47 L. R. A. (N. S.) 337.

(49) Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 162 (an absolute denial of liability upon receipt of proofs of loss is a waiver); Butler Bros. v. American Fidelity Co., 120 Minn. 157, 167, 139 N. W. 355; Beyer v. Minn. Farmers Mut. Ins. Co., 125 Minn. 518, 145 N. W. 376 (by proceeding to rebuild damaged building, defendant waived the clause in the policy providing for arbitration of the amount of loss—in action for damages for failure to replace the building in as good condition as before the loss, the clause in respect to arbitration has no application); Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650.

See Note, 15 L. R. A. (N. S.) 1055.

4794. Board of referees—Competency—Practice—The selection of the third referee by the two chosen by the insured and the insurer need not be in writing. He may be selected before the other two have qualified. The fact that the two referees, after orally agreeing upon and selecting the third referee, agreed to sign thereafter a writing naming the referee so selected, does not show that the oral selection was not intended to be final. Astell v. American Central Ins. Co., 114 Minn. 206, 130 N. W. 1002.

Where an insurance policy contains the provision as to appraising losses thereunder required by chapter 421, Laws of 1913 (G. S. 1913, § 3318), and an appraisal is initiated pursuant thereto, if one party refuses to recognize the appraiser appointed by the other upon the ground that he is incompetent, the burden is upon such party to show that such appraiser is in fact incompetent. The parties are entitled to be heard and to present evidence as in common-law arbitrations, and the competency of the appraisers is to be determined by the rules applied in determining the competency of common-law arbitrators. While it is desirable that appraisers be familiar with the matters and things which they are called upon to appraise, the mere fact that they are not experts in the line of business to which such matters pertain is not alone and in itself sufficient to sustain a charge of incompetency. American Central Ins. Co. v. District Court, 125 Minn. 374, 147 N. W. 242. See Note, 52 L. R. A. (N. S.) 497.

(51) See Note, 47 L. R. A. (N. S.) 1191.

4797. Setting aside award—An award cannot be vacated for mere inadequacy, but an award may be so grossly inadequate as to justify a

jury in finding fraud invalidating it. Baldinger v. Camden Fire Ins. Co., 121 Minn. 160, 141 N. W. 104.

(60) Baldinger v. Camden Fire Ins. Co., 121 Minn. 160, 141 N. W. 104.

4799. Refusal of referee to act—(66) Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650.

PAYMENT OF LOSS

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 it cannot be taken from him and given to a mortgagee or other lienor on any doctrine of equitable conversion. Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

4803. Amount—Valued policy—It is only where a loss on buildings is total that the insurable value as stated in the policy forms the basis of determining the amount of a recovery. Where the loss is partial, the insured is entitled to recover the actual amount of his loss, and this cannot be based on the insurable value. Where the coinsurance clause permitted by R. L. 1905, § 1642, as amended by Laws 1907, c. 446 (G. S. 1913, § 3322), is attached to a policy of fire insurance, and the insured maintains insurance on the building to the amount which he is by such clause required to carry, in case of a total loss the insurable value as stated in the policy, and not the actual value at the time of the fire, is the basis of determining the amount of recovery on the policy. Oppenheim v. Fireman's Fund Ins. Co., 119 Minn. 417, 138 N. W. 777.

A verdict held not excessive. Baldinger v. Camden Fire Ins. Co., 121 Minn. 160, 141 N. W. 104.

4804a. Right of replacement—Waiver—Certain policies covered a stock of goods, clothing, and men's furnishing goods. Held, that if the insurance companies had the right to replace the damaged stock, they should have promptly given notice of an intention to replace, and that, by failing to give the same and demanding an appraisement of the loss, the right of replacement, if it existed at all, was waived. Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650.

LIFE INSURANCE

4809. Condition as to health—Sound health—(83) See 7 Mich. L. Rev. 437.

4810. Death in violating law—(84) Note, 60 Am. St. Rep. 160.

4811. Suicide of insured—The insured is presumed to have been sane. The fact that he committed suicide is not, in itself, sufficient to establish insanity. Ledy v. National Council, 129 Minn. 137, 151 N. W. 905.

(85) Note, 84 Am. St. Rep. 539.

(88) O'Connor v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454; Peterson v. Prudential Ins. Co., 115 Minn. 232, 132 N. W. 277; Meyer v. Travelers Ins. Co., 130 Minn. 242, 153 N. W. 523.

(89) Peterson v. Prudential Ins. Co., 115 Minn. 232, 132 N. W. 277; Meyer v. Travelers Ins. Co., 130 Minn. 242, 153 N. W. 523.

4812. To whom payable—See Note, 44 Am. St. Rep. 404 (effect of policy payable to "heirs").

4813. Rights of beneficiaries—When vested—Under R. L. 1905, §§ 1691, 1692 (G. S. 1913, §§ 3465, 3466), a bankrupt holding a policy payable to his wife cannot be required to pay the surrender value of the policy to the trustee in bankruptcy, though the policy reserves to him the right to change the beneficiary. In re Johnson, 176 Fed. 591.

4815. Proof of death—(5) See 3 Mich. L. Rev. 77.

See Note, 137 Am. St. Rep. 718.

4816. Payment of premiums—Notes—The issuance and delivery of a policy of life insurance is a sufficient consideration for a note previously given for the first premium on such a policy. A clause in such a note, giving the "privilege of increasing or decreasing insurance on first payment," gives to the maker an option, and if he desires to avail himself of it the obligation is upon him to so signify. Evidence of a contemporaneous oral agreement that, before writing the policy, the payee should inquire whether defendant desired to exercise the option, varies the written agreement, and is not admissible. Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870.

A breach or violation of the terms of the policy by the insured which will relieve the insurer from liability thereunder will also relieve the insured from further liability for premiums to become due thereafter. Poe v. Cameron, 130 Minn. 15, 153 N. W. 129.

MUTUAL BENEFIT INSURANCE

4817a. Nature—Insurance companies—Mutual benefit societies are generally, in part, insurance companies and their certificates are insurance contracts. Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120.

4818. Constitution and by-laws constitute contract—Change—G. S. 1913, § 3544, does not change the rule that a by-law which unreasonably changes the contract of insurance is void as to members taking out a

certificate prior to its enactment. Ledy v. National Council, 129 Minn. 137, 151 N. W. 905.

It is provided by statute that, the certificate, the constitution and laws of the association and the application for membership and medical examination, signed by the applicant, shall constitute the contract between the association and the member. Dechter v. National Council, 130 Minn. 329, 153 N. W. 742.

A by-law restricting the class of beneficiaries may be waived. It should be liberally construed against the society. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

(21) Rosenstein v. Court of Honor, 122 Minn. 310, 142 N. W. 331 (a by-law limiting the time within which suit might be brought held unreasonable and void as to certificates issued prior to its enactment); Ruder v. National Council, 124 Minn. 431, 145 N. W. 118 (by-law changing the time for bringing an action on a certificate held not binding on a prior certificate holder or his beneficiary); Ledy v. National Council, 129 Minn. 137, 151 N. W. 905 (a by-law providing that if the insured committed suicide, sane or insane, within two years, the society should be liable for only one-fifth the amount of the certificate, held binding though it extended the period during which it should remain in force). See Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806; Note, 1 L. R. A. (N. S.) 1065; 83 Am. St. Rep. 706; 6 Mich. L. Rev. 179; 17 Harv. L. Rev. 127; 26 Id. 180.

4822. Membership—Qualifications—By-laws—A death benefit certificate issued by a mutual aid association, wherein it was provided that all obligations thereunder should cease if the member "at the time of his death belonged to a secret, non-Catholic aid association or for any reason could not be considered as a rightful and reputable member of his respective society or this association," held, when construed, as required, most favorably to assured, not forfeited by his membership in a secret aid association open to Roman Catholics, sanctioned by their actual membership, and not shown to have been disapproved by that church, though in no way affiliated therewith. Geronime v. German Roman Catholic Aid Assn., 127 Minn. 247, 149 N. W. 291.

A valid contract of insurance may be made orally, providing there is nothing in the constitution or by-laws of the insurer, or in the application, that makes a written contract, or countersigning by local officers, or actual delivery to or assent by the insured, a condition precedent to a valid obligation. Where there is such a condition precedent, until it is complied with there can be no contract that binds the insurer. Reiter v. National Council, 131 Minn. —, 154 N. W. 665.

Where the laws of a fraternal association and also the application for beneficiary membership therein provide that an applicant shall not be-

come a beneficiary member thereof until his medical examination is approved by the chief medical officer, and the applicant dies before such examination reaches such officer, its subsequent approval by him in ignorance of such death creates no liability against the association. Erickson v. Brotherhood of Locomotive Firemen and Enginemen, 129 Minn. 264, 152 N. W. 537.

(27) Hegna v. Modern Brotherhood, 118 Minn. 368, 136 N. W. 1035 (condition against liability if member becomes intemperate in the use of liquors, drugs or narcotics, or if his death is due to such intemperance); Rodell v. Relief Department, 118 Minn. 449, 137 N. W. 174 (condition for release of all claims against railway company arising out of death of insured void as to claim under federal statute for death by wrongful act).

4822a. Rating—Agreement for rerating—The evidence conclusively showed a mutual agreement between defendant, a fraternal benefit society, and an insured member, to the effect that the amount of the benefit certificate should be reduced, and the assessments based on the real age of the member. This agreement was valid and binding upon both parties, though no new certificate was, in fact, issued or delivered to the member. In this action brought to recover the amount of the original certificate, plaintiffs, if entitled to recover at all, are limited to the amount of the certificate as reduced, with certain deductions, and may recover such amount. Reiter v. National Council, 131 Minn. —, 154 N. W. 665.

4822b. Expulsion of members—Laws of a society providing for the expulsion of members are valid if reasonable. They may require an appeal within the society as a condition precedent to a resort to the courts. The procedure must be fair and reasonable and afford the member an opportunity to be heard in his defence. A judgment of expulsion is not subject to collateral attack for mere irregularity of procedure not depriving a member of a hearing substantially as provided by the contract and the demands of justice. A member may acquiesce in a wrongful expulsion and abandon his membership. After a wrongful expulsion a member need not pay or tender his dues and assessments in order to preserve his rights. In an action on a certificate the burden of proving a lawful expulsion is generally on the society. Malmstead v. Minneapolis Aerie, 111 Minn. 119, 126 N. W. 486; Marcus v. National Council, 123 Minn. 145, 143 N. W. 265; Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120; Marcus v. National Council, 127 Minn. 196, 149 N. W. 197; Rigler v. National Council, 128 Minn. 51, 150 N. W. 178; Dechter v. National Council, 130 Minn. 329, 153 N. W. 742; Stolorow v. National Council, 130 Minn. 345, 153 N. W. 848. See Note, 53 L. R. A. (N. S.) 806, 817, 823; 114 Am. St. Rep. 24; 26 Harv. L. Rev. 178.

Evidence held not to show that a member acquiesced in a wrongful expulsion. Dechter v. National Council, 130 Minn. 329, 153 N. W. 742. See Stolorow v. National Council, 130 Minn. 345, 153 N. W. 848.

A member may recover damages for a wrongful expulsion. Malmstead v. Minneapolis Aerie, 111 Minn. 119, 126 N. W. 486. See 14 Col. L. Rev. 89.

4822c. Officers—Notice to officer notice to order—An officer of a fraternal insurance order represents such order in the performance of the duties of his office, so that his knowledge and action in reference to a matter within the scope of such duties, in the absence of fraud, may be considered as the knowledge and action of the order. Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946.

4823. Beneficiaries—Where the named beneficiary dies before the insured and no new beneficiary is named, the heirs of the insured are entitled to the fund on his death, in the absence of any provision to the contrary. They take as beneficiaries and not by descent. In such a case an unauthorized payment to an administrator of a deceased beneficiary has been held not to release the society, and that the heirs of the insured were not estopped and were not guilty of laches. Devaney v. Ancient Order, 122 Minn. 221, 142 N. W. 316.

When the designation of a beneficiary made by the insured is one that could legally be made under the law and the rules of the order, and when it is still a legal designation under the conditions that exist at the time of the death of the insured, the marriage of the insured after the certificate is issued does not operate to revoke or make void the prior designation and substitute the wife as beneficiary. Where the law or the rules of the order provide that the marriage of a member shall operate to make void the prior designation, of course it has that effect. And where the first designation is one not permitted by the rules of the order, or where, though a legal designation when made, it becomes an illegal one when by reason of the marriage of the insured the former beneficiary is no longer in the class from which the insured would be permitted to select a beneficiary, the proceeds of the certificate will not go to the designated beneficiary, but will be given to the legal beneficiary at the time of death. In a certificate the father of the insured was designated as the beneficiary. Insured afterwards married. The rules of the association provided that the mortuary benefit could be only in favor of members of the family of the insured or blood relatives or mutually for husband and wife. Held, that the designation of the father as beneficiary was under the rules of the order legal at the time it was made, and would be legal if made after the marriage of the insured, and that the marriage did not operate to make the designation void or to substitute the

wife as beneficiary. Vanasek v. Western Bohemian Fraternal Assn., 122 Minn. 273, 142 N. W. 333.

The classes of persons eligible as beneficiaries under policies issued by a fraternal association are to be determined by the rules adopted for the express purpose of governing such matters, and not by general statements made for the purpose of indicating the general object of such association, and restrictions limiting the classes who may be so designated must be expressed in positive terms and cannot be inferred from general statements. The by-laws of the association having provided that policies may be made payable to the affianced wife of the insured, a policy so payable is valid, though the object of the association, as stated in its constitution, is to provide insurance for the surviving relatives of its members. Christenson v. Madson, 127 Minn. 225, 149 N. W. 288.

An affianced wife may be made a beneficiary. Whether subsequent illicit relations between the insured and his affianced wife will defeat recovery is an open question. Christenson v. Madson, 127 Minn. 225, 149 N. W. 288.

A stepdaughter held a proper beneficiary as a member of the family of the insured, within the meaning of the statutes of Illinois and the by-laws of the society. Provisions of by-laws restricting the right to be a beneficiary may be waived by the society and the society may be estopped by its conduct from taking advantage of them. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

While a society cannot extend its beneficiary class beyond a statutory limitation it may restrict it more than the statute. A beneficiary must be competent not only when the certificate is issued but also when the insured dies. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

(28) G. S. 1913, § 3542. See Christenson v. Madson, 127 Minn. 225, 149 N. W. 288; Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

4824. Change of beneficiaries—The by-laws of a society provided the method by which the insured could effect a change of beneficiaries. The insured made no attempt to comply with any of the requirements of the by-laws in this respect. He did, some days before his death, deliver his certificate to his wife. He also at some time and to some person, but at what time and to what person does not appear, expressed a desire that his wife should have the proceeds of his insurance. Held, that there was no valid change in the beneficiary. Vanasek v. Western Bohemian Fraternal Assn., 122 Minn. 273, 142 N. W. 333.

It is the general rule that in making a change of beneficiary the insured is bound to do it in the manner pointed out by the policy and by-laws of the society. Three exceptions are recognized to the general rule: (1) Where the society has waived strict compliance with its own rules, and in pursuance of a request of the insured has issued to him a

new certificate in which the beneficiary is changed, the original beneficiary cannot complain that the course indicated by the regulations was not pursued. (2) If it is beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. As, for example, where the insured has lost his certificate and is unable to comply with the requirement that it be surrendered. (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued. Vanasek v. Western Bohemian Fraternal Assn., 122 Minn. 273, 142 N. W. 333.

The beneficiary named in a benefit certificate acquires no vested interest thereunder until the death of the assured, and his expectant interest may be defeated at any time prior thereto by the proper substitution of another in his stead; but his interest becomes fixed and vested at such death, and cannot be defeated thereafter. If the assured has done all the things required of him to make a change in beneficiary, his death before the issuance of the new certificate required by the by-laws will not defeat such change, in the absence of an express provision in the contract specifying when the change shall take effect. Where the contract provided that "no change in the designation of beneficiary or beneficiaries shall be effective until a new certificate shall have been issued during the lifetime of the member, and until such time the provisions of the old certificate shall remain in force," and the request for the change was not received until after the death of the member, the proposed change did not become effective. Hughes v. Modern Woodmen, 128 Minn. 458, 145 N. W. 387.

(40) Note, L. R. A. 1915A, 109.

(45) Note, L. R. A. 1915A, 580.

4826. Rights of beneficiaries—When vested—(49, 50) Hughes v. Modern Woodmen, 124 Minn. 458, 145 N. W. 387.

4829. Representations of applicant—(54) O'Connor v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454; Gruber v. German Roman Catholic Aid Society, 113 Minn. 340, 129 N. W. 581; Marcus v. National Council, 123 Minn. 145, 143 N. W. 265; Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404; Silverstein v. Knights and Ladies of Security, 129 Minn. 340, 152 N. W. 724; Reiter v. National Council, 131 Minn. —, 154 N. W. 665.

4830. Construction—The rule that ambiguous language will be construed against the insurer cannot be invoked unless the words of the policy, when given their fair and ordinary meaning presumptively in the minds of the parties, fail to make the intent clear as to at least some

of the language used, and leaves that degree of uncertainty which would justify honest differences of opinion and argument between intelligent men as to their meaning. Geronime v. German Roman Catholic Aid Assn., 127 Minn. 247, 149 N. W. 291.

(56) Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; Kelly v. Ancient Order, 113 Minn. 355, 129 N. W. 846; Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946; Geronime v. German Roman Catholic Aid Assn., 127 Minn. 247, 149 N. W. 291.

(58) Cook v. Modern Brotherhood, 114 Minn. 299, 131 N. W. 334; Geronime v. German Roman Catholic Aid Assn., 127 Minn. 247, 149 N. W. 291.

See Digest, § 4659.

4831. Prohibited employments—Forfeiture—A mining brakeman in an open pit held not a "railway freight brakeman" or "railway freight switchman," within the meaning of a policy. Cook v. Modern Brotherhood, 114 Minn. 299, 131 N. W. 334.

A forfeiture from engaging in a prohibited employment may be waived. Johnson v. Modern Brotherhood, 114 Minn. 411, 131 N. W. 471; Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946. See Note, 27 L. R. A. (N. S.) 446.

(60) See Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946.

(62) Johnson v. Modern Brotherhood, 114 Minn. 411, 131 N. W. 471.

4832. Disability—A benefit certificate provided a payment for a total disability defined as follows: "Suffering by means of a physical separation of the loss of four fingers of one hand at or above the third joint, * * * provided the above amputations occur" to one after he becomes a member of the beneficiary department. Proof of the loss by separation of three fingers of the hand above the third joint, and of an injury to the other finger which impaired to the extent of 50 per cent. its usefulness, but did not result in or warrant a physical separation of any part of such finger, does not entitle the insured to payment as for a "total disability." Mady v. Switchmen's Union, 116 Minn. 147, 133 N. W. 472. See § 5854f; Note, 38 L. R. A. 529.

4834. Provisions against resort to the courts—(66) Malmsted v. Minneapolis Aerie, 111 Minn. 119, 126 N. W. 486; Marcus v. National Council, 123 Minn. 145, 143 N. W. 265; Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120. See Whitney v. Nat. Masonic Accident Assn., 52 Minn. 378, 54 N. W. 184; 26 Harv. L. Rev. 178.

4836. Payment of assessments and dues—Where a member of a society pays an assessment levied and payable before he becomes a member, which under the constitution and rules of the society he is not ob-

ligated to pay, such payment, to save a forfeiture, should be applied to pay the next succeeding assessment. Under the constitution and rules of defendant society, and the facts herein, deceased was not obligated to pay a certain assessment levied and payable before he became a member. Price v. Brotherhood of Railroad Trainmen, 116 Minn. 275, 133 N. W. 793.

Evidence held to show that the insured duly paid or tendered certain assessments. Reiter v. National Council, 131 Minn. —, 154 N. W. 665.

See, §§ 4822a; 4841.

4837. Levying assessments—An assessment to pay future losses not authorized by the contract is void, or at least not a ground for forfeiture in case of non-payment. Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289, reversed, 237 U. S. 662.

(72) Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289, 237 U. S. 662.

4838. Notice of assessments—A notice demanding payment of a single amount, which included the illegal assessment and the quarterly dues, and notifying the insured that, unless such amount was paid by a day stated, his policy would be forfeited, made it clear that a tender of the dues alone would have been a vain and idle ceremony, and the law does not require a tender under such circumstances. Such notice was not a sufficient notice as to the dues. Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289.

4839. Forfeiture for non-payment of dues or assessments—Held no forfeiture where payment of dues and assessments was stopped because it was supposed that the member was dead. Kelly v. Ancient Order, 113 Minn. 355, 129 N. W. 846.

To avoid a forfeiture a payment of an assessment made before a party became a member, and which he was not legally liable to pay, should be applied on the next assessment. Price v. Brotherhood of Railroad Trainmen, 116 Minn. 275, 133 N. W. 793. See Ibs v. Hartford Life Ins. Co., 119 Minn. 113, 137 N. W. 289.

There can be no forfeiture for the non-payment of an assessment to pay future losses not authorized by the contract. Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289.

(82) Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289.

(86) See Strand v. Loyal Americans, 122 Minn. 118, 142 N. W. 10.

4840. Return of assessments when certificate void—(88) National Council v. Garber, 131 Minn. —, 154 N. W. 512. See § 4695.

4841. Waiver and estoppel—A grand or superior lodge may be bound by a waiver of a subordinate lodge though it had no knowledge of the

acts of the subordinate lodge constituting the waiver. Mueller v. Grand Grove, 69 Minn. 236, 72 N. W. 48; Elder v. Grand Lodge, 79 Minn. 468, 82 N. W. 987; Graves v. Modern Woodmen, 85 Minn. 396, 89 N. W. 6; Villmont v. Grand Grove, 111 Minn. 203, 126 N. W. 730; Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946; Sauerwein v. Grand Lodge, 121 Minn. 229, 141 N. W. 174; Dougherty v. Supreme Court, 125 Minn. 142, 145 N. W. 813. See Note, 4 L. R. A. (N. S.) 421; 38 Id. 571.

A society cannot take advantage of its own negligence in failing to make up the proofs of death, or if it repudiates a claim, in failing to notify the beneficiary. Kelly v. Ancient Order, 113 Minn. 355, 129 N. W. 846.

A provision of an Iowa statute requiring benefit societies to make provision for the payment of benefits "subject to the compliance by members with its constitution and laws," held not to affect the doctrine of waiver or estoppel. Johnson v. Modern Brotherhood, 114 Minn. 411, 131 N. W. 471.

It having been the long-continued and uniform custom of defendant to give the insured notice of each demand for expense dues, thus giving the insured the right to believe that such notice would be continued to be given, defendant cannot forfeit the policy for a failure to pay dues as to which no notice has been given. Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289.

Where a society clearly indicates its intention to refuse further recognition of a membership, subsequent tender of dues and assessments is not necessary to keep the membership in force, but a recovery is subject to a deduction thereof. Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120; Reiter v. National Council, 131 Minn. —, 154 N. W. 665.

The conduct of defendant in repudiating the contract of deceased relieved her from making application to join another council on dissolution of the council to which she belonged, and waived the requirement that plaintiffs make proofs of death and of their claim on blanks to be furnished by defendant. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

A society may waive a restriction in the class of beneficiaries and may be estopped from taking advantage of it. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

Held a question for the jury whether defendant had waived nonpayment of assessments by refusing to receive payment thereof when tendered by the insured. Kulberg v. Supreme Ruling, 126 Minn. 494, 148 N. W. 299.

Whether a beneficiary was estopped from denying that disputed answers to questions in an application for membership were not the an-

swers of the insured, by the retention by her of the certificate without objection, held a question for the jury. Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850.

(89) Villmont v. Grand Grove, 111 Minn. 201, 126 N. W. 730; Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; Sauerwein v. Grand Lodge, 121 Minn. 229, 141 N. W. 174; Dougherty v. Supreme Court, 125 Minn. 142, 145 N. W. 813.

(91) See Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728.

(94, 96) Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946.

4842. Waiver of forfeiture—(1) Hendrickson v. Grand Lodge, 120 Minn. 36, 138 N. W. 946. See Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395. See cases under § 4841.

4844. Proof of claim—A division secretary held the agent of a society for the purpose of furnishing blanks and making proof of death. Held that the society could not take advantage of its own negligence in failing to make up the proofs of death, or, if it repudiated the claim, in failing to notify the beneficiary to that effect. Delay of beneficiary in making proof of death held excusable. Kelly v. Ancient Order, 113 Minn. 355, 129 N. W. 846.

A certificate provided that, if death was due to delirium tremens caused by the intemperate use of alcoholic drinks, it should be null and void. In proofs of death furnished by the beneficiary, it was stated that the cause of the death of insured was delirium tremens. Held, that such statements in the proofs are not conclusive, and do not preclude or estop the beneficiary from showing that such statements were made by mistake, and that in fact the insured did not die from such cause. Held, further, that plaintiff produced testimony tending to show such a mistake, and that the cause of death was not as stated, sufficient to warrant the denial of a motion to dismiss, made at the close of plaintiff's case. Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1.

The laws of a society imposed upon officers thereof, and not upon the beneficiary, the duty to take the initial steps to procure proofs of death, and required such proofs to be upon blanks furnished by the association. The beneficiary applied to the officers for such blanks, which they failed to furnish, and he subsequently furnished a certificate of death from the health department. Held, that his right to sue is not barred by failure to file proofs in the prescribed form. Rosenstein v. Court of Honor, 122 Minn. 310, 142 N. W. 331.

Conduct of the society in repudiating the contract may relieve the beneficiary of the necessity of making proof of the death of the insured and of his claim on blanks furnished by the society. It is well settled that a disavowal of liability by the insurer, on other grounds, after death

of the alleged member, dispenses with the necessity of making proofs of death. It is likewise the law that if the insurer during the lifetime of the insured declares a forfeiture of the insurance contract and continues its disavowal of the contract up to the time of death of the deceased, such action on its part amounts to a waiver of the provisions of the contract requiring proofs of death. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

(8, 9) Rosenstein v. Court of Honor, 122 Minn. 310, 142 N. W. 331.

(11) See Kelly v. Ancient Order, 113 Minn. 355, 129 N. W. 846.

4848a. Governing board—Meetings—Notice—The constitution of a society provided that its Imperial Good Samaritan might call special meetings of its governing board, the Imperial Council, whenever he deemed proper, and notice of the time, place, and purpose of such meeting should be mailed by the Imperial Scribe to each member of the Council. The Scribe refused to mail such notices after the Imperial Good Samaritan had issued the call, had requested the Scribe in writing to mail the notices, and had furnished him with signed copies of the notice. Thereupon the Imperial Good Samaritan mailed, in the proper place and time, a notice to each member of such Council, which notice was received by each in due course of mail. Such notice so mailed and received as to contents complied fully with the constitutional requirements. Held, that such notice was valid, and the meeting pursuant thereto was a legally called meeting of the Council. Whipple v. Christie, 122 Minn. 73, 141 N. W. 1107.

4850a. Action by insured as a bar to action by beneficiary—The bringing of an action by deceased for damages for breach of contract, in the absence of proof that judgment was entered or some benefit received by deceased or some detriment suffered by defendant, does not bar an action by the beneficiaries of deceased to recover under the terms of the contract. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

4852. Burden of proof—In making proof on a certificate the insured has not the burden of proving the application, medical examination or the laws of the society, though these form a part of the contract. Dechter v. National Council, 130 Minn. 329, 153 N. W. 742.

(19) Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1 (that death was caused by delirium tremens within an exception in the contract); Strand v. Loyal Americans, 122 Minn. 118, 142 N. W. 10 (as to forfeiture for non-payment of assessments); Ruder v. National Council, 124 Minn. 431, 145 N. W. 118 (as to payment of assessments); Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120 (as to expulsion proceedings sufficient under the law of the society to require the insured to appeal or to be bound by the determination); Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472 (that a demand

for aid involved a claim upon which the member was not entitled to aid); Marcus v. National Council, 127 Minn. 196, 149 N. W. 197 (as to rightfulness of expulsion); Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404 (burden on defendant to prove non-payment of dues or assessments).

See Digest, § 4738.

4853. Pleading—(20) Strand v. Loyal Americans, 122 Minn. 118, 142 N. W. 10 (reply held not to admit the allegations of the answer as to the non-payment of assessments); Kulberg v. Supreme Ruling, 126 Minn. 494, 148 N. W. 299 (answer held not to admit the cause of action alleged in the complaint—amendment to answer improperly denied); Marcus v. National Council, 127 Minn. 196, 149 N. W. 197 (pleadings held to raise question of waiver of non-payment of assessments, of waiver of a law of the society requiring members of a dissolved council to take certain steps to preserve their membership, and of waiver of proofs of death); Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404 (complaint on benefit certificate—unnecessary to allege that all dues and assessments had been paid—reply held not to admit that the insured had failed to pay dues and assessments); Dechter v. National Council, 130 Minn. 329, 153 N. W. 742 (complaint alleged absolute obligation to pay a certain amount on the death of the insured—certificate contained conditions—variance held immaterial).

See Digest, §§ 4735–4737; Dunnell, Minn. Pl. 2 ed. §§ 684–688.

MUTUAL HAIL INSURANCE

4863. Assessments—A mutual hail and cyclone insurance company is required to make assessments for losses and expenses, upon all members liable thereto, pro rata, and assessments which levy a greater rate upon members in one locality than upon those in another locality are unauthorized and cannot be enforced. Minnesota Farmers Mut. Ins. Co. v. Landkammer, 126 Minn. 245, 148 N. W. 305.

4865a. Amount of recovery—Adjustment of loss—In an action for a loss, held, that an adjustment for the loss was procured by fraud, that the amount recovered was justified by the evidence, and that there were no errors in the charge or in the rulings on evidence. Johnson v. Minnesota Farmers Mutual Ins. Co., 128 Minn. 1, 150 N. W. 174.

EMPLOYERS' LIABILITY INSURANCE

4866a. Refusal of insurer to defend action—Failure of insured to observe statute—Action to recover from the insurer in a liability insurance contract the amount paid by the insured in the settlement of an action brought against him, made after the insurer had denied liability under

the contract and refused to defend the action. Held, that the accident was not caused by "the failure of the insured to observe a statute affecting the safety of persons," was covered by the contract, and the insurer, in denying liability and refusing to defend the action after notice, breached the contract. Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355.

4867. Construction of particular policies—(38) Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355; Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955 (finding as to amount of indemnity called for by the policy, which had been destroyed by fire, held justified by the evidence).

4867a. Notice to insurer of action—Held not necessary to notify the insurer of a second action brought for the same cause after the voluntary dismissal of the first action, where the insurer was notified of the first action, but denied liability, and refused to defend the same. Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355.

4867b. Settlement—Recovery from insurer—By its denial of liability and refusal to settle or defend the action, the insurer released the insured from its agreement not to settle a claim without the consent of the insurer, and waived the condition of the contract making a judgment after trial of the issue a condition precedent to a recovery by the insured under the contract. Where the insurer has agreed to settle or defend an action brought to recover of the insured for an accident covered by the policy, and has wrongfully refused to so settle or defend the action, and the insured defends the same and in good faith makes a settlement thereof, he may recover the amount paid on such settlement, unless it is shown that there was in fact no liability, or that the amount paid was excessive. The settlement is presumptive evidence that there was a liability and as to the amount thereof. Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355.

4868. Estoppel—Plaintiffs in an action upon an employers' liability insurance policy held precluded by their conduct from asserting that defendant was estopped or had waived its right to defend on the ground that the loss was not covered by the terms of the policy. Mann v. Employers Liability Assur. Corp., 123 Minn. 305, 143 N. W. 794.

There are numerous cases holding that where an insurance company takes up the defence of an action, knowing the facts bring it within a risk exception, and, under the general agreements of the policy authorizing it to control litigation, conducts the case to the end, and nothing further appears, it will be deemed precluded, by way of either estoppel or waiver, from taking a position inconsistent with the one previously assumed and denying liability. So also, under like circumstances, the company has been held estopped where it conducted the defence

down to the trial and then withdrew, leaving assured no reasonable opportunity to prepare his own defence. Mann v. Employers Liability Assur. Corp., 123 Minn. 305, 143 N. W. 794.

4868a. Settlement with employee—The defendant's contention that the plaintiff was precluded from a recovery by its negligent failure to effect a settlement with the defendant's injured employee before suit and judgment on his claim held not sustained by the evidence. Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955.

4868b. Action for premium—Findings of fact, in an action for the recovery of a premium for a policy which the defendants claimed had been canceled, held justified by the evidence. Empire State Surety Co. v. Cameron, 110 Minn. 92, 124 N. W. 442.

4868c. Pleading—Issues—The record in this case considered, and held to show that the question of the insured's liability in the case settled was not an issue under the pleadings, that such issue was not tried by consent, and that it was not shown by the evidence that the insured was not liable for the accident, or that the amount paid in the settlement thereof was excessive. Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355.

ACCIDENT INSURANCE

4871. Representations—Waiver—Construction—Evidence held to justify a finding of a waiver of notice and proof of injury under an accident policy. Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

(43) Davis v. Nat. Casualty Co., 115 Minn. 125, 131 N. W. 1013; James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582; Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395; Johnson v. Bankers Mutual Casualty Ins. Co., 129 Minn. 18, 151 N. W. 413.

(44) Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

4871a. What constitutes an accident—Medical treatment—Injury received in sliding to base in a base ball game. Subsequent operation for appendicitis. Prior existence of disease. Proximate cause. Death caused by septic peritonitis. Verdict for plaintiff sustained. Ludwig v. Preferred Accident Ins. Co., 113 Minn. 510, 130 N. W. 5.

Whether death was caused by accidental means held a question for the jury. James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582; Huestis v. Aetna Life Ins. Co., 131 Minn. ——, 155 N. W. 643.

Where a shoemaker fell near his bench and injured himself it was held that the evidence justified a finding of accidental injury. Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

A sunstroke held an accident. Mather v. London Guarantee & Accident Co., 125 Minn. 186, 145 N. W. 963.

(45) Gardner v. United Surety Co., 110 Minn. 291, 125 N. W. 264.

See Note, 30 L. R. A. 206; 5 L. R. A. (N. S.) 296; 24 Harv. L. Rev. 221; 28 Id. 209.

4871b. Cash benefit—Delinquency—Ultra vires contracts—A policy contained a clause that entitled the insured to a cash benefit of $120 after the policy had been in continuous force without delinquency for the term of ten years from its date. The policy required insured to make payments of $1 within ten days after the first day of each month, and provided that, in case any such payment was not made when due, the policy should be ipso facto null and void. Insured made all his monthly payments promptly, except that one payment was made after the time limited, which payment was received by the company without objection and retained. Held, that the policy had been in "continuous force without delinquency," within the meaning of the clause. Davis v. National Casualty Co., 115 Minn. 125, 131 N. W. 1013.

The insured having fully performed the contract, and the insurer having received and retained the benefits of such performance, the latter cannot evade performance on the ground that the contract was ultra vires. Davis v. National Casualty Co., 115 Minn. 125, 131 N. W. 1013.

4872. Various provisions of policies construed—A platform at a railway station held a "public highway" within the meaning of a policy. Rudd v. Great Eastern Casualty & Indemnity Co., 114 Minn. 512, 131 N. W. 633.

A provision as to the policy being in "continuous force without delinquence." Davis v. National Casualty Co., 115 Minn. 125, 131 N. W. 1013.

A provision against recovery for disability of which "there shall be no external or visible mark on the exterior of the body." James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582.

A provision covering a risk from "the burning of a building while the insured is therein." Kleis v. Travelers Ins. Co., 118 Minn. 422, 136 N. W. 1101.

A provision excepting from liability for loss of time caused by an invisible injury. Peterson v. Locomotive Engineers etc. Assn., 123 Minn. 505, 144 N. W. 160.

A provision for monthly payments of indemnity during the continuance of a disability, and a provision requiring affirmative proof of illness and injury. Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

A provision for an autopsy upon demand of the insurer. Johnson v. Bankers Mutual Casualty Ins. Co., 129 Minn. 18, 151 N. W. 413 (de-

mand must be made at a reasonable time and on a proper occasion—properly made on the widow—may be made through a third party). See Note, L. R. A. 1915D, 1199.

(49) See Note, 48 L. R. A. (N. S.) 524.

(53) See Ashelby v. Travelers Ins. Co., 131 Minn. —, 154 N. W. 946.

(55) See 6 Mich. L. Rev. 346.

4873. Disease concurrent cause—Recovery sustained where an operation for appendicitis was performed after the accident and death was caused immediately by septic peritonitis. Ludwig v. Preferred Accident Ins. Co., 113 Minn. 510, 130 N. W. 5.

4873a. What are visible injuries—Visible injuries are not limited to external injuries, but include any internal injuries the existence of which may be ascertained through observation or examination. Peterson v. Locomotive Engineers etc. Assn., 123 Minn. 505, 144 N. W. 160. See James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582.

4874. Negligence—(57) Zeitler v. National Casualty Co., 124 Minn. 478, 145 N. W. 395.

4874a. Intoxication—Burden of proof—Accident policies usually provide that there shall be no recovery if the insured was intoxicated at the time of the accident. The burden of proving intoxication is on the insurer. Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180 (finding that insured was not intoxicated sustained).

4874b. Suicide—Whether the insured came to his death by suicide or the accidental discharge of a revolver held a question for the jury. Meyer v. Travelers Ins. Co., 130 Minn. 242, 153 N. W. 523.

4875. Proof of death—Evidence held to justify a finding that decedent came to his death by falling from a railway platform. Rudd v. Great Eastern Casualty & Indemnity Co., 114 Minn. 512, 131 N. W. 633.

Failure to give notice of claim within the prescribed time is waived where the insurer denies liability wholly on another ground. Johnson v. Bankers Mutual Casualty Ins. Co., 129 Minn. 18, 151 N. W. 413.

In an action upon an accident insurance policy, in which the plaintiff was the beneficiary, insuring the deceased against loss resulting from bodily injuries effected directly and independently of all other causes, an internal hemorrhage being the immediate cause of death, held, that the evidence justified a finding that the hemorrhage came as the result of an injury, as claimed by the plaintiff, and not from cancer, as claimed by the defendant, and that the court was in error in

granting defendant's motion for judgment notwithstanding the verdict. Ashelby v. Travelers Ins. Co., 131 Minn. —, 154 N. W. 946.

See Note, 137 Am. St. Rep. 718.

TORNADO INSURANCE

4875a. Property covered—The court rightly determined that certain policies not purporting to cover subsequent constructions covered property in the process of construction at the time of their issuance, and that certain other policies of like form issued prior to the commencement of the work of construction did not cover such property. Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. —, 154 N. W. 515.

4875b. Average or distribution clause—Held, that the "average" or "distribution" clause contained in certain policies, providing that the amount insured should attach in the proportion that the value of the property covered by the policy contained in each of certain places where located bore to the value of all of it, had no application where the insured property was in one place. Northwestern Fuel Co. v. Boston Ins. Co., 131 Minn. —, 154 N. W. 515.

4875c. Coinsurance clause—Conflict of laws—Held, that a provision requiring percentage coinsurance was satisfied, though such coinsurance did not cover all of the property insured by the defendants, it being sufficient in amount and there being no provision that such coinsurance should be concurrent and cover the property as a whole. The insurance policies being Wisconsin contracts, and the governing law of Wisconsin not being pleaded nor proved, and the Minnesota statute being without application, this construction was made without reference to the Minnesota statute or the local law of Wisconsin. Northwestern Fuel Co. v. Boston, 131 Minn. —, 154 N. W. 515.

LIABILITY INSURANCE

4875d. Necessity of payment by insured after trial—A provision in a policy that no action shall lie against the company, "unless brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue," applies only in case the company denies liability and refuses to defend. Patterson v. Adan, 119 Minn. 308, 138 N. W. 281. See Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355.

INTERESSE TERMINI—See Landlord and Tenant, 5387a.

INTEREST

4877. Necessity of agreement—Partners are not entitled to interest against one another in the absence of express agreement. Ames v. Ames, 113 Minn. 137, 129 N. W. 156.

(62) Fallon v. Fallon, 110 Minn. 213, 124 N. W. 994.

4879. Incident of debt—(65) See American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co., 233 U. S. 261.

4881. After maturity of debt—(70) Green v. Northwestern Trust Co., 128 Minn. 30, 150 N. W. 229.

4882. On accounts—In an action by a wholesaler for goods sold and delivered to a retailer interest was properly computed according to the terms indicated by the ledger sheets. Retailers often buy goods on time, agreeing to pay interest under certain terms. Usually the terms are stated in the invoice. Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226.

4883a. Property in custodia legis—As a general rule interest is not allowed after property of an insolvent is in custodia legis, but it is sometimes allowable when it would not result in inequality among creditors of the same rank. American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co., 233 U. S. 261.

4884. When begins to run—Demand—Interest is allowable on all contracts for the payment of money from the date the debt becomes due. The acceptance of goods sold on a credit of a specified number of days is equivalent to a promise to pay the money on that day, and interest accrues as an incident of the debt and not merely as damages. American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co., 233 U. S. 261.

4885. Computation—Partial payments—(82) See Corrigan v. Foot, 126 Minn. 531, 148 N. W. 98 (partial payments—interest—instructions held erroneous).

INTERPLEADER

4892. Under statute—The statutory proceeding of interpleader, where applicable, provides substantially the remedy formerly obtained by a bill of interpleader in equity. After claimants to an offered reward have interpleaded under the statute and raised an issue as to their respective rights, in the reward, a case is made properly triable by the court without a jury. On the trial of such case, the right of each claimant to the whole or a portion of the reward should be determined, even though by consent a jury trial is had. Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

(2) See Devaney v. Ancient Order, 122 Minn. 221, 142 N. W. 316 (action by heirs of insured to recover fund due on a benefit certificate—bringing in administrator of a deceased named beneficiary held not authorized by the statute); Pouch v. Prudential Ins. Co., 204 N. Y. 281, 97 N. E. 731 (affidavit must show a reasonable ground for the claim of the third party).

See Dunnell, Minn. Pl. 2 ed. §§ 138–143.

4893. In equity—(5) Note, 10 L. R. A. (N. S.) 748.

INTERSTATE COMMERCE

4894. What constitutes—Shipment of goods by railroad from points in this state to points in other states is interstate commerce. Seaman v. Minneapolis & Rainy River Ry. Co., 127 Minn. 180, 149 N. W. 134; McCallum v. Minneapolis & Rainy River Ry. Co., 129 Minn. 121, 151 N. W. 974.

Shipments between two points within the state, the route of transportation being wholly within the state, are not interstate commerce, and the provisions of the Interstate Commerce Act are inapplicable. Sullivan v. Minneapolis & Rainy River Ry. Co., 121 Minn. 488, 142 N. W. 3.

A shipment of grain by common carrier from another state into this state held interstate commerce. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

Although live stock had been transported from without the state to a point within the state in the same car in which appellant carried it, the contract for its transportation in the instant case was made in Minnesota for carriage between two points in Minnesota, and was not interstate. Naumen v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1076.

(11) Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790.

See §§ 1205d, 1205f, 1298, 1300, 1312, 1318, 1323a, 1355, 1357a, 6022a–6022n.

4895. Exclusive jurisdiction of Congress—A contract by a common carrier to supply to a particular interstate shipper a specified number of cars on certain dates, to be used in such shipment, is not a violation of the act of Congress regulating interstate commerce, unless it appears that the contract, if performed, will in fact extend to that shipper an undue or unreasonable preference over other shippers. W. H. Ferrell & Co. v. Great Northern Ry. Co., 119 Minn. 302, 138 N. W. 284.

When Congress acts in the regulation of interstate commerce the power of the states in relation to the subject ends. Ford v. Chicago etc. Ry. Co., 123 Minn. 87, 143 N. W. 249. See § 6022c.

Chapter 433, Laws 1913, prohibiting the shipment of cream over any railroad in this state for a greater distance than sixty-five miles, held to apply to all railroad companies doing business in the state, and to shipments arising without and terminating within, as well as to those originating within and terminating without, the state, and as such an unreasonable interference with and prohibition of interstate commerce, and void. State v. Chicago, G. W. R. Co., 125 Minn. 332, 147 N. W. 109.

On interstate shipments by carrier the federal rule of damages applies. Seaman v. Minneapolis etc. Ry. Co., 127 Minn. 180, 149 N. W. 134.

(15) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819.

(17) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819; State v. Chicago, G. W. R. Co., 125 Minn. 332, 147 N. W. 109.

4897. Held not to interfere with interstate commerce—The garnishment of a debt made up of traffic balances arising out of interstate commerce. Starkey v. Cleveland etc. Ry. Co., 114 Minn. 27, 130 N. W. 504.

A tax on property within the state of an express company engaged in interstate commerce, based on gross earnings within the state on interstate shipments. State v. U. S. Express Co., 114 Minn. 346, 131 N. W. 489.

A judgment against a foreign corporation prohibiting it from doing business in this state because of its having entered into an unlawful agreement in restraint of trade. State v. Creamery Package Mfg. Co., 115 Minn. 207, 132 N. W. 268.

A law imposing a gross earnings tax on freight line companies. State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410.

(28) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819, reversed, 226 U. S. 426.

INTERVENTION

4897a. Definition—(29) Faricy v. St. Paul Investment & Savings Soc., 110 Minn. 311, 125 N. W. 676; Rocca v. Thompson, 223 U. S. 317.

4899. Nature of interest entitling party to intervene—Stockholders have not the requisite interest until the officers of the corporation fail in their duty. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

(32) Erickson v. Revere Elevator Co., 110 Minn. 443, 126 N. W. 130 (sale of capital stock of a corporation—query whether the purchasing stockholder might intervene in an action); Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727 (action for negligence in starting a fire—insurance company paying loss may intervene in action by owner of property).

(33, 35) Faricy v. St. Paul Investment & Savings Soc., 110 Minn. 311, 125 N. W. 676.

See Dunnell, Minn. Pl. 2 ed. § 132.

4901a. Rights of intervener—Relief—Speaking generally, an intervener has all the rights of an ordinary party to an action, including the right to appropriate relief. McKinley v. National Citizens Bank, 127 Minn. 212, 149 N. W. 295.

4902. Intervener cannot delay or terminate action—(38) See National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818; Dunnell, Minn. Pl. 2 ed. § 133.

4903. Pleading—See Dunnell, Minn. Pl. 2 ed. § 134.

4904a. Costs—Where an intervener claiming a lien on property for negligent loss of which the action is brought, reiterates the allegations of the complaint in the action and becomes practically a co-plaintiff, he is liable, under G. S. 1913, § 7766, jointly with plaintiff for costs, upon the setting aside of separate verdicts in their favor, including the expense of a transcript and two copies of the testimony. McKinley v. National Citizens Bank, 127 Minn. 212, 149 N. W. 295.

An intervener whose claim was not sustained held liable for costs. Thief River Co-operative Store Co. v. Skahl, 131 Minn. —, 154 N. W. 953.

INTOXICATING LIQUORS

CONSTITUTIONALITY OF STATUTES

4905. In general—Chapter 252, Laws 1901, prohibiting and punishing the keeping of blind pigs, or places for the unlawful sale of intoxicating liquors, is not unconstitutional as special or class legislation, nor as authorizing unreasonable searches and seizures. State v. Stoffels, 89 Minn. 205, 94 N. W. 675; State v. Hanson, 114 Minn. 136, 130 N. W. 79.

The legislature may constitutionally provide for the establishment of prohibition districts by local option or by direct legislation, though the license of the sale of intoxicating liquors is the general rule of the state, and prohibition in certain districts the exception. State v. Stoffels, 89 Minn. 205, 94 N. W. 675; State v. Carver, 126 Minn. 5, 147 N. W. 660.

The statute providing for a search of an unlicensed drinking place and seizure and forfeiture of intoxicating liquors and other property used in their unlawful sale found therein, is a proper exercise of the police power of the state, and constitutional. State v. Hanson, 114 Minn. 136, 130 N. W. 79; Hawkins v. Langum, 115 Minn. 100, 131 N. W. 1014.

The provision of section 3142, G. S. 1913, forbidding the sale of intoxicating liquor within one-half mile of a town or municipality which has voted no license, is constitutional, but the half-mile zone which may thus by vote of the adjacent town or municipality become closed against the saloon cannot embrace any territory within a village or city. State v. Carver, 126 Minn. 5, 147 N. W. 660.

Chapter 484, Laws 1913 (G. S. 1913, §§ 3136, 3137), prohibiting the soliciting of orders for the sale of intoxicating liquors within certain territory, is not unconstitutional within article 4, § 27, of the constitution, because its subject is not expressed in its title. Nor is it unconstitutional upon the ground that the prohibition of soliciting of orders for the sale of intoxicating liquors is an unreasonable restraint upon the freedom or liberty of private contract. State v. Droppo, 126 Minn. 68, 147 N. W. 829.

LOCAL OPTION

4906. In general—History of legislation. State v. White, 130 Minn. 336, 153 N. W. 602.

Prior to the enactment of Laws 1913, c. 387, the local option statutes did not apply to cities, but only to villages and rural towns. Kleppe v. Gard, 109 Minn. 251, 123 N. W. 665; Anderson v. Le Sueur, 127 Minn. 318, 149 N. W. 472; State v. White, 130 Minn. 336, 153 N. W. 602.

Section 1533, R. L. 1905, is a general provision applying to all municipalities having local option and superseded section 48, chapter 145, Laws 1895. State v. Osakis, 112 Minn. 365, 128 N. W. 295.

The Australian method of voting may be adopted in a local-option election. Peterson v. Taylors Falls, 112 Minn. 407, 128 N. W. 470.

In determining whether informal ballots should be counted, and whether they should be counted for or against license, the general rules applicable to informal ballots in general elections apply. Krassin v. Waseca, 119 Minn. 137, 137 N. W. 191; Peterson v. Taylors Falls, 112 Minn. 407, 128 N. W. 470; Hanford v. Alden, 122 Minn. 149, 142 N. W. 15; McLaughlin v. Rush City, 122 Minn. 428, 142 N. W. 713; Eikmeier v. Pipestone County, 131 Minn. —, 155 N. W. 92; Schultz v. Shelp, 131 Minn. —, 155 N. W. 97. See Digest, §§ 2947–2949.

The general statute requires a "majority" vote in favor of license. This means a majority of all the electors voting at the election and not merely a majority of the votes cast for or against license. State v. Osakis, 112 Minn. 365, 128 N. W. 295; Thune v. Hetland, 114 Minn. 395, 131 N. W. 372; Lodoen v. Warren, 118 Minn. 371, 136 N. W. 1031; McLaughlin v. Rush City, 122 Minn. 428, 142 N. W. 713; Anderson v. Le Sueur, 127 Minn. 318, 149 N. W. 472; Eikmeier v. Pipestone County, 131 Minn. —, 155 N. W. 92.

In determining the total number of votes cast, under Laws 1915, c. 23, defectively marked ballots must be counted, but not ballots cast by persons not qualified to vote. Eikmeier v. Pipestone County, 131 Minn. —, 155 N. W. 92.

Under the county option law of 1915 a majority of all votes cast at the election must be in favor of the proposition to prohibit the sale of liquor in order to carry it. Eikmeier v. Pipestone County, 131 Minn. —, 155 N. W. 92; Schultz v. Shelp, 131 Minn. —, 155 N. W. 97.

Record held to show that a majority of all votes cast at a county option election held in 1915 in Meeker county were in favor of prohibiting the sale of liquor. Schultz v. Shelp, 131 Minn. —, 155 N. W. 97.

In cities governed by a home rule charter the charter provisions, if any, control as to the number of votes necessary to carry the election. Thune v. Hetland, 114 Minn. 395, 131 N. W. 372.

Under Laws 1913, § 387, in cities of the fourth class, a majority of the votes cast "upon the question" is sufficient to carry the election. Anderson v. Le Sueur, 127 Minn. 318, 149 N. W. 472.

Under the law creating the city of Warren, when a majority of the votes cast at any annual city election has been cast against granting license to sell intoxicating liquors, no license can be granted until a majority of all votes cast at a subsequent annual city election is in favor of granting such license. By "majority" is meant a majority of the whole number of electors voting at the election, and not a majority of the votes recorded for or against license. Lodoen v. Warren, 118 Minn. 371, 136 N. W. 1031.

The election may be contested under the general statute. See Hanford v. Alden, 122 Minn. 149, 142 N. W. 15; Digest, §§ 2979–2993.

The provision of section 3142, G. S. 1913, forbidding the sale of intoxicating liquor within one-half mile of a town or municipality which has voted no license, is constitutional, but the half-mile zone which may thus by vote of the adjacent town or municipality become closed against the saloon cannot embrace any territory within a village or city. State v. Carver, 126 Minn. 5, 147 N. W. 660.

A sale of intoxicating liquor by one licensed by the common council of the village, during the period of his license but after the town in which the village is located has voted "no license," is unlawful, where there has been no statutory separation of the village and the town and both participate in the election. State v. McKinnon, 126 Minn. 505, 148 N. W. 99. See State v. White, 130 Minn. 336, 153 N. W. 602.

Under the local option statutes, if a town votes upon the license question and a village located within the town and not separated therefrom for all purposes has not voted thereon as an independent municipality, the vote of the town determines the question for all the territory of the town, including that within the village; but if the village itself as an independent municipality votes upon the question, the vote of the village determines such question for the territory within the village regardless of the vote of the town. State v. White, 130 Minn. 336, 153 N. W. 602.

LICENSES

4908. Who required to be licensed—Wholesalers—Section 135, c. 8, Laws 1895, giving to city councils the power to license and regulate the sale of intoxicating liquors, construed, with reference to the whole legislation of the state dealing with the subject of licensing the sale of intoxicating liquors and the uniform practical construction thereof, and held, that it does not apply to exclusively wholesale dealers selling in quantities of five gallons or more. State v. Sullivan, 117 Minn. 329, 135 N. W. 748.

(59) State v. Sullivan, 117 Minn. 329, 135 N. W. 748.

4908a. For sales out of municipal limits forbidden—Chapter 147, Laws 1915, which went into effect on April 16, 1915, prohibited the issuance of licenses to sell intoxicating liquor except in incorporated cities, villages and boroughs; and a license to sell such liquor in a rural township, for a period of one year from May 8, 1915, issued pursuant to an order of the board of county commissioners, is void although the order directing the issuance of such license was adopted by the board prior to the enactment of the above statute. State v. Orr, 131 Minn. —, 155 N. W. 216.

4910. Issuance—When becomes operative—Where the power to issue licenses to sell intoxicating liquors is vested in the city council, the

function of the mayor under an ordinance requiring his signature to such licenses is purely ministerial, and he has no power in such connection to impose any conditions or limitations upon the use of the license. Delivery of a liquor license to a third person to whom the licensee has sold his business, at the latter's request or upon his acquiescence, for the purpose of having it transferred to him, is sufficient to render the issuance of the license complete. Downey v. Red Wing, 121 Minn. 348, 141 N. W. 495.

4911. Granting a matter of discretion—Mandamus—(68) See State v. Osakis, 112 Minn. 365, 128 N. W. 295.

4912. Nature and scope of licensing power—(81) Gillen v. South St. Paul, 111 Minn. 172, 126 N. W. 624.

4914. Conflict between general laws and municipal charters and ordinances—(91, 92) State v. Osakis, 112 Minn. 365, 128 N. W. 295; Mankato v. Olger, 126 Minn. 521, 148 N. W. 471.

4915. Ordinances held valid—An ordinance making it unlawful for a minor to frequent or loiter about a saloon. Mankato v. Olger, 126 Minn. 521, 148 N. W. 471.

4917. Fees for licenses—Discrimination—Refundment—Distribution—A city council has authority, by general ordinance or resolution, to fix the license fee for the sale of intoxicating liquors, subject to the provisions of section 1527, R. L. 1905 (G. S. 1913, § 3120), but cannot arbitrarily discriminate against an applicant, by exacting a greater than the established fee. An applicant for a license, who, under protest, pays the amount exacted in excess of the established fee, may recover such excess in an action against the city as for money had and received. Gillen v. South St. Paul, 111 Minn. 172, 126 N. W. 624. See Note, 30 L. R. A. 415.

Section 1536, R. L. 1905 (G. S. 1913, § 3150), providing for the refundment in certain cases of money paid for licenses, is not mandatory, but vests a discretionary power in the municipal authorities. Bender v. Fergus Falls, 115 Minn. 66, 131 N. W. 849.

Laws 1909, c. 450, construed, and held, that it gives to the county 10 per cent. of all liquor license money paid into the treasury of any incorporated village situated within the limits of the county, and that the village cannot defeat the right of the county by appropriating the 10 per cent. for either school or road and street purposes. Sibley County v. Gibbon, 115 Minn. 56, 131 N. W. 786.

4918. Bonds—Liability—The liquor dealer's bond, executed under the provisions of section 1524, R. L. 1905 (G. S. 1913, § 3116), and acts amendatory thereof, was intended by the legislature as security for an observance of and compliance with the liquor laws of the state, and for the benefit and protection of all persons injured or damaged in conse-

quence of an unlawful sale of liquor by the licensee. Though the bond is executed to the state, injured persons may prosecute an action thereon in their own name for damages suffered by them for a violation thereof. The bond constitutes a contract between the licensee and his surety on the one hand, and the state and all persons injured in consequence of a violation thereof on the other; and though a breach thereof, by an unlawful sale of liquor by the licensee, necessarily constitutes a tort, the action for damages resulting from such sale is upon the contract, and not for the tort. The tort is but evidence of the breach of the contract. The cause of action for such breach of contract survives the death of the licensee, and the action may be prosecuted against his estate. Koski v. Pakkala, 121 Minn. 450, 141 N. W. 793.

Under chapter 246, Laws 1905 (G. S. 1913, § 3117), both the principal and surety on a saloon keeper's bond are liable for any damage proximately caused by any act which is a violation of the conditions of the bond. Where the person in charge of a saloon pours alcohol upon a guest and then sets fire to him, there is a violation of the condition of the bond that the licensee will keep a quiet and orderly house. It is not necessary, to a violation of this condition, that the licensee shall be guilty of the statutory crime of keeping a "disorderly house." That crime involves habitual or repeated acts of disorder, not necessary to a breach of the bond. Lynch v. Brennan, 131 Minn. —, 154 N. W. 795.

4919. Revocation—In proceedings to revoke a liquor license under G. S. 1913, § 3152, the person proceeded against is entitled to notice and an opportunity to be heard and to be advised of the nature of the charges against him, but he waives all question as to the sufficiency of the notice and to the sufficiency of the form of the charges made against him if, without objection, he appears and contests on the merits. State v. Duluth, 125 Minn. 425, 147 N. W. 820.

4919a. Act of bartender or other employee act of employer—The act of the barkeeper in selling liquor to a minor is the act of the proprietor; the proprietor must pay the penalty for such sales made by his barkeeper; the delinquency of the barkeeper is the only evidence required to prove the guilt of the proprietor. The fact that the sale was made without the knowledge or assent of the proprietor, and contrary to his instructions, furnishes no defence. State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

CRIMINAL OFFENCES

4920. Sales without a license—One who acts in good faith as the agent or messenger only of a purchaser of intoxicating liquors is not himself guilty of an unlawful sale thereof; but the law will not tolerate any device or pretence to conceal an unlawful act. State v. Ito, 114 Minn. 426, 131 N. W. 469.

Whether two persons may be convicted for a single sale is an open question. State v. Weingarth, 124 Minn. 124, 144 N. W. 745.

4924. Sales to minors—To render a sale of liquor to a minor unlawful, it is not necessary that notice forbidding such sale should previously have been given. State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

4925. Sales to habitual drunkards—Where a notice forbidding the sale of intoxicating liquor to an habitual drunkard is served upon a bartender then on duty in a saloon, and is thereafter seen and examined by the proprietor of the saloon, it is actual notice to such proprietor, from the time that he so examined it. The proprietor is liable for any sale of intoxicating liquor to such habitual drunkard made, either by himself or any of his bartenders, after he received such notice. The notice is not invalid for failing to show upon its face that the person signing it is one of the persons authorized by statute to give it, but is invalid unless the person signing it was in fact one of the persons authorized by statute to give it, and such fact must be established at the trial. State v. Provencher, 129 Minn. 409, 152 N. W. 775.

An instruction as to what constitutes an habitual drunkard held sufficient in the absence of a request embodying a correct and more specific definition. State v. Provencher, 129 Minn. 409, 152 N. W. 775.

4928. Unlicensed drinking places—Blind pigs—It is unimportant that the statute does not define an "unlicensed drinking place." Complaint under R. L. 1905, § 1550 (G. S. 1913, § 3169), held sufficient. State v. McKinley, 114 Minn. 434, 131 N. W. 369. See State v. Hanson, 114 Minn. 136, 130 N. W. 79.

(53) State v. Hanson, 114 Minn. 136, 130 N. W. 79.

CRIMINAL PROSECUTIONS

4929. Jurisdiction of district, municipal and justice courts—A justice of the peace held to have jurisdiction of a prosecution for keeping an unlicensed drinking place under R. L. 1905, § 1550 (G. S. 1913, § 3169). State v. Hanson, 114 Minn. 136, 130 N. W. 79.

4931. Indictment or complaint under general statutes for selling without a license—(64) State v. Schmidt, 111 Minn. 180, 126 N. W. 487.

4937. Indictment for selling liquor to a minor—(01) State v. Schmidt, 111 Minn. 180, 126 N. W. 487.

4942. Burden of proving license on accused—(90) State v. Ito, 114 Minn. 426, 131 N. W. 469. See Note, 36 L. R. A. (N. S.) 98.

4944. What are intoxicating liquors—Presumption—Judicial notice—(93) See Note, 48 L. R. A. (N. S.) 302.

4945. Evidence—Admissibility—(4) State v. Lindquist, 110 Minn. 12, 124 N. W. 215 (sale of liquor without a license—evidence of discovery of jugs of liquor concealed in bathroom on second floor of building held admissible—evidence as to policemen receiving money from liquor dealers for protection held inadmissible—held proper to allow jury to take jugs to jury room); State v. Brand, 124 Minn. 408, 145 N. W. 39 (sale to prostitute—reputation in the community admissible to prove that the woman was a prostitute—detective purchasing liquor for a prostitute as her accomplice—necessity of corroboration—woman not accomplice of seller); State v. Jones, 126 Minn. 45, 147 N. W. 822 (sale of liquor to intoxicated person—record kept by village clerk competent evidence of the issuance of liquor license under which sale was made—persons observing purchaser of liquor competent to testify as to his intoxication).

4946. Evidence—Sufficiency—(6) State v. Lindquist, 110 Minn. 12, 124 N. W. 215; State v. Ito, 114 Minn. 426, 131 N. W. 469; State v. Weinberg, 122 Minn. 528, 142 N. W. 1135; State v. Weingarth, 124 Minn. 124, 144 N. W. 745 (evidence held insufficient to sustain a conviction).

(9) State v. Provencher, 129 Minn. 409, 152 N. W. 775.

SEARCHES AND SEIZURES

4948. Statute constitutional—Warrant—(16) State v. Hanson, 114 Minn. 136, 130 N. W. 79; Hawkins v. Langum, 115 Minn. 100, 131 N. W. 1014.

4948a. Property seized in custodia legis—Action for recovery—Property seized by an officer pursuant to a warrant issued under section 1553, R. L. 1905 (G. S. 1913, § 3172), in proceedings against an unlicensed drinking place, is, after seizure, in the custody of the law, and the possession thereof by the officer cannot be disturbed until the proceedings are terminated, and an order of the court disposing of the property is made and served upon him, or in some way brought to his official attention. Until such order is made by the court, neither an action for the possession, for the conversion, or for the loss of the property by the negligence of the officer, can be maintained by the owner of the property or by any person claiming an interest therein. Complaint construed, and held not to state a cause of action for the recovery of the value of such property, in that it does not allege that an order had been made by the court directing its return to plaintiff. Manter v. Petrie, 123 Minn. 333, 143 N. W. 907.

4948b. Action for wrongful seizure—Sufficiency of warrant—In an action to recover damages for the seizure of intoxicating liquors which

belonged to plaintiff, brought against a village marshal and citizens commanded by him to assist in the search and seizure, held that when a search warrant is fair on its face, is issued by a court which has jurisdiction of the subject-matter, contains nothing to apprise the officer directed to execute it that it was issued without authority, and is not a violation of the constitution or statute of this state, such a warrant is a full protection to the officer and his deputies, who obey its commands. Such a warrant protects the officer, though it does not contain a technically accurate or sufficient charge of the offense, and though the complaint on which it was issued does not. The warrant under which defendants in this case searched plaintiff's premises and seized intoxicating liquors found thereon was a full protection to defendants. Ingraham v. Booton, 117 Minn. 105, 134 N. W. 505.

CIVIL LIABILITY

4948c. Injury caused by intoxication—Statute—A recovery by a parent for loss of services and medical attendance caused by the intoxication of a minor son, sustained under the statute. Dobrowoloske v. Parpala, 121 Minn. 455, 141 N. W. 803. See 27 Harv. L. Rev. 279 (whether doctrine of volenti non fit injuria applies to action under statute).

4948d. Illegal sales—Action for price—Action for goods sold. Defence, that the goods were intoxicating liquors, and were sold to the defendant to be sold by him at retail without a license therefor. Some of the goods were sold to the defendant under the designation of "Hop Tea," and the balance as "Blue Label." Held, construing the answer, that the trial court erred in excluding evidence tending to show that both were one and the same thing, lager beer; also, in directing a verdict for the plaintiff. Sioux Falls Brewing & Malting Co. v. Kitterman, 116 Minn. 204, 133 N. W. 468.

JOINT ADVENTURE

4949. What constitutes—Quasi partnership—Obligations of parties—Trust—An unsuccessful joint adventure in the purchase of land and improvements. Contract construed as to liability of one of the parties to pay the other for certain services. Emmel v. Zapp, 112 Minn. 375, 127 N. W. 1134, 128 N. W. 572.

Sureties on a contractor's bond completing the contract of the contractor held engaged in a joint adventure. Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142.

Facts held not to show a joint adventure in the purchase of land. Bennett v. Harrison, 115 Minn. 342, 357, 132 N. W. 309.

If losses occur in a joint adventure they must be borne equally by all of the parties, in the absence of an express contract to the contrary. Albrecht v. Latzke, 120 Minn. 181, 139 N. W. 158. See Latzke v. Albrecht, 113 Minn. 322, 129 N. W. 508.

Real estate held by any member of a joint adventure for the benefit of the members is impressed with a trust in favor of all the members and this trust follows the land until it passes into the hands of a bona fide purchaser. Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108. See Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820; Bruner v. Jacobson, 122 Minn. 66, 141 N. W. 1097; Selwyn & Co. v. Waller, 212 N. Y. 507, 106 N. E. 321.

Plaintiff procured the sale of a tract of land from a third party to defendant; the contract being taken in the name of defendant. The evidence sustains the finding of the jury that it was agreed between plaintiff and defendant that the land was bought for their joint benefit, and that, on plaintiff's procuring a sale, the parties should divide the net profits. Such a contract was in the nature of a partnership or joint adventure, and was not the sale to plaintiff of an interest in land, and was not within the statute of frauds. Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476 (verdict negatived fraud on the part of plaintiff).

Where A had dealings with B, who was engaged in a joint adventure with C, it was held that the dealings between A and B were outside the scope of the joint adventure of B and C and C was not liable thereon. B purported to act for himself and A acted on the supposition that B was acting for himself alone. C did not ratify the acts of B. Lawrence v. Streeter, 130 Minn. 64, 153 N. W. 126.

An agreement between several to procure an option to further develop a mine, and subsequently to form a corporation and issue stock, to be equally divided among them, held a joint adventure or partnership. Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

(21) Gasser v. Woll, 115 Minn. 59, 131 N. W. 850; Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108; De La Motte v. N. W. Clearance Co., 126 Minn. 197, 148 N. W. 47; Selwyn & Co. v. Waller, 212 N. Y. 507, 106 N. E. 321. See Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759 (failure of project—right to return of subscriptions); Prosser v. Manley, 122 Minn. 448, 142 N. W. 876 (plaintiff held not entitled to share in profits of a certain real estate transaction—evidence held not to show any profits); Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65 (promoters of corporation—action to recover secret profits by some of the promoters defeated by proof that the plaintiff knew that they were to receive a commission from the owners of land purchased—no cause of action in corporation).

(01) Gasser v. Wall, 111 Minn. 6, 126 N. W. 284; Id., 115 Minn. 59, 131 N. W. 850.

See Note, 50 L. R. A. (N. S.) 1046; 14 Col. L. Rev. 539.

JUDGES

4953. Qualifications—Election—Extending term—A person not an attorney at law is ineligible as a candidate for supreme or district court judge. State v. Schmahl, 125 Minn. 533, 147 N. W. 425.

4954. Vacancies—Appointment and election to fill—(27–31) State v. Windom, 131 Minn. —, 155 N. W. 629.

4955. De facto judges—(32) State v. Windom, 131 Minn. —, 155 N. W. 629.

4959. Not civilly liable for judicial acts—(37) Alzua v. Johnson, 231 U. S. 106. See Note, 44 L. R. A. (N. S.) 164.

4962. Disqualification—(44) State v. Ledbeter, 111 Minn. 110, 126 N. W. 477 (fact that judge is related to the attorney of one of the parties within ninth degree does not disqualify him).

(45) State v. Hoist, 111 Minn. 325, 126 N. W. 1090 (filing affidavit in conformity to statute disqualifies judge ipso facto—affidavit held to have been filed in time).

JUDGMENTS

IN GENERAL

4965. Formal sufficiency—Certainty—The ordinary form of judgment in an action at law is that the prevailing party recover from the other a specific sum of money, or a specific parcel of real estate, or specific chattels. If a judgment is uncertain the entire record may be resorted to for the purpose of removing the uncertainty. Upton v. Merriman, 122 Minn. 158, 142 N. W. 150.

(54) Upton v. Merriman, 122 Minn. 158, 142 N. W. 150.

(56) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

4967. In rem and in personam—A money judgment for a mortgage debt held to be a personal judgment. Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315.

ARREST OF JUDGMENT

4988. In general—(91) Baker v. Warner, 231 U. S. 588.

ON DEFAULT

4991. Notice—If judgment is entered without notice in a case requiring notice the remedy of the adverse party is an application to the trial court for relief. Objection cannot be raised for the first time on appeal. State v. Jack, 126 Minn. 367, 148 N. W. 306.

(99) Hoff v. N. W. Elevator Co., 120 Minn. 224, 139 N. W. 153.

4993. Diligence in entering—(4) Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737.

4995a. Counterclaim may be ignored—Where a defendant fails to appear at the trial he is deemed to have abandoned any counterclaim pleaded by him and it may be ignored. The court need not make any order in relation thereto. H. W. Johns-Manville Co. v. Great Northern Hotel Co., 128 Minn. 311, 150 N. W. 907.

4996. Relief which may be awarded—In an action for divorce alimony may be granted on default, though not specifically demanded in the complaint. The matter is governed by a special statute taking it out of the general rule. Ecker v. Ecker, 130 Minn. 472, 153 N. W. 864.

(15) See 7 Col. L. Rev. 551.

OPENING DEFAULT ON PUBLICATION OF SUMMONS

5003. A matter of right—Statute—A defendant to whom a copy of a summons is delivered in person out of the state, as a substitute for publication of summons, is entitled to have a default opened as of right un-

der the statute. Wheaton Flour Mills Co. v. Welch, 122 Minn. 396, 142 N. W. 714.

This section of the statute does not afford an exclusive remedy for parties served by publication. They may proceed under the general statute governing the opening of defaults. Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

(30) Long v. Long, 112 Minn. 400, 128 N. W. 464; De Laittre v. Chase, 112 Minn. 508, 128 Minn. 670; Wheaton Flour Mills Co. v. Welch, 122 Minn. 396, 142 N. W. 714; Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

5005. A good defence sufficient cause—Upon the hearing of the application the court should not try the merits of the issues presented by the proposed answer. Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

5006. Diligence in making application—(36, 37) De Laittre v. Chase, 112 Minn. 508, 128 N. W. 670 (unexcused delay of seven months after notice held to justify denial of application).

(38, 39) Foster v. Coughran, 113 Minn. 433, 438, 129 N. W. 853; Wheaton Flour Mills Co. v. Welch, 122 Minn. 396, 142 N. W. 714.

5007a. Imposing terms—The court, in granting an application under the statute, may impose terms, though the applicant has not been guilty of laches. But the court is not authorized to impose terms which deprive such applicant of any substantial right as claimed under the issues of his proposed answer, or terms which are burdensome, in a case where there is no laches and the application is made within the year after entry of judgment. Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

5008. Question on appeal—(41) Long v. Long, 112 Minn. 400, 128 N. W. 464; De Laittre v. Chase, 112 Minn. 508, 128 N. W. 670.

OPENING DEFAULT JUDGMENTS—IN GENERAL

5009. Statute—How far exclusive—Action—(43) Cremer v. Michelet, 114 Minn. 454, 131 N. W. 627.

5011. Application of statute—(52, 53) Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

(57) See Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998.

5012. A matter of discretion—(62, 63) Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998.

5013. Relief to be granted liberally—(67) Dr. Shoop Family Medicine Co. v. Oppliger, 124 Minn. 535, 144 N. W. 743; Northwest Thresher Co. v. Herding, 126 Minn. 184, 148 N. W. 57; Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

(68) Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

(69) See Macknick v. Switchmen's Union, 131 Minn. —, 154 N. W. 1099.

5014. Who may move—One who, after a judgment against a defendant in an action to quiet title, purchases defendant's title, succeeds to all his interest and rights, and may properly apply for a vacation of the judgment. In such case the applicant's rights are those the original defendant would have had, if the application had been made by him. Long v. Long, 112 Minn. 400, 128 N. W. 464.

Lack of notice or knowledge of the pendency of the action is sufficient excuse, under section 4160, R. L. 1905 (G. S. 1913, § 7786), for the failure of an "unknown defendant" to answer therein, and authorizes the court, under said section, upon seasonable application, to give such defendant an opportunity to interpose a meritorious defence to the cause of action set out in the complaint. Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

Probably a surety may have relief in a proper case. See Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

(72) Long v. Long, 112 Minn. 400, 128 N. W. 464.

(73) Foster v. Coughran, 113 Minn. 433, 129 N. W. 853. See Note, 54 L. R. A. 464.

See Digest, §§ 5111–5113.

5015. Time of application—Diligence—Laches—(76) Hoff v. N. W. Elevator Co., 120 Minn. 224, 139 N. W. 153; Zinn v. Huhn, 120 Minn. 491, 139 N. W. 952; Fred v. Segal, 122 Minn. 43, 141 N. W. 806; Dr. Shoop Family Medicine Co. v. Oppliger, 124 Minn. 535, 144 N. W. 743; Northwest Thresher Co. v. Herding, 126 Minn. 184, 148 N. W. 57 (delay of forty-two days after notice of the judgment held not fatal).

5016. Notice of judgment—The record of a judgment recorded under R. L. 1905, § 3350 (G. S. 1913, § 6837), is not notice within the meaning of R. L. 1905, § 4160 (G. S. 1913, § 7786), limiting the time of application for opening a judgment to one year from notice thereof. Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

5018. Moving affidavits—Sufficiency—An affidavit by an attorney, based upon knowledge acquired from investigation of the affairs of the corporation, held to contain sufficient showing of facts to sustain an order opening a default judgment. The affidavit of all officers and directors as to ignorance of the entry of the judgment is not necessary. Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

5019. Applicant must have a meritorious defence—A discharge in bankruptcy is a meritorious defence. Northwest Thresher Co. v. Herding, 126 Minn. 184, 148 N. W. 57.

The statute of limitations is a meritorious defence. See Zinn v. Huhn, 120 Minn. 491, 139 N. W. 952; Northwest Thresher Co. v. Herding, 126 Minn. 184, 186, 148 N. W. 57.

(84) Southern Minn. Invest. & Loan Co. v. Livingston, 117 Minn. 421, 136 N. W. 8; Klein v. W. & D. Railroad Warehouse & Storage Co., 124 Minn. 530, 144 N. W. 1134.

(87) See Klein v. W. & D. Railroad Warehouse & Storage Co., 124 Minn. 530, 144 N. W. 1134.

(89) See Zinn v. Huhn, 120 Minn. 491, 139 N. W. 952 (defence of the statute of limitations).

5020. Affidavit of merits—(92) Clifford v. Great Northern Ry. Co., 118 Minn. 22, 136 N. W. 260; Dr. Shoop Family Medicine Co. v. Oppliger, 124 Minn. 535, 144 N. W. 743.

(93) Clifford v. Great Northern Ry. Co., 118 Minn. 22, 136 N. W. 260.

5023. Terms—(4) Dr. Shoop Family Medicine Co. v. Oppliger, 124 Minn. 535, 144 N. W. 743.

(99) Pasich v. Polga, 112 Minn. 510, 128 N. W. 669 (bond for payment of any judgment that might be recovered and for costs); Clifford v. Great Northern Ry. Co., 118 Minn. 22, 136 N. W. 260 (condition for payment of fifty dollars costs sustained). See Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

5024. Costs—(5, 6) See Pasick v. Polga, 112 Minn. 510, 128 N. W. 669; Clifford v. Great Northern Ry. Co., 118 Minn. 22, 136 N. W. 260.

5025. Excusable neglect—Lack of notice or knowledge of the pendency of the action is sufficient excuse for the failure of an "unknown defendant" to answer therein. Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

Where there was a removal from the state to the federal court, and the case was stricken from the calendar of the latter court, and there was a question whether the case was still in the state court, and there was a long delay in bringing the case on in the state court, and the attorneys for both parties were at fault, it was held proper to open a default. Nelson v. Chicago & N. W. Ry. Co., 129 Minn. 316, 152 N. W. 721.

(8) Slimmer v. State Bank, 122 Minn. 187, 142 N. W. 144.

(15) Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

(18) See Dr. Shoop Family Medicine Co. v. Oppliger, 124 Minn. 535, 144 N. W. 743.

(27) Schultz v. Wallin, 130 Minn. 45, 152 N. W. 865.

5026. Surprise—A default held properly opened where an order for judgment on the pleadings was obtained ex parte. The fact that the defendant had put in a sham answer tending to delay the action was not controlling. Dennis v. Firth, 113 Minn. 235, 129 N. W. 387.

An attorney has power to bind his client by a stipulation for judgment, but where an attorney, from ignorance of facts or from bad faith, stipulates for judgment against a client who has a just defence, the court may, in its discretion, open the judgment and permit the defence to be interposed, if no substantial prejudice will result to the opposing party from the incident delay. Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

(30) Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671. See Fitzgerald v. Fitzgerald, 129 Minn. 414, 152 N. W. 772 (claim that judgment was entered upon an unauthorized stipulation of an attorney—application held properly denied).

(31) Clifford v. Great Northern Ry. Co., 118 Minn. 22, 136 N. W. 260.

5035. Question on appeal—The rule of the supreme court against disturbing the action of the trial court applies not only to the excuse for the default, but also to the good faith and merit of the defence. The trial court is better able to determine the value of affidavits of attorneys than the supreme court. Southern Minn. Invest. & Loan Co. v. Livingston, 117 Minn. 421, 136 N. W. 8.

On appeal from an order denying an application the supreme court will not consider the sufficiency of the complaint, or the objection that the judgment was larger than the complaint justified, these objections not having been raised in the trial court. Nicholls & Taylor v. Frederick Milling Co., 123 Minn. 531, 143 N. W. 1123.

(52) Big Stone County Bank v. Crown Elevator Co., 111 Minn. 399, 127 N. W. 818; Pasich v. Polga, 112 Minn. 510, 128 N. W. 669; Dennis v. Firth, 113 Minn. 235, 129 N. W. 387; Foster v. Coughran, 113 Minn. 433, 129 N. W. 853; Jamieson v. Ramsey County, 114 Minn. 230, 130 N. W. 1000; Burghardt v. Knights of Maccabees, 116 Minn. 244, 133 N. W. 612; Southern Minn. Invest. & Loan Co. v. Livingston, 117 Minn. 421, 136 N. W. 8; Clifford v. Great Northern Ry. Co., 118 Minn. 22, 136 N. W. 260; Hoff v. N. W. Elevator Co., 120 Minn. 224, 139 N. W. 153; Zinn v. Huhn, 120 Minn. 491, 139 N. W. 952; Slimmer v. State Bank, 122 Minn. 187, 142 N. W. 144; Nicholls & Taylor v. Frederick Milling Co., 123 Minn. 531, 143 N. W. 1123; Dr. Shoop Family Medicine Co. v. Oppliger, 124 Minn. 535, 144 N. W. 743; Northwest Thresher Co. v. Herding, 126 Minn. 184, 148 N. W. 57; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566; Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671; Nelson v. Chicago & N. W. Ry. Co., 129 Minn. 316, 152 N. W. 721; Fitzgerald v. Maher, 129

Minn. 414, 152 N. W. 772; Schultz v. Wallin, 130 Minn. 45, 152 N. W. 865; State v. Schultz, 131 Minn. —, 154 N. W. 659.

(53) Nelson v. Chicago & N. W. Ry. Co., 129 Minn. 316, 152 N. W. 721; Fitzgerald v. Maher, 129 Minn. 414, 152 N. W. 772.

(54) Bundermann v. Bundermann, 117 Minn. 366, 135 N. W. 998.

ENTRY

5039. Either party may cause entry—Effect of appeal—A judgment may be entered notwithstanding an appeal from a non-appealable order, with a stay bond. Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169.

(68, 69) See Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169.

5041. Relief allowable—In general—If the plaintiff proves facts justifying the relief awarded it is immaterial that he failed to prove other facts alleged in his complaint. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

Courts of equity can adapt the relief to the facts of the particular case. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

(79) Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156; Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

(80) Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952 (plaintiff may be granted broader relief than prayed). See Digest, § 95.

(84) Cheever v. Converse, 35 Minn. 579, 28 N. W. 217; Baldwin v. Fisher, 110 Minn. 186, 191, 124 N. W. 1094; Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423; Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827; State v. Ryder, 126 Minn. 95, 147 N. W. 953; O'Rourke v. O'Rourke, 130 Minn. 292, 153 N. W. 607; Camp v. Boyd, 229 U. S. 530. See Digest, § 3138; Note, 116 Am. St. Rep. 877 (limitations of rule).

5045. Judgment in actions for tort against several—(12) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20.

5046. Judgment after death of party—(15) Note, 29 Am. St. Rep. 816; 126 Id. 622.

5049. Construction—In arriving at the meaning of a judgment or decree, it is improper to rely wholly on the literal reading of clauses severed from the sentence in which they are placed. The judgment as a whole should be considered in interpreting any particular clause or sentence therein, and if so considered there be any doubt, or it be open to two constructions, the pleadings and findings or verdict may be resorted to, and that construction given which harmonizes with the record. Held, that the trial court properly construed the judgment and decree herein. Simons v. Munch, 127 Minn. 266, 149 N. W. 304.

5051. Rendition of judgment—(34) See State v. Gieseke, 125 Minn. 497, 147 N. W. 663 (pointing out the difference between civil and criminal practice in rendering judgment—in criminal practice the judgment is pronounced by the judge in open court and an entry thereof made by the clerk in the minutes).

LIEN

5068. To what estates and interests attaches—Homestead—Bankruptcy—The entry and docketing of a judgment against a bankrupt, pending the bankruptcy proceedings and before the discharge of the bankrupt, becomes a valid lien upon real property of the bankrupt, which by reason of the homestead exemption at the time of the adjudication in bankruptcy did not pass to the bankrupt estate, but which was liable to the payment of the debt represented by the judgment, because not a part of the homestead when the debt was created; the homestead exemption having been enlarged by statute subsequent to the creation of the debt. The subsequent discharge of the bankrupt does not in such a case annul or extinguish the judgment, except so far as it imposes a personal liability upon the bankrupt. The judgment is a valid lien upon the particular property, and may be enforced by special execution. Though the judgment record does not disclose that particular property is liable for its payment, that fact may be established by extrinsic evidence on application for a special writ of execution, or other proceeding, when the right to resort to the land is called in question. Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75.

A judgment is not a lien on the personal property of the judgment debtor. Galbraith v. Whitaker, 119 Minn. 447, 138 N. W. 772.

Where a vendor, instead of conveying directly to the vendee, conveys to a third party, who is actually residing upon the land, and such third party conveys to the vendee, an existing judgment against such third party does not become a lien as against the vendee, as whatever interest vested in such third party through such deed forthwith became his homestead. Where the vendor held the title as security only, and the equitable owner was in possession of the property, but the records failed to disclose any interest in such equitable owner, and both the vendor and the equitable owner informed the purchaser that the vendor was the owner, and that the equitable owner was merely his tenant, and in reliance thereupon the purchaser paid the full purchase price and received and recorded his title deeds, without any knowledge of the interest of such equitable owner, or of a judgment which was in fact a lien thereon, the purchaser took the title free and clear from the lien of such judgment. Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720.

Where the owner of a city lot conveyed the same as security by deed which was duly recorded, a judgment docketed thereafter against the

grantor held not constructive notice of the lien thereof to a subsequent purchaser from the vendee. Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720.

A creditor of a party selected as a mere medium through whom a conveyance of land is made does not, by reason of that fact alone, acquire any right, title, or interest in the land by virtue of a judgment existing against such medium. Wheeler v. Nelson, 130 Minn. 365, 153 N. W. 861.

(83) Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75; Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720. See Note, 34 Am. St. Rep. 496.

(87) First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132. See Note, L. R. A. 1915B, 340.

See Digest, § 8307; Note, 117 Am. St. Rep. 776.

SATISFACTION

5073. In general—Statute—A judgment which has been paid may be vacated in an action by a subsequent judgment creditor. Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748 (complaint sustained).

(5) Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097 (court may relegate parties to an action).

(6) Orr v. Sutton, 127 Minn. 37, 148 N. W. 37.

(10) Finnish People's Home Co. v. Longyear-Mesaba Land & Iron Co., 117 Minn. 313, 135 N. W. 990.

JUDGMENT NOTWITHSTANDING VERDICT—AT COMMON LAW

5075. In general—(13) See Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

JUDGMENT NOTWITHSTANDING VERDICT—UNDER STATUTE

5076. Enlargement of common-law remedy—(17) See Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

5078. Must not infringe right to jury trial—(19) See Slocum v. N. Y. Life Ins. Co., 228 U. S. 364.

5079. Motion for directed verdict necessary—The motion for a directed verdict should specify the grounds therefor. Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759.

A motion to dismiss an appeal from the probate court is not equivalent to a motion to direct a verdict. McKnight v. Martin, 124 Minn. 191, 144 N. W. 941.

(21) Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759; McKnight v. Martin, 124 Minn. 191, 144 N. W. 941.

5082. When judgment may be ordered—A judgment cannot be ordered for inconsistency in verdicts, general or special. Bell v. Northern Pacific Ry. Co., 112 Minn. 488, 128 N. W. 829.

The fact that a party was entitled to a directed verdict on the trial does not necessarily entitle him to judgment notwithstanding the verdict on appeal. Kotefka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482. See Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 115, 127 N. W. 436.

If the complaint is not sufficient to permit a recovery upon the facts which the evidence tended to prove, it can be amended, and the action tried on its merits. If, however, it is obvious from the undisputed evidence that the plaintiff cannot make a case for the jury, even if the complaint be amended, the defendant is entitled to judgment; otherwise, not. Rihmann v. George J. Grant Const. Co., 114 Minn. 484, 131 N. W. 478.

If it is probable that the plaintiff has a good cause of action, though not properly pleaded, judgment should not be ordered. Bennett v. Great Northern Ry. Co., 115 Minn. 128, 131 N. W. 1066.

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. Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790; Daily v. St. Anthony Falls Water Power Co., 129 Minn. 432, 152 N. W. 840.

Whether a defendant, on a motion for judgment under the statute, may raise the objection that the complaint does not state a cause of action, is an open question. Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045.

Judgment will be ordered only when the evidence is conclusive against the verdict. It will not be ordered for error in either law or procedure committed at the trial. Bosch v. Chicago etc. Ry. Co., 131 Minn. ——, 155 N. W. 202.

Whether judgment notwithstanding the verdict may be granted in favor of the master where a suit, based upon negligence of a servant and brought against both master and servant, results in a verdict in favor of the servant and against the master, there being evidence tending both to prove and to disprove the charge of negligence, is doubted but not decided. Bosch v. Chicago etc. Ry. Co., 131 Minn. ——, 155 N. W. 202.

(28) Virtue v. Creamery Package Mfg. Co., 114 Minn. 167, 130 N. W. 996; Kotepka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482; Bennett v. Great Northern Ry. Co., 115 Minn. 128, 131 N. W. 1066; Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85; Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; W. H. Ferrell & Co. v. Great Northern Ry. Co., 119 Minn. 302, 138 N. W. 284; Keegan v. G. Heileman Brewing Co., 129 Minn. 496, 152 N. W. 877.

(29) Lynch v. Great Northern Ry. Co., 112 Minn. 382, 128 N. W. 457; Magers v. Minneapolis etc. Ry. Co., 112 Minn. 435, 128 N. W. 576; Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; Erwin v. Shell, 119 Minn. 496, 138 N. W. 691; Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

(30) Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145; Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710; Keegan v. G. Heileman Brewing Co., 129 Minn. 496, 152 N. W. 877.

(31) Bennett v. Great Northern Ry. Co., 115 Minn. 128, 131 N. W. 1066; Larson v. Great Northern Ry. Co., 116 Minn. 337, 133 N. W. 867; Beier v. Aberdeen Hotel Co., 118 Minn. 237, 136 N. W. 757; Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029; Roy v. Dannehr, 124 Minn. 233, 144 N. W. 758 (where the evidence on another trial may be such that the jury may be able to render a consistent verdict); Melberg v. Wild Rice Lumber Co., 125 Minn. 469, 147 N. W. 427; Daily v. St. Anthony Falls Water Power Co., 129 Minn. 432, 152 N. W. 840; Bosch v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 202.

(32) Howard v. Farr, 115 Minn. 86, 131 N. W. 1071; Melberg v. Wild Rice Lumber Co., 127 Minn. 524, 149 N. W. 1069; Berg v. Pittsburg Construction Co., 128 Minn. 408, 150 N. W. 1092; Petra v. Crookston Lumber Co., 128 Minn. 479, 151 N. W. 183; Clymer v. Kellogg, Spencer & Sons, 130 Minn. 327, 153 N. W. 602.

(33) Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; Moe v. Kekos, 127 Minn. 117, 149 N. W. 8; Converse v. Vaughn, 130 Minn. 52, 153 N. W. 133.

(34) Galbraith v. Whitaker, 119 Minn. 447, 138 N. W. 772; Erwin v. Shell, 119 Minn. 496, 138 N. W. 691; Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

(35) See Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 115, 127 N. W. 436; Kotefka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482.

(36) Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790.

5084. Appealability of order on motion—An order based upon an alternative motion for judgment notwithstanding the verdict or a new trial, denying the motion for judgment but granting a new trial, on the ground that the verdict was not sustained by the evidence, is not an appealable order. The former rule of the court sustaining the right of appeal from such orders was abrogated by chapter 474, Laws 1913, by which an appeal from orders granting new trials, except in certain instances, was abolished. Kommerstad v. Great Northern Ry. Co., 125 Minn. 297, 146 N. W. 975; Ness v. Supreme Lodge, 129 Minn. 530, 152 N. W. 1102. See Laws 1915, c. 31.

The practice of appealing before there is either a verdict or decision **upon which** a judgment may be entered is questionable. Foot, Schulze **& Co. v. Porter**, 131 Minn. —, 154 N. W. 1078.

(39) Hodge v. Franklin Ins. Co., 111 Minn. 321, 126 N. W. 1098; J. **R. Watkins** Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966.

(41) Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 132 N. W. 911.

5087. Waiver of right to new trial—If, after the verdict, the unsuccessful party moves for judgment notwithstanding the verdict, but **does not move** in the alternative for a new trial, he cannot on appeal be **awarded a new** trial. By resting solely upon his motion for judgment **he waives all** errors which would be ground only for a new trial. N. W. **Marble & Tile** Co. v. Williams, 128 Minn. 514, 151 N. W. 419; Helmer **v. Shevlin-Mathieu** Lumber Co., 129 Minn. 25, 151 N. W. 421; Daily **v. St. Anthony** Falls Water Power Co., 129 Minn. 432, 152 N. W. 840.

5087a. Statute not applicable in federal courts—The federal courts **cannot order** judgment under the statute. Slocum v. N. Y. Life Ins. Co., **228 U. S. 364.**

ASSIGNMENT

5089. In general—Evidence held sufficient to justify a finding that **a judgment** against plaintiff and his cosurety was assigned to defendant. **Carlson v. Smith**, 127 Minn. 203, 149 N. W. 199.

Effect of assignment. Note, 78 Am. St. Rep. 46.

(67) 27 Harv. L. Rev. 686.

5090. Filing and entering—Statute—(73) Carlson v. Smith, 127 Minn. **203, 149 N.** W. 199.

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

5091. To be made with caution—(74) Foster v. Brick, 121 Minn. 173, **141 N. W. 101.**

See Digest, § 9829.

5093. Notice of motion—(77) See Wetmore v. Karnick, 205 U. S. 141.

5095. May be made after term—(81) Schloss v. Lennon, 123 Minn. **420, 144 N.** W. 148.

5097a. Jurisdictional defects—If a court is without jurisdiction to enter a judgment in the first instance, it is equally without jurisdiction to **amend it. Juster** v. Court of Honor, 120 Minn. 325, 139 N. W. 701.

5098. Clerical mistakes of judge—(87) See Schloss v. Lennon, 123 Minn. **420, 144** N. W. 148.

5100. Judgment not authorized by order—(90) Keenan v. Johnson, **111 Minn. 174**, 126 N. W. 523; Endicott v. Davidson, 122 Minn. 411, 142 **N. W. 805.**

5101. Modification of judgment on motion—A modification of a judgment in accordance with an order remanding the case, in an action to obtain an injunction against the construction of a public ditch, held proper. A motion for a modification which was an attempt to secure an adjudication of the form and validity of new proceedings, held properly denied. Bilsborrow v. Pierce, 114 Minn. 185, 130 N. W. 852.

When a clerk makes an irregular entry of judgment, and the time to appeal from the judgment expires, it is an open question whether the court may vacate the judgment, make other findings and order the entry of another judgment at variance with its original decision. State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

A judgment may be modified so as to incorporate conditions of an award in condemnation proceedings, even though the judgment as to damages has been paid and discharged. Minneapolis etc. Traction Co. v. Grimes, 128 Minn. 321, 150 N. W. 906.

(92) See Bilsborrow v. Pierce, 114 Minn. 185, 130 N. W. 852.

5104. Amendment of names of parties—(99) Morrison County Lumber Co. v. Duclos, 131 Minn. ——, 154 N. W. 952.

VACATION

5111. Application by non-resident—Attachment—(16) Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915.

5112. Application by stranger—A judgment which has been paid may be vacated in an action by a subsequent judgment creditor. Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748.

Persons who are strangers to the record may have a judgment vacated for fraud or collusion affecting them. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

(17) See, as to an application by a surety, Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

See Digest, § 5014.

5114. Laches—Laches will sometimes defeat an action though the judgment was void for want of jurisdiction. McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

5117. Void judgments—Remedy by motion or action—An action may be maintained to set aside a judgment upon the ground that no process had been served or jurisdiction acquired in any manner. A different rule prevails in cases where jurisdiction was acquired over a party in the suit in which judgment was obtained. In such case the remedy by motion under section 4160, R. L. 1905 (G. S. 1913, § 7786), where applicable, is exclusive, except as to judgments obtained by fraud. Cremer v. Michelet, 114 Minn. 454, 131 N. W. 627.

A judgment is never void for error, if the court has jurisdiction over the person of the defendant and the subject-matter of the action. Therefore the defects in the pleadings in a civil action—for example, the failure of the complaint to state facts constituting a cause of action—do not render a judgment void. It is valid, unless reversed or set aside on appeal, or by some other appropriate proceeding in the action. An independent action in equity to set aside a judgment cannot be resorted to as a substitute for a demurrer to a defective pleading. McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

(29) See Cremer v. Michelet, 114 Minn. 454, 131 N. W. 627; McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

5118. Want of jurisdiction—Service on a domestic corporation by handing the summons to one not specified in the statute held properly set aside. Schlesinger v. Modern Samaritans, 121 Minn. 145, 140 N. W. 1027.

(39) Lunschen v. Peterson, 120 Minn. 288, 139 N. W. 506. See Cremer v. Michelet, 114 Minn. 454, 131 N. W. 627; Willard v. Marr, 121 Minn. 23, 139 N. W. 1066.

5121. Facts arising subsequent to judgment—Discharge in bankruptcy—Provision is made for the vacation of judgments after a discharge in bankruptcy under certain conditions. G. S. 1913, § 7914; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

5122. Fraud—A judgment of dismissal ends the action. But the court has jurisdiction to vacate such a judgment, in case of fraud or collusion, on the motion of a party or of strangers who bear such relation thereto or to the subject-matter that their rights are affected. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818.

5123a. Mistake—A judgment of dismissal, entered upon stipulation or acquiescence of plaintiff's counsel, may be set aside by the court, and the cause reinstated for sufficient cause shown. The matter rests largely in the discretion of the trial court. That plaintiff and the court overlooked the fact that a new action would be barred by a contract limitation may furnish sufficient cause. Macknick v. Switchmen's Union, 131 Minn. —, 154 N. W. 1099.

5123a. Pleading—A general allegation, in a complaint in an action by a judgment creditor of defendant, seeking to avoid the lien of prior judgments on land owned by defendant, that such prior judgments were paid prior to a time stated, is a sufficient allegation of payment as against a general demurrer, and such complaint states a cause of action for the relief demanded, that such prior judgments be declared paid and satisfied. Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748.

EQUITABLE ACTION TO VACATE FOR FRAUD

5125. When lies—(56) See Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051 (action by wife to set aside a judgment against her husband fraudulent as to her); Note, 54 Am. St. Rep. 218.

STATUTORY ACTION TO VACATE FOR FRAUD

5126. Nature of action—Not exclusive of remedy by motion—(61) Cremer v. Michelet, 114 Minn. 454, 131 N. W. 627.

5127. Validity and construction of statute—An action under the statute is governed by equitable principles. McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

The relief sought is of an extraordinary character and to be allowed only in unequivocal cases. Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

(64) Major v. Leonard, 115 Minn. 439, 132 N. W. 915.

(66) McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

(67) Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

5128. For perjury—A motion to set aside a judgment, under section 4277, R. L. 1905 (G. S. 1913, § 7910), on the ground that it was procured by perjured testimony, will not be entertained when the complaint in the action fully informed the defendant of what plaintiff would attempt to prove, and defendant, though he answered, failed to appear at the trial, and was not fraudulently deceived by any act of plaintiff. Major v. Leonard, 115 Minn. 439, 132 N. W. 915.

(68) Major v. Leonard, 115 Minn. 439, 132 N. W. 915; McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708; National Council v. Ruder, 126 Minn. 154, 147 N. W. 959; Young v. Lindquist, 126 Minn. 414, 148 N. W. 455; Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666. See Note, 10 L. R. A. (N. S.) 216, 23 Id. 564; 25 Id. 574.

5129. For fraudulent practices—The fraud must be of a substantial character and proved unequivocally. Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

(69) See Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666.

See Digest, § 5131.

5131. Judgment of divorce—In an action to vacate a decree of divorce on the ground that it was obtained by fraud and perjury of the prevailing party, brought after the death of the party guilty of the fraud, the state is no longer a party interested, and the action becomes one involving mere property rights, governed by the ordinary equitable principles. In such an action, where the fraud and perjury charged against the prevailing party does not involve the jurisdiction of the court, nor any

fraud or deception by which the opposing party was misled or prevented from making a defence, but relates solely to perjury and concealment in establishing the cause of action alleged, it does not come within the purview of section 4277, R. L. 1905 (G. S. 1913, § 7910). McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

Conceding without deciding that an agreement of separation between the parties, entered into after the desertion charged in the complaint, would be material evidence on that issue, the failure to disclose on the trial the existence of such agreement, though intentional, is not fraud or perjury for which the judgment can be set aside under the statute. Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666.

If substituted service of summons, in place of personal, is made through the fraud of the plaintiff, with the intent of keeping the action a secret from the defendant, the judgment may be set aside for such fraud, even after the death of the plaintiff, in the absence of an estoppel. Kriha v. Kartak, 127 Minn. 406, 149 N. W. 666 (no fraud proved).

5133. After death of party—(74) See McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708; Note, 125 Am. St. Rep. 230.

5134. Laches—A defendant, upon whom the summons and complaint in a divorce suit were personally served delayed for fourteen years after such service, and more than nine years after knowledge that a decree had been entered, to apply to the court to have it vacated, but waited till after the death of the plaintiff therein. Held, that her long delay was not excused, either by her ill health or the alleged ignorance of the fraud and perjury practiced by the prevailing party. McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

5135. Pleading—A complaint in an action to restrain the enforcement of a judgment on the ground that it was procured by perjury, held insufficient. National Council v. Ruder, 126 Minn. 154, 147 N. W. 959.

(76) Young v. Lindquist, 126 Minn. 414, 148 N. W. 455.

COLLATERAL ATTACK

5137. In general—A judgment of naturalization rendered by a domestic court having jurisdiction of the subject-matter and of the person of the applicant is not subject to collateral attack. State v. MacDonald, 24 Minn. 48.

Held proper to exclude a judgment void on the face of the record because entered after the action had been dismissed on the record. Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

(81) State v. Ries, 123 Minn. 397, 143 N. W. 981.

5138. What constitutes—Evidence received not to impeach a judgment collaterally, but to show an agreement between the plaintiff and

third parties as to the distribution of the proceeds of the judgment. Keenan v. Johnson, 111 Minn. 174, 126 N. W. 523.

See Note, 23 Am. St. Rep. 104.

5139. For want of jurisdiction over the subject-matter—(86) See Malmsted v. Minneapolis Aerie, 111 Minn. 119, 122, 126 N. W. 486.

(87) See Digest, § 2347.

5139a. For failure to invoke jurisdiction in prescribed manner—Where it is provided by statute that the jurisdiction of the court shall be invoked in a particular manner, as, for example by petition, and it affirmatively appears from the record, or is conceded, that jurisdiction was not so invoked, all the proceedings are void and subject to collateral attack, at least in the absence of consent, waiver or estoppel. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

5140. For want of jurisdiction of particular issues—(90) See Ordean v. Grannis, 118 Minn. 117, 127, 136 N. W. 575, 1026; McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781; Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385; 7 Col. L. Rev. 551.

5141. For want of jurisdiction over the person—(91) Riley v. Pearson, 120 Minn. 210, 139 N. W. 361.

(93, 94) See Digest, § 2347.

(98) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

5142. For want of jurisdiction to award the relief granted—(99) See Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

5143. Fraud—The rule that a judgment of a domestic court of superior jurisdiction cannot be attacked collaterally for fraud by parties or privies, is not applicable where the fraud is such that the court does not acquire jurisdiction of the parties. Riley v. Pearson, 120 Minn. 210, 139 N. W. 361.

The doctrine against collateral attack applies almost exclusively to judgments of duly constituted courts, or the proceedings and decisions of judicial or quasi judicial officers in matters within their jurisdiction. It has no application to contracts, or to stipulations or agreements in actions or proceedings not followed by judicial confirmation. All private writings, contracts, and agreements are open to attack for fraud, or for want of authority in an agent to enter into the same, whenever or wherever rights are asserted thereunder. It is unnecessary to assail them by direct proceeding. Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

(1) State v. Ries, 123 Minn. 397, 143 N. W. 981. See Digest, § 8364; 36 L. R. A. (N. S.) 980 (kinds of judgments within rule).

(2) National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818; Grant v. Bibb, 129 Minn. 312, 152 N. W. 728; Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804. See Digest, § 5112.

5145. For error or irregularity—Where a court has jurisdiction of the subject-matter and the parties, and renders a judgment which it had jurisdiction to enter if the facts pleaded and proved warranted it, such judgment, though erroneous under the pleadings and proof in the case, is not void, and cannot be attacked collaterally. Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575, 1026.

When a judgment is introduced as evidence against strangers it may be impeached for fraud upon them, and for want of jurisdiction of the subject-matter, but for no other cause. Grant v. Bibb, 129 Minn. 312, 152 N. W. 728.

(5) Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575, 1026 (decree of sale in partition action because the liens on the property exceeded its value); Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172 (that a person representing an infant was not regularly appointed); State v. Ries, 123 Minn. 397, 143 N. W. 981 (general rule state—judgment adjudging tax sales void); Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565 (failure to allow all the credits to which a defendant was entitled in an action for rent); Grant v. Bibb, 129 Minn. 312, 152 N. W. 728 (error).

(8) McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708.

(10) Connecticut Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N W. 1.

(13) Briscoe v. District of Columbia, 221 U. S. 547.

5146. Presumption of validity—(17) State v. Wolfer, 119 Minn. 368, 138 N. W. 315.

HOW PROVED

5147. Domestic judgments—(18) See McKinley v. Macbeth, 113 Minn. 148, 129 N. W. 216, 389.

(20) Lindeke v. Scott County Co-operative Co., 126 Minn. 464, 148 N. W. 459.

ACTIONS ON JUDGMENTS

5152. Pleading—(34) Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799 (statutory mode of pleading judgment).

See Dunnell, Minn. Pl. 2 ed. §§ 689, 691.

AS EVIDENCE

5154. Evidence of rendition and legal consequences—An interlocutory decree in a suit for the infringement of a patent held conclusive evidence

that a party had not yet prevailed in the suit. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(36) Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292 (existence of a judgment as a fact); Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416; Grant v. Bibb, 129 Minn. 312, 152 N. W. 728 (rule of text stated).

5156. Not evidence against strangers of facts on which based—Exceptions—A judgment quieting title to land does not operate as an estoppel against strangers to the action. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

A judgment committing an insane person to a state insane asylum or appointing a guardian for an insane person is prima facie evidence of the insanity of the person. See §§ 4517, 4523, 4524.

(38) Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Bradford v. Borg, 114 Minn. 387, 131 N. W. 373; Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289; Painter v. Gunderson, 123 Minn. 342, 143 N. W. 911; Carel v. Haedecke, 123 Minn. 435, 143 N. W. 1124; Torgeson v. Crookston Lumber Co., 123 Minn. 476, 144 N. W. 154; Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66; Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416 (inadmissible to prove marriage).

(40) See Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416.

(41) See Tilt v. Kelsey, 207 U. S. 43.

5156a. Of facts provable by reputation—While, as a general rule, a judgment binds only the parties and their privies, a judgment in a prior action may be admissible against a stranger as prima facie proof of facts which may be proved by reputation, such as custom, pedigree, race, death, alienage and the like. Grant Bros. Const. Co. v. United States, 232 U. S. 647.

Our supreme court has refused to adopt this rule, so far at least as proof of marriage is concerned. Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416.

5157. As a link in a chain of title—(43) See Arnold v. Smith, 121 Minn. 116, 140 N. W. 748; Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416.

AS A BAR OR ESTOPPEL—RES JUDICATA

5159. Basis of doctrine—The foundation of the doctrine of res judicata, or estoppel by judgment, is that both parties have had their day in court. Johannessen v. United States, 225 U. S. 227.

(46) Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099.

5160. Doctrine to be applied cautiously—(47) See Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 418, 145 N. W. 124.

5160a. Court without jurisdiction—Where the court has no jurisdiction to determine a particular issue in an action its judgment therein does not operate as a bar on that issue. McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781.

5160b. Ex parte decision—An ex parte decision is not res judicata. Merz v. Wright County, 114 Minn. 448, 131 N. W. 635.

5161. Distinction between estoppel by judgment and estoppel by verdict—(48) Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787; Clay, Robinson & Co. v. Larson, 125 Minn. 271, 146 N. W. 1095.

5162. Estoppel by verdict—Different cause of action—(49) See Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923.

(50) See White v. Hewitt, 119 Minn. 340, 138 N. W. 421.

(52) Major v. Lunn, 115 Minn. 404, 132 N. W. 321 (issue as to ownership of realty); Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124 (issue as to whether plaintiff sold land for the defendant as a broker—issue as to compensation—express contract for compensation alleged, also reasonable value of services); Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787 (issue as to title to land—in first action it was held that a deed was given for a valuable consideration and passed the title in fee absolutely—in the second action it was sought to ingraft a trust upon the deed, in other words, to show that it was less than an absolute deed); Clay, Robinson & Co. v. Larson, 125 Minn. 271, 146 N. W. 1095 (issue as to whether advancements made by one of the parties for the care of certain cattle under a bill of sale took precedence over a chattel mortgage of the other party); Connecticut Mutual Life Ins. Co. v. Schurmeier, 125 Minn. 368, 147 N. W. 246 (issue as to validity of claim against the estate of a decedent); Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565 (issue as to amount of rent due and unpaid); Seeger v. Young, 127 Minn. 416, 149 N. W. 735 (registration proceedings—issue as to title); Messinger v. Anderson, 131 Fed. 785 (issue as to construction of will).

(53) White v. Hewitt, 119 Minn. 340, 138 N. W. 421; Upton v. Merriman, 122 Minn. 158, 142 N. W. 150. See Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Note, 44 Am. St. Rep. 562.

(58) Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124.

(61) McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781.

5163. Estoppel by judgment—Former judgment as a bar—General rule—A judgment bars all grounds for the relief sought and, as res judicata, it is a bar to a subsequent action between the same parties the

object of which is to reach the same result by different means. Calaf v. Calaf, 232 U. S. 371.

There may be exceptions to the general rule where it is shown that a particular issue or question was not in fact litigated because withdrawn, or where there are several causes of action and one of them is dismissed or abandoned before the trial. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 127.

A judgment in an action to determine the title to realty is conclusive of the rights of all parties to the action and those in privity with them, including all rights or interests which were or could have been litigated therein. Telford v. McGillis, 130 Minn. 397, 153 N. W. 758.

(62) Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099; White v. Hewitt, 119 Minn. 340, 138 N. W. 421; Harbek v. Carpenter-Robinson, 123 Minn. 389, 143 N. W. 916; Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131. See Disbrow Mfg. Co. v. Creamery Package Mfg. Co., 115 Minn. 434, 438, 132 N. W. 913.

(63) McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131.

(65) Calaf v. Calaf, 232 U. S. 371.

5164. Verdict or findings must pass into judgment—(67) Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

5165. Estoppel must be mutual—(69) Bigelow v. Old Dominion etc. Co., 225 U. S. 111.

5166. Subsequently accruing rights—Instalments—(71) Crozier v. B. F. Nelson Mfg. Co., 120 Minn. 524, 139 N. W. 353; Chapman v. Propp, 125 Minn. 447, 147 N. W. 442. See Lindberg v. Morrison County, 116 Minn. 504, 134 N. W. 126 (instalment of tax lien—judgment held res judicata as to validity of subsequent liens).

5167. Indivisible causes of action—Splitting—The right of action given by section 4503, R. L. 1905 (G. S. 1913, § 8175), for the wrongful death of a person, creates one single, indivisible cause of action; and a recovery against, or settlement with, one of the wrongdoers, is a bar to a subsequent action against others whose wrongful conduct may have contributed to cause the death. Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796. See Note, 34 L. R. A. 788; 8 L. R. A. (N. S.) 384.

Where the plaintiff, in an action for damages resulting from an overflow caused by the backing up of the water from the defendant's dam, so framed his complaint that he was restricted to proof of certain specific acts as having caused such backing up and overflow, the cause of action was nevertheless predicated upon the defendant's violation of his ultimate duty to so conduct and maintain its dam as not to violate the

rights of the plaintiff, whose lands lay further up the river; and hence a judgment in favor of the defendant in such action was a bar to a subsequent action between the same parties for the same relief sought in the former action, though the allegations of the complaint in the second action were sufficiently broad to admit of proof of any and all specific acts or omissions of the defendant in violation of its ultimate obligation to the plaintiff with respect to the maintenance of the dam. Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099.

The rule affects both parties in the same way. A judgment for the defendant under like circumstances will result in the same consequences. Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099.

A single and entire cause of action cannot be split up into several suits, and the judgment in a suit brought upon such cause of action is a bar to a second suit thereon, though the complaint in the second suit may set forth grounds for relief which were not set forth in the complaint in the first suit. In suits based upon negligence, the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury. A judgment, rendered in a suit brought by a passenger to recover for injuries sustained while alighting from a street car, is a bar to a subsequent suit brought by the same passenger against the same defendant to recover for the same injuries, though the particular acts of negligence charged may be different in the two suits, as the cause of action in both suits is the violation of the ultimate duty to afford safe egress from the car. McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131.

(72) McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131; Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099 (overflow of land by a dam).

(73) See 12 Col. L. Rev. 261; 60 Am. L. Reg. 531; 24 Harv. L. Rev. 492; 27 Id. 490; Note, 36 L. R. A. (N. S.) 240.

(74) See Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099.

5168. Independent causes of action—(76) Mead v. Mead, 115 Minn. 524, 132 N. W. 1132 (a judgment for conversion held not a bar to an action of replevin for crops, the same crop not being involved); Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099; Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029. See Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124 (action for services—complaint alleging reasonable value of services and also express contract).

5169. Test of distinct causes of action—In determining whether a judgment in a former action between the same parties is res judicata, the

test is not the nature of the relief demanded, but is whether the facts put in issue, found, and adjudged in the former action are the same facts sought to be litigated in the present action. Tew v. Webster, 118 Minn. 375, 136 N. W. 1098.

The singleness of a cause of action is not necessarily affected by the variety or severability of the damages. Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099.

The test is not whether the two complaints are so drawn that the same evidence would be admissible under both, but whether the same evidence which will sustain the cause of action upon which a recovery is sought in the second action, would have sustained the cause of action upon which a recovery was sought in the first action. A judgment on a single and entire cause of action will bar a second action thereon, though the complaint in the second action may set forth grounds for relief not set forth in the complaint in the first action. McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131.

(79) Tew v. Webster, 118 Minn. 375, 136 N. W. 1098; Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099.

5170. Merger of cause of action in judgment—A judgment in personam in a court of a foreign country does not merge the original cause of action unless it has been satisfied. Swift v. David, 181 Fed. 828.

Where a creditor has acquired a lien on his debtor's property in one state he does not lose the benefit of it by proceeding to secure a lien *on* his debtor's property in another state. See 26 Harv. L. Rev. 375.

(81) The doctrine of merger is not applicable to strangers. Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

5172. Who may assert—Stranger defending action—(85) Souffront v. Compagnie Des Sucreries, 217 U. S. 475; Kapiolani Estate v. Atcherley, 238 U. S. 119. See Telford v. McGillis, 130 Minn. 397, 153 N. W. 758.

5173. Who are privies—Privity denotes mutual or successive relationship to the same right of property. There is no privity between joint tortfeasors. Bigelow v. Old Dominion etc. Co., 225 U. S. 111.

An unrecorded quitclaim deed from plaintiff's grantor to plaintiff, construed together with a contract entered into between them at the same time, constituted plaintiff the agent or attorney of the grantor to conduct litigation, sell the property described in the deed, and divide the proceeds, and did not make plaintiff a bona fide purchaser or give him a title that can prevail as against the subsequent estoppel of his grantor by the judgment and decision in the former suit. White v. Hewitt, 119 Minn. 340, 138 N. W. 421.

A guardian is not in privity with his ward. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

A county is in privity with its board of county commissioners. A **judgment** against a municipality is binding on the taxpayers and officers thereof. Murphy v. Scott County, 125 Minn. 461, 147 N. W. 447. **See Note,** 105 Am. St. Rep. 204.

(86) Note, 112 Am. St. Rep. 21.

(89) See Digest, § 2078; Note, 97 Am. St. Rep. 463.

(93) See Mackay v. Randolph, 178 Fed. 881.

5176. Persons answerable over—Sureties—Indemnitors—It is only **when the** indemnitor has been notified and has had an opportunity to **defend that** he will be concluded by a judgment against the indemnitee **as to all** questions determined therein which are material to a recovery **against him** by the indemnitee. Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715.

It is settled law that, where one is bound either by law or by agreement to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the suit and opportunity to control and manage it. And if the indemnitee settles the suit without trial he may recover the amount from the indemnitor, providing it was a reasonable sum to pay, and the indemnitee was liable in some amount. Where there is a trial and judgment in the action against the indemnitee, after notice to defend given to the indemnitor, the judgment is conclusive evidence that the indemnitee was liable, and as to the amount. But where there is no trial and judgment establishing the liability, the question remains open for decision. But a judgment rendered upon a stipulation of settlement should be held to be presumptive evidence of the liability of the insured and the amount thereof. Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355.

A surety on an executor's bond is bound by a judgment of a federal court allowing a claim against the estate. Connecticut Mutual Life Ins. Co. v. Schurmeier, 117 Minn. 473, 136 N. W. 1; Id., 125 Minn. 368, 147 N. W. 246.

From the nature of the obligation entered into by a surety on an administrator's bond, he is, though not a party to the proceeding, bound and concluded by a judgment against his principal, in the absence of fraud or collusion; the judgment against the principal is res judicata and cannot be collaterally attacked in an action on the bond. Such judgment or order of the probate court cannot be attacked by the surety on the ground that the court was mistaken in the facts on which the order was based, or on the ground that it was erroneous as a matter of law. Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

Facts held not to warrant the court in aiding a surety by restraining the enforcement of a judgment, pending an action by the surety to com-

pel the principal debtor to pay it. U. S. Fidelity & Guaranty Co. v. Connecticut Mut. Life Ins. Co., 126 Minn. 528, 148 N. W. 306.

One who contracts to be bound by the decision of a court or other tribunal is bound by the decision as fully as if he were a party to the action or proceeding. He cannot attack the decision collaterally except for fraud or want of jurisdiction. Martin County v. Kampert, 129 Minn. 151, 151 N. W. 897.

(1) Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

(2) Martin County v. Kampert, 129 Minn. 151, 151 N. W. 897.

(97) Patterson v. Adan, 119 Minn. 308, 138 N. W. 281 (indemnitor—liability policy); Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355 (indemnitor—employer's liability insurance); Kapiolani Estate v. Atcherley, 238 U. S. 119 (warrantor of title—necessity of notice). See 132 Am. St. Rep. 759.

(99) Note, 40 L. R. A. (N. S.) 698.

5177. Parties bound by representation—Contingent interests—A party is bound by a judgment in an action brought by his representative. Telford v. McGillis, 130 Minn. 397, 153 N. W. 758.

(4) Note, 97 Am. St. Rep. 762; 8 L. R. A. (N. S.) 49.

5179. Judgment must be on the merits—A mere interlocutory decree in an equitable action is not res judicata. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(6) Morrison County v. Lejouburg, 124 Minn. 495, 145 N. W. 380.

5180. Judgment of dismissal—Nonsuit—Rulings in a previous action, from the order of dismissal in which no appeal has been taken, are not binding upon the parties to another action subsequently brought upon the same facts. Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997.

A dismissal on motion of defendant for want of prosecution is not a bar. Lovell v. St. Clair, 126 Minn. 108, 147 N. W. 822.

(8) Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Morrison County v. Lejouburg, 124 Minn. 495, 145 N. W. 380; Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617.

5186. Judgment against one of several tortfeasors—(25) Bigelow v. Old Dominion etc. Co., 225 U. S. 111.

5189. Judgment of divorce—(28) See Digest, § 2799.

5190. Judgment in mandamus proceedings—(29) Murphy v. Scott County, 125 Minn. 461, 147 N. W. 447. See Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66 (stranger to action not bound).

5193. Criminal and civil actions—A judgment in a criminal action is not admissible in a civil action to prove any fact there determined.

Chantango v. Abaroa, 218 U. S. 476. See Note, 103 Am. St. Rep. 19; 11 L. R. A. (N. S.) 653.

5194. Immaterial that judgment is erroneous—It is the adjudication which determines the estoppel by judgment, or by verdict, and not its correctness or the propriety of the method by which it is reached. Clay, Robinson & Co. v. Larson, 125 Minn. 271, 146 N. W. 1095. See Digest, §§ 5145, 5208.

5194a. Judgment of court without jurisdiction—A judgment of a court without jurisdiction of the subject-matter or parties is not res judicata. Robertson v. Gordon, 226 U. S. 311; Murray v. Pocatello, 226 U. S. 318.

5195. Equitable relief not obtainable in former action—(35) See Major v. Owen, 126 Minn. 1, 147 N. W. 662 (action to determine adverse claims—plaintiff asserting only legal title—right to assert equitable title in subsequent action).

5197. Counterclaims—(38) Virginia etc. Co. v. Kirven, 215 U. S. 252.

5201. Effect of appeal and reversal—(43) See Messenger v. Anderson, 171 Fed. 785; 26 Harv. L. Rev. 438.

5204. How asserted—Pleading—Motion—Stay—(46) Swank v. St. Paul City Ry. Co., 61 Minn. 423, 63 N. W. 1088; Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022. See Messenger v. Anderson, 171 Fed. 785.

(49) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022.

5205. Held a bar—Miscellaneous cases—A judgment involving the validity of an instalment of an assessment for local improvements, held res judicata as to validity of subsequent instalments. Lindberg v. Morrison County, 116 Minn. 504, 134 N. W. 126.

A judgment in an action to compel the lowering of a dam, held a bar to an action of ejectment to recover the land submerged by the backwater from the same dam. Tew v. Webster, 118 Minn. 375, 136 N. W. 1098.

A judgment in an action for damages for an overflow of lands caused by the backing up of the water from a dam, held a bar to another action for damages which might have been asserted in the former action. Liimatainen v. St. Louis River Dam & Imp. Co., 119 Minn. 238, 137 N. W. 1099.

A judgment in an action to determine adverse claims, held a bar to an action for partition. White v. Hewitt, 119 Minn. 340, 138 N. W. 421.

A judgment for a balance due on an account for goods sold and delivered, held a bar to an action to recover partial payments on the account not pleaded or proved in the former action. Harbeck v. Carpenter-Robinson Co., 123 Minn. 389, 143 N. W. 916.

A judgment in an action for services wherein the complaint alleged an express contract and also the reasonable value of the services and there was no election, held a bar to a subsequent action for the reasonable value of the services. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124.

A judgment in mandamus proceedings against a board of county commissioners to approve and allow a claim against the county, held a bar to an action against the county on the same claim. Murphy v. Scott County, 125 Minn. 461, 147 N. W. 447.

A judgment in an action for conversion and fraud, held a bar to an action for conspiracy and the same fraud. Ziegler v. Suggit, 129 Minn. 309, 152 N. W. 754.

A judgment in an action to determine adverse claims, held a bar to a subsequent action of the same nature involving title to the same land. Telford v. McGillis, 130 Minn. 397, 153 N. W. 758.

A judgment in an action by a passenger in a street car to recover for injuries sustained while alighting from the car, held a bar to an action for the same injuries based on a different charge of negligence in the management of the car. McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131.

(61) See Mead v. Mead, 115 Minn. 524, 132 N. W. 1132.

5206. Held not a bar—Miscellaneous cases—A conveyance of land by the owner, who had previously entered into a contract with another for the logging of the standing timber, did not relieve the vendor from liability for damages for having violated the terms of the logging contract; and a decree entered in an action subsequently brought by the vendee, to the effect that the logging contractor had no interest in the land, was not a bar to an action for damages by such contractor against the vendor. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923.

A prior judgment in an action by the owner of horses against a contractor to recover a personal judgment for the agreed price of their services, and against defendant in this action to establish and foreclose a lien claimed by such owner, held not to estop defendant from now claiming that plaintiffs acquired no lien on the logs; the judgment being merely a personal one against the contractor, and it appearing that the court in such action did not and could not adjudicate such lien. McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781.

A judgment in the federal courts to recover treble damages for alleged combination in restraint of trade in violation of the Sherman anti-trust act, held not a bar to a subsequent action in the state courts for unfair competition and malicious prosecution of a civil action. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

A judgment in an action on a note given by a vendor to secure performance of his agreement to convey, held not a bar to an action for damages for breach of contract to convey. Chapman v. Propp, 125 Minn. 447, 147 N. W. 442.

A judgment for defendant in an action to determine adverse claims, wherein the plaintiff asserted only a legal title, held not a bar to a subsequent action wherein plaintiff asserted an equitable title. Major v. Owen, 126 Minn. 1, 147 N. W. 662.

(85) See Crozier v. B. F. Nelson Mfg. Co., 120 Minn. 524, 139 N. W. 353.

(94) See Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124.

FOREIGN JUDGMENTS

5207. Full faith and credit—(99) Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172; Fall v. Eastin, 215 U. S. 1. See Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289 (constitutional provision for full faith and credit held not violated by exclusion of a decree where the issues and parties are different), reversed 237 U. S. 662. See Note, 103 Am. St. Rep. 304.

5208. Collateral attack—(2) Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172; Brown v. Fletcher's Estate, 210 U. S. 82; Bigelow v. Old Dominion etc. Co., 225 U. S. 111. See Note, 103 Am. St. Rep. 304.

(4) Note, 32 L. R. A. (N. S.) 905.

(5) Clay, Robinson & Co. v. Larson, 125 Minn. 271, 146 N. W. 1095.

JUDICIAL SALES

5215. Title of purchaser—Caveat emptor—(19) Arnold v. Smith, 121 Minn. 116, 140 N. W. 748. See Note, 135 Am. St. Rep. 917.

JURY

IN GENERAL

5225. Oath—(36) See Bakke v. Melby, 119 Minn. 504, 138 N. W. 950 (when new trial may be granted for failure to swear juror—showing on appeal).

5226. Sickness or temporary insanity of juror—(39) See Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322 (temporary insanity of juror during trial).

RIGHT TO JURY TRIAL IN CIVIL ACTIONS

5227. Constitutional provision—Construction—(41) Peters v. Duluth, 119 Minn. 96, 137 N. W. 390; State v. Ryder, 126 Minn. 95, 147 N. W. 953; Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

(45) Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

5229. Right determined by complaint—It is not the pleader's theory of his action, but the nature of the issues to be tried, that determines the right to a jury trial. The demand for judgment is not conclusive. An action may be equitable though the plaintiff demands only damages. Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

5230. Legal actions—In general—An action on an administrator's bond held triable by jury though the answer pleaded fraud and asked for equitable relief. Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

(52) See Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

5231. Equitable actions—In an equitable action a defendant interposing a counterclaim of a legal nature is not entitled to a jury trial of his counterclaim. Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

(63) State v. Ryder, 126 Minn. 95, 147 N. W. 953 (action under Laws 1913, c. 562, for the suppression of houses of prostitution); Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532; Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

5232. Actions including legal and equitable causes of action—In an equitable action a defendant interposing a counterclaim of a legal nature is not entitled to a jury trial of his counterclaim. Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

(64) Davis v. Forrestal, 124 Minn. 10, 144 N. W. 423; Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

(66) Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

5233. Miscellaneous actions and proceedings—There is no constitutional right to a jury trial in interpleader proceedings. Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

There is no constitutional right to a jury trial in proceedings for the registration of title to lands. Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

There is no constitutional right to a jury trial in an action for the abatement of a house of prostitution. State v. Ryder, 126 Minn. 95, 147 N. W. 953.

There is no constitutional right to a trial by jury in an action to restrain a trespass to realty and for incidental damages. Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532.

There is no constitutional right to a jury trial in an action to charge the defendant as a trustee of certain property, the legal title to which he holds, and to require him to account as such trustee. Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

There is no constitutional or statutory right to a jury trial of the issues of testamentary capacity or undue influence on appeal to the district court from the allowance of a will by the probate court. Lewis v. Murray, 131 Minn. —, 155 N. W. 392.

5234. Waiver of trial by jury in civil cases—Plaintiff held not to have waived his right to a general verdict, or consented to a special finding by the jury and a reservation of the cause for trial and decision by the court. Blied v. Barnard, 116 Minn. 307, 133 N. W. 795.

The constitution expressly provides that a jury trial may be waived. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

RIGHT TO JURY TRIAL IN CRIMINAL ACTIONS

5235. Constitutional right—An action under Laws 1913, c. 562, for the abatement of a house of prostitution, is not a criminal proceeding and the defendant is not entitled to a jury trial. State v. Ryder, 126 Minn. 95, 147 N. W. 953.

(21, 22) St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

(27) See 26 Harv. L. Rev. 754.

5236. Waiver of right—(32) 25 Harv. L. Rev. 179; Note, 46 L. R. A. (N. S.) 38.

SUMMONING AND DRAWING

5240. Special venire—The discharge of the whole or part of a jury panel, and the summoning of a new one, rests in the discretion of the

trial court. The fact that special veniremen were summoned from only seven out of thirty-six towns, cities, and villages in the county, and that eight were summoned from one village and others from points near to it, is not ground for challenge to the panel; no bad faith, fraud, or oppression being established, and it not appearing that the persons selected were not as a class fair-minded jurors. State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

5241. Talesmen—(51) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507.

IMPANELING

5248. Challenge to the panel—The fact that special veniremen were summoned from only seven, out of thirty-six, towns, cities and villages in the county, and that eight were summoned from one village and others from points near it, is not ground for challenge to the panel, no bad faith, fraud or oppression being established, and it not appearing that the persons selected were not as a class fair-minded jurors. State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

(63) State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

5252. Examination of juror—When impaneling a jury in an action to recover for personal injuries, it is proper to ascertain whether an insurance company is maintaining the defence, and whether any of the proposed jurors are interested in that or any other insurance company. Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561.

Record held to disclose no basis for imputation of bad faith on the part of plaintiff's counsel in referring, during his examination of a juror, to a liability insurance company as the real party in interest; and hence denial of defendant's motion to discharge the panel on account thereof was not error. Uggen v. Bazille & Partridge, 127 Minn. 364, 149 N. W. 459.

(83) See Note, L. R. A. 1915A, 153.

5253. Challenge for implied bias—That a juror is a client of one of the attorneys is not a ground for challenging for implied bias. Sorseliel v. Red Lake Falls Milling Co., 111 Minn. 275, 126 N. W. 903.

Under G. S. 1913, § 9233 (Rev. Laws 1905, § 5391, subd. 2), making the relation of master and servant between the defendant and the plaintiff a cause of challenge for implied bias, it is not a good cause of challenge to a proposed juror that he is in the employ of a corporation, the majority of the stock of which is controlled by another corporation, and so on down to a final holding corporation, which holding corporation in the same way controls the majority of the stock of the defendant corporation; such holding corporation not owning stock in either, and neither owning stock in the other. Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250.

5254. Peremptory challenges—The court ruled that interveners had the separate right to challenge jurors, and that the order of challenge should be: Defendants; interveners; plaintiffs. The record shows that a colloquy occurred between the court and counsel as to the right of interveners to interpose their third peremptory challenge to a talesman; the plaintiffs having exhausted their peremptory challenges. Counsel for interveners claimed the right, and the court stated that it was inclined to hold, under the circumstances, that the right did not exist. Counsel for interveners took an exception to the court's statement; but no particular juror was challenged, and the court did not rule on the question, and for all that appears in the record the plaintiffs might have admitted the challenge, if it had been made. Fink v. United American Fire Ins. Co., 114 Minn. 177, 130 N. W. 944.

Limiting the number of peremptory challenges to three for both defendants, even if erroneous, does not entitle appellant to a reversal unless it appear that appellant was not permitted to exercise all three challenges and that some juror remained upon the panel whom appellant wished to exclude therefrom. Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938.

5258. Trial of challenge—(5) Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250.

JUSTICES OF THE PEACE

JURISDICTION AND POWERS

5263. Limited to county—Denied in certain cities—(12) See Juster v. Court of Honor, 120 Minn. 325, 139 N. W. 701.

(15) See State v. Baker, 114 Minn. 209, 130 N. W. 999 (Laws 1909, c. 348, did not repeal or modify the prior special laws creating justice courts in St. Paul).

5264. Limited by amount in controversy—A justice court has no jurisdiction of a counterclaim for an amount exceeding one hundred dollars. Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530.

5266a. Objection to jurisdiction—Waiver—Where defendant filed an answer after discontinuance of a justice court action, caused by adjournment, on plaintiff's motion on the return day, for more than one week (G. S. 1913, § 7522), he thereby waived objection to jurisdiction, though the answer was a nullity, so far as regards admission of proofs thereunder, because not filed within the time allowed by law; and on the adjourned day the justice properly denied defendant's motion to dismiss for lack of jurisdiction. Quaker Creamery Co. v. Carlson, 124 Minn. 147, 144 N. W. 449.

5268. Place of holding court and of return of process—(36) **Holmes v.** Igo, 110 Minn. 133, 124 N. W. 974.

5269. Not a court of record—Jurisdiction must appear—(37) **Hanford** v. Alden, 122 Minn. 149, 142 N. W. 15; State v. McDonough, **117 Minn.** 173, 134 N. W. 509 (not a court of record).

5270a. Power to punish for contempt of court—Justices of **the peace** have limited power to punish for contempt of court. G. S. 1913, § 7615; State v. McDonough, 117 Minn. 173, 134 N. W. 509; State v. **Langum,** 125 Minn. 304, 146 N. W. 1102.

PLEADING

5279. Construed liberally—Aider by verdict—(71) Bernth **v. Smith,** 112 Minn. 72, 127 N. W. 427 (action to recover a balance due **on a special** contract for services).

5281. Time to plead—(76, 77, 79, 81) Quaker Creamery Co. **v. Carl**son, 124 Minn. 147, 144 N. W. 449.

5284. Counterclaims—A justice court has no jurisdiction **of a counterclaim** for an amount exceeding one hundred dollars. **Duresen v.** Blackmarr, 117 Minn. 206, 135 N. W. 530.

5287. Verification—(93) Quaker Creamery Co. v. Carlson, **124 Minn.** 147, 144 N. W. 449.

PROCEDURE

5292. Transfer of action—Change of venue—The docket **entries of a** justice, fixing the time and place for appearance before the **justice** to whom the cause is transferred, cannot be impeached by affi**davit** showing an oral agreement. State v. McKinley, 114 Minn. 434, **131 N. W.** 369.

5295. Summons—In an action against a village a summons **may** provide for its service by delivering a copy thereof to the chief **executive** officer of the village, or in his absence to the clerk of the village. Getty v. Alpha, 115 Minn. 500, 133 N. W. 159.

5299. Certifying case when title to realty is involved—When **title to** realty is involved in a criminal case the justice should proceed only as an examining magistrate. That is, he should proceed to examine the accused and bind him over or discharge him. State v. Sweeney, 33 Minn. 23, 21 N. W. 847; State v. Hager, 119 Minn. 512, 138 N. W. 935.

(51) See Thompson v. St. Louis River Dam & Imp. Co., **113** Minn. 425, 129 N. W. 780 (title to realty held not involved in action).

(52, 55) Twitchell v. Cummings, 123 Minn. 270, 143 N. **W. 785;** Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565.

(58) State v. Hager, 119 Minn. 512, 138 N. W. 935.

5302. Exceptions—(66) Quaker Creamery Co. v. Carlson, 124 Minn. 147, 144 N. W. 449.

APPEAL TO DISTRICT COURT

5320. Who may appeal and in what cases—An appeal from the judgment of a justice of the peace in a village incorporated under Laws 1891, c. 146, is properly taken to the district court rather than to the municipal court. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

Any aggrieved person may appeal from a judgment in a justice court upon questions of law and fact, when the amount claimed in the complaint exceeds thirty dollars, whether the decision is upon questions of law or upon the merits. Getty v. Alpha, 115 Minn. 500, 133 N. W. 159.

5322. Notice of appeal—Under R. L. 1905, § 3982 (G. S. 1913, § 7602), notice of appeal from justice court must be served personally or by leaving a copy at the residence of the person served. Leaving a copy at the office of such person is not sufficient. The proper service of a notice of appeal and the filing of proper proof thereof are essential to the jurisdiction of the district court. Spitzhak v. Regenik, 122 Minn. 352, 142 N. W. 709.

(42) Spitzhak v. Regenik, 122 Minn. 352, 142 N. W. 709.

5323. Affidavit—(59) Holmes v. Igo, 110 Minn. 133, 124 N. W. 974.

5327. Entry of appeal on district court calendar—Judgment for failure—(89) Wentworth v. National Live Stock Ins. Co., 110 Minn. 107, 124 N. W. 977.

5330. Appeals on questions of law alone—Effect—Scope of review—Trial—Judgment—On appeal to the district court on questions of law alone, the cause is tried on the evidence returned; and where such evidence does not support a verdict for plaintiff, but discloses a want of a meritorious cause of action, it is proper to order judgment for defendant. Phillipps v. Webb, 125 Minn. 300, 146 N. W. 1100.

(1) Phillipps v. Webb, 125 Minn. 300, 146 N. W. 1100.

(7) Durenberger v. Peck, 110 Minn. 528, 125 N. W. 121.

5331. Appeals on questions of law and fact—Effect—Trial de novo—(20) Sheehy v. Whipps, 122 Minn. 53, 141 N. W. 811.

(24) See Koch v. Fischer, 122 Minn. 123, 142 N. W. 18.

5334. Defective or unauthorized appeal—Waiver—In an action of which the district court has original jurisdiction, defects in the proceedings to perfect an appeal may be waived by general appearance of the respondent in district court. Spitzhak v. Regenik, 122 Minn. 352, 142 N. W. 709.

5337. Judgment of affirmance on dismissal or default—(38) Holmes v. Igo, 110 Minn. 133, 124 N. W. 974.

APPEAL TO MUNICIPAL COURT

5339. Under special acts—(40) Holmes v. Igo, 110 Minn. **133, 124 N.** W. 974; Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, **1118.**

CRIMINAL JURISDICTION AND PROCEDURE

5340. Jurisdiction—(41) State v. Hanson, 114 Minn. 136, **130 N. W.** 79. See Digest, § 4929.

(49) State v. Sweeney, 33 Minn. 23, 21 N. W. 847; **State v. Hager,** 119 Minn. 512, 138 N. W. 935.

5343. Complaint—Warrant—The omission of the judge to indorse on a complaint an order for a warrant, as required by law, cannot avail defendant after plea, trial and conviction without raising the objection. Mankato v. Olger, 126 Minn. 521, 148 N. W. 471.

JUVENILE COURTS

5349a. Jurisdiction—Laws 1913, c. 260, giving the probate court in counties having less than 50,000 inhabitants jurisdiction of cases under the juvenile court act, repeals Laws 1913, c. 43, giving the district court exclusive jurisdiction of such cases in counties having a population of not less than 33,000. An injunctional order made by the juvenile court of Minneapolis, forbidding the marriage of a girl of the age of fifteen years, to which marriage her parents consented in writing, held without jurisdiction, and that a disobedience thereof was not punishable as a contempt of court. State v. District Court, 118 Minn. 170, 136 N. W. 746.

KIDNAPPING

5349b. Evidence—Sufficiency—Evidence held sufficient to justify a conviction. State v. Newman, 127 Minn. 445, 149 N. W. 945.

LACHES

5351. General principles—One is not barred by laches if he was under no duty to assert his claim. Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851.

Where a relation of trust and confidence exists between the parties, and the trustee is guilty of fraud or breach of duty, the evidence should be very strong to permit the guilty party to escape on the plea that the person defrauded and to whom the trustee owes the duty of acting in the utmost good faith, without concealment of the truth, had delayed demanding his rights. Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029.

Where there is a mutual mistake as to land conveyed, the vendee is not guilty of laches until he discovers the mistake, or is chargeable with knowledge of facts from which, in the exercise of reasonable diligence, he ought to have discovered it. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

It is a circumstance of importance, in determining whether a plaintiff has been guilty of laches, that the situation of the parties has changed, or that material witnesses have died, or that because of lapse of time evidence has otherwise been lost, so that the ascertainment of the essential facts is made difficult, and the exact facts upon which the rights of the parties depend must necessarily be in doubt. Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

(85) Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

(89) Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737; Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

(90) Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029; Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882. See Note, 2 Am. St. Rep. 795.

(91) Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871; State v. Brooks-Scanlon Lumber Co., 122 Minn. 400, 142 N. W. 717 (the pith and substance of the doctrine of laches is unreasonable delay in enforcing a known right); Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882; Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482.

(92) Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

(94) Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882. See Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

5352. Application to legal proceedings—(98) State v. Brooks-Scanlon Lumber Co., 122 Minn. 400, 142 N. W. 717.

5356. Of public officers and agents—(4) State v. Brooks-Scanlon Lumber Co., 122 Minn. 400, 142 N. W. 717.

5359. Pleading—Facts in avoidance—Demurrer—If a complaint in an equitable action discloses delay in assertion of a right which, unexplained, amounts to laches, it must also allege facts excusing the delay. A person is not to be barred by laches of the assertion of a right unless he have knowledge, actual or imputed, of the existence of the right, but where the facts are such as would ordinarily be known to him he must plead want of knowledge on his part. In order to relieve himself of the charge of laches on the ground of ignorance of the facts it is not sufficient to allege generally that he was ignorant of the facts until a given time. He must allege facts and circumstances from which the court may determine whether or not the discovery was made at the time mentioned. Sweet v. Lowry, 131 Minn. —, 154 N. W. 793.

(7, 8) Sweet v. Lowry, 123 Minn. 13, 142 N. W. 882.

5360. Application of doctrine in particular cases—(10) Fallon v. Fallon, 110 Minn. 213, 124 N. W. 994 (money deposited with defendant payable on demand); Hempstead v. Leland, 111 Minn. 224, 126 N. W. 736 (action to set aside fraudulent conveyances); Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851 (action to determine adverse claims); Ekberg v. Swedish-American Publishing Co., 114 Minn. 196, 130 N. W. 1029 (action by stockholder for an accounting); Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737 (delay in entering a default judgment); Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871 (action for cancelation of deed for support of grantor during his life); McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708 (action to vacate a judgment of divorce); Arnold v. Smith, 121 Minn. 116, 140 N. W. 748 (action to impress a constructive trust on land); Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170 (action for money had and received to recover an award in condemnation proceedings paid to one not entitled to it); Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518 (wrongful cancelation of insurance policy—action on policy); Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156 (action to rescind sale of land for mutual mistake as to the land); Devaney v. Ancient Order, 122 Minn. 221, 142 N. W. 316 (action by heirs of insured to recover fund due on a benefit certificate); Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710 (action to rescind land contract for fraud); Kent v. Costin, 130 Minn. 450, 153 N. W. 874 (action to compel defendant to transfer shares of stock in a corporation to plaintiff so that the two might have an equal number as agreed between them before the formation of the corporation).

LANDLORD AND TENANT

IN GENERAL

5361. When relation exists—(11) See Hayes v. Moore, 127 Minn. 404, 149 N. W. 659 (relation held not to exist).

5362. Effect of conveying reversion—Attornment—A conveyance of the reversion brings the grantee in privity with the lessee, puts him in the place of the original lessor, subjects him to the burdens of such covenants of the lessor as run with the land, and entitles him to the benefits of the covenants of the lessee. He may sue upon or release such covenants, and may enforce or accept a surrender of the lease. The possession of the tenant becomes his possession. The rights and liabilities existing between the grantee and the lessee are the same as those that originally existed between the grantor and the lessee. In short he becomes the landlord and the original lessor ceases to be such. The tenant holds of the new landlord upon the same terms as he held of the old. The obligations of the original lessor that remain after the conveyance of the reversion are personal contract obligations only, and involve no duty of control over the premises. In fact his obligation is no longer a primary obligation, but is secondary only. The new landlord, having assumed or become charged with the fulfilment of the terms, conditions and agreements of the lessor, contained and provided for in said lease, has succeeded to the primary liability. The liability of the original lessor has become the liability of a surety only. The original lessor is now a stranger to the premises, as much so as though he had never owned them. He has no right to enter for any purpose without the consent of his grantee. Glidden v. Second Ave. Invest. Co., 125 Minn. 471, 147 N. W. 658. See Note, L. R. A. 1915C, 190, 245.

(15) Glidden v. Second Ave. Invest. Co., 125 Minn. 471, 147 N. W. 658.

5363. Tenant cannot deny landlord's title—(20) Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754.

5364. Right of landlord to enter—(26) Glidden v. Second Ave. Invest. Co., 125 Minn. 471, 147 N. W. 658.

5366. Eviction of tenant by landlord—Damages—(31) Pappas v. Stark, 123 Minn. 81, 142 N. W. 1046.

5368. Duty to make repairs—Contracts—An agreement by a tenant to continue as a tenant from month to month is a sufficient consideration for a promise by the landlord to repair the premises. Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466.

(34) Kingsted v. Wright County Co-operative Co., 116 Minn. 131, 133 N. W. 399.

See Digest, § 5397.

5369. Defective and unsafe premises—Liability of landlord and tenant—It is not necessary to show that a landlord, who has undertaken to maintain the demised premises or any of their appliances in a safe condition, had actual notice of their unsafe condition in order to charge him with negligence; for it is sufficient if it be shown that he either knew, or by the exercise of ordinary care he might have known, their condition. Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289; La Pray v. Lavoris Chemical Co., 117 Minn. 152, 134 N. W. 313; Williams v. Dickson, 122 Minn. 49, 141 N. W. 849.

If, at the time of a lease, the demised premises are in a defective and dangerous condition, which is known to the landlord, and concealed from the tenant, the former is liable to the tenant, or his licensee, who, without negligence on his part, is injured by reason of such dangerous condition, though the landlord does not covenant to make repairs. Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786.

A landlord held not liable to a tenant for damage resulting from a leak in water pipes, in the absence of evidence showing negligence on the part of the landlord. Bridgeman v. Giese, 120 Minn. 254, 139 N. W. 489.

Action by tenant against landlord for damages caused by the flooding of the premises with water from a ceiling. Rule of res ipsa loquitur held not applicable. Evidence held not to justify a finding that the water came from a leak in certain water pipes under the control of defendant, or that defendant was negligent, conceding that the damage was caused by a leak in such pipes. Narbonne v. Storer, 121 Minn. 505, 141 N. W. 835.

Where the landlord by the terms of the lease expressly contracts to keep the leased premises in repair, a legal duty thereby arises on his part toward third persons lawfully upon the premises to perform the contract, and a negligent failure to do so, which results in injury to such third person, renders him liable for such damages as may have been suffered in consequence of his negligence. The rule applies to a case where the landlord contracts to keep the leased premises properly heated, and his negligent failure to perform the contract renders him liable to a servant of the tenant who suffers injury in consequence of the neglect. Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428.

The basis for the liability, as respects the servants and others upon the premises at the invitation of the tenant, must be found in an implied legal duty on the part of the landlord to keep and perform his contract for their benefit and protection. They have, of course, no remedy on

the contract, for they are not parties to it and are strangers to its obligations. The sole remedy is an action for the wrong committed by the landlord by his negligence in failing to perform an act assumed by him which he was bound under the circumstances to know would protect them from harm if performed, or expose them to injury if not performed. Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428.

When property is licensed for a public purpose, as, for example, for a theater, concert hall, or wharf, the landlord is liable, regardless of the covenants in the lease. Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428.

A landlord held liable for the death by fire of a person rightfully occupying a room in a tenement, on the ground that the landlord negligently allowed a chute in the tenement to be filled with dry rubbish, whereby the fire spread so rapidly that the deceased could not escape. The question whether the deceased was rightfully in the building at the time of the fire held a question of fact for the jury. McColl v. Cameron, 126 Minn. 144, 148 N. W. 108.

A landlord held liable to a guest of a tenant injured in attempting to escape from a burning building with inadequate fire escapes. Wardwell v. Cameron, 126 Minn. 149, 148 N. W. 110.

Where a lessor by his lease contracts to keep the leased premises in repair, and he negligently fails to do so, he is liable to the lessee and to members of his family occupying the same for personal injuries received from a defective condition of the premises; but neither a stipulation in the lease that the lessee may make alterations at his own expense with the consent of the lessor, nor a provision that the lessor may enter and make repairs, will impose upon the lessor an obligation to keep the premises in repair. When the lessor does not agree to repair and there is no fraud or concealment as to the safe condition of the premises, and the situation is not such as to create a nuisance, the lessee takes the risk of their safe occupancy. But if there is a concealed trap or danger on the premises at the time of the leasing and its existence is not obvious, but is known to the lessor and unknown to the lessee, the lessor is in duty bound to disclose it, and he is liable for negligent failure to do so even though he makes no contract to repair. It is not important whether plaintiff, injured by defective condition of leased premises used as a restaurant and dwelling, was an assignee of the lease or the wife of the lessee; her rights in either case are substantially the same. An assignment contrary to the terms of the lease does not ipso facto terminate the lease, but merely gives the lessor an option to do so. An assignment assented to by the lessor is not a new leasing. The rights of the parties so far as concerns liability for dangerous conditions of the premises are determined as of the time of the original leas-

ing, and not as of the time of the assignment. Keegan v. G. Heilman Brewing Co., 129 Minn. 496, 152 N. W. 877.

(40) Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786; Daley v. Towne, 127 Minn. 231, 149 N. W. 368; Keegan v. G. Heilman Brewing Co., 129 Minn. 496, 152 N. W. 877. See Note, 48 L. R. A. (N. S.) 917.

(41) Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466 (defective railing about porch); La Pray v. Lavoris Chemical Co., 117 Minn. 152, 134 N. W. 313 (defective freight elevator); Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786 (defective floor of outhouse); Keegan v. G. Heilman Brewing Co., 129 Minn. 496, 152 N. W. 877 (defective railing of a rear platform). See Note, 50 L. R. A. (N. S.) 286 (liability to third persons).

(42) Williams v. Dickson, 122 Minn. 49, 141 N. W. 849 (liability of landlord extends to servants of tenant—defective railing to stairway—defect had existed so long that the landlord was chargeable with notice—landlord bound to take notice of tendency of wood to decay—plaintiff was carrying a basket of clothes up the stairway and was pushed by basket against railing—to save herself from falling she caught hold of the railing, which gave way on account of its rotten condition, and she was thrown to the stone sidewalk below, a distance of eight feet—plaintiff held not to have assumed the risk or been guilty of contributory negligence as a matter of law).

5370. Nuisance—Liability of landlord—(52) Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786.

HOLDING OVER

5380. Effect at common law—A tenant under a lease from month to month gave notice to quit but remained in possession for a month after the time specified in the notice for the termination of the tenancy. There was no new agreement, but the landlord elected to treat the tenancy as continued. Held, that by holding over after the time named the tenant waived the notice, and the case is as if no notice to quit had been given. The tenancy, by the election of the landlord to treat it as continuing, became or remained a tenancy from month to month. It could only be terminated by a new notice to quit. G. S. 1913, § 6812, does not operate to make such tenancy one for a single month. King v. Durkee-Atwood Co., 126 Minn. 452, 148 N. W. 297.

(73) Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031; King v. Durkee-Atwood Co., 126 Minn. 452, 148 N. W. 297.

(74) Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031. See Digest, § 5413 (84); Note, 112 Am. St. Rep. 751.

5381. Statute—Urban realty—Where a tenant from month to month holds over after a notice to quit the statute does not operate to make

the tenancy one for a single month. King v. Durkee-Atwood Co., 126 **Minn. 452,** 148 N. W. 297.

(84) Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031.

(85) Grimes v. Gaughan, 129 Minn. 537, 152 N. W. 653.

LEASES

5383. What constitutes—Certain instruments held leases and not conditional sales of the ore in place. Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

An instrument in form a lease of lots for ten years, with fixed sums and instalments to be paid as rent, but providing that the lessee shall excavate and remove earth to grade, and pay the lessor for earth removed at a stipulated price per yard, the fixed payments to be applied on such price, excess, if any, to be paid in cash, providing for a deduction for waste, providing for re-entry in case of default, and for quiet and peaceful possession and enjoyment until default, and providing against assignment or underletting, is a lease in substance as well as form, and in case of default of payment an action in forcible entry and unlawful detainer may be maintained thereon. Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785.

A contract for farming on shares held a lease. State v. Municipal Court, 123 Minn. 377, 143 N. W. 978.

(87) See Pappas v. Stark, 123 Minn. 81, 142 N. W. 1046 (contract giving plaintiff a right to maintain a boot blacking stand and checking privileges in a hotel—whether contract constituted a lease held immaterial); Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785 (instrument in form of a lease and providing that the lessee should excavate and remove earth to grade and pay the lessor therefor, held a lease).

5384. What passes by—The owner leased certain real property for the term of 100 years. Subsequently, before the expiration of the lease, he leased it to another for the term of 1,000 years; the term thereof commencing immediately. The second lease construed, and held to have been a grant in præsenti, and to vest in the second lessee the control of the property, and the right to the rents and profits issuing therefrom. Benjamin v. N. W. Fire & Marine Ins. Co., 119 Minn. 27, 137 N. W. 183.

See Digest, § 6123 (mining leases).

5387a. Successive leases—Interesse termini—Where the owner of realty grants to one person the right of possession for a term of years and thereafter leases the property to another, to commence at the expiration of the first grant, no reversion or other present right passes to the second lessee, except the right of possession in the future, leaving the lessor in control of the property, with the right to collect and receive the rents, issues, and profits accruing therefrom. The second lessee has

a mere interest in the term or interesse termini. Benjamin v. N. W. Fire & Marine Ins. Co., 119 Minn. 27, 137 N. W. 183.

5388. Construction—A farm lease, providing that if the lessor sold the farm and gave notice to the tenant that he desired to give possession to the purchaser, the tenant should forthwith vacate upon payment by the lessor of a certain amount for plowing, construed. Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4.

A farm lease, giving to the vendee of the owner the right to possession upon a sale, construed. Carlson v. Wenzel, 127 Minn. 460, 149 N. W. 937.

(96) Lowry Realty Co. v. Wiles, 123 Minn. 297, 143 N. W. 738 (rule inapplicable where intention clear); Hanley Falls Creamery Co. v. Milton Dairy Co., 126 Minn. 226, 148 N. W. 46.

(97) Hanley Falls Creamery Co. v. Milton Dairy Co., 126 Minn. 226, 148 N. W. 46. See Digest, § 1820.

5389. Parol evidence—(1) See Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4.

(98) Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048.

5391. Restrictions on use—See Digest, § 2676.

5393. Implied covenants—(11) Note, 38 Am. St. Rep. 476.

5394. Covenants running with the land—(15, 17) Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

5395. Covenants for quiet enjoyment—(18) Weinman v. De Palma, 232 U. S. 571.

See Note, 53 Am. St. Rep. 113.

5397. Covenants as to repairs, etc.—An agreement by a tenant to continue as a tenant from month to month is a sufficient consideration for a promise by the landlord to repair the premises. Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466.

A covenant in a lease, obligating the lessor to "keep the premises in good repair," imposes upon him the duty to maintain the premises in as sound condition as when the contract was entered into, and to repair such defects as occur from the elements, or such as arise from decay or deterioration, or other natural causes, but does not impose an obligation to improve the property by the construction of a drain to carry water which in "wet weather" finds it way into the basement. Kingsted v. Wright County Co-operative Co., 116 Minn. 131, 133 N. W. 399.

See Digest, § 5368.

5399. Covenants as to taxes—(25-31) See Note, L. R. A. 1915A, 334.

See Digest, § 9253.

5401. Covenants to heat—The owner of a building leased a portion of it and in the lease covenanted to furnish heat to the tenant. It thereafter sold the property to one who assumed all its obligations under the lease, and the tenant recognized the grantee as landlord. The original lessor was not thereafter liable to employees of the lessee for damages for personal injury resulting from negligent failure to properly heat the premises. Glidden v. Second Ave. Invest. Co., 125 Minn. 471, 147 N. W. 658.

(33) See Glidden v. Longfellow, 124 Minn. 101, 144 N. W. 428 (covenant to heat—liability to employees of lessee).

5404. Covenants giving lessee option to purchase—Where the owner executes a lease of real estate and also executes to the lessee an option to purchase the same, parol evidence is admissible to show that both instruments were executed at the same time and as parts of the same transaction, though they bear different dates. The obligations assumed by the lessee under the lease furnish a sufficient consideration to support the option, as they are parts of one contract. An option provided that failure to pay the rent at the time and in the manner stated in the lease should render the option void. One instalment of rent was not paid until some weeks after it became due, but was then paid and accepted without objection. Subsequent instalments were also paid and accepted without objection. Held, that the default resulting from the failure to pay such instalment at the time stipulated had been waived. Crystal Lake Cemetery Assn. v. Farnham, 129 Minn. 1, 151 N. W. 418.

(37) Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387.

5406. Subletting—The possession of a subtenant is the possession of the lessee. Weiss v. Zenith Realty Co., 129 Minn. 486, 152 N. W. 869.

(46) See Cohen v. Conrad, 110 Minn. 207, 124 N. W. 992.

(47) Devlin v. Le Tourneau, 122 Minn. 184, 142 N. W. 155 (covenant held waived—by reason of the waiver the sublessee became the lawful tenant of the property—after the waiver plaintiff succeeded to the title of the lessor expressly "subject to the rights of tenants in possession"—plaintiff held subject to waiver—covenant not violated after plaintiff became owner). See Cohen v. Todd, 130 Minn. 227, 153 N. W. 531.

See Digest, § 5408; Note, 117 Am. St. Rep. 91.

5407. Surrender—Contracts—Breach—Damages—An answer held to present an issue as to a surrender by the tenant and an acceptance thereof by the landlord. Kingsted v. Wright County Co-operative Co., 116 Minn. 131, 133 N. W. 399.

Where a landlord, in releasing for a valid consideration his tenant from his obligations for the remainder of the term of a lease of a store building, knew that the tenant, in a prior sale of his stock of goods to

a third person, had agreed, under condition to pay a certain sum in the event of his default, not to sublet the building for a general merchandise store during the remainder of his term, and it was covenanted in such agreement of release that the landlord would not let the said store for such purpose during the remainder of the time that the tenant's term would have run, the landlord's violation of such covenant rendered him liable, under the rule of Hadley v. Baxendale, 9 Ex. 341, to the tenant for the amount which the latter, by reason of such violation, was compelled to pay to such third person pursuant to the provisions of the contract for the sale of the goods. Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201.

Possession of a lessee's subtenant is the possession of the lessee himself, and continued possession by a subtenant after the premises have become untenantable subjects the lessee to the same liability as though he were in personal possession. Weiss v. Zenith Realty Co., 129 Minn. 486, 152 N. W. 869.

(51) See 28 Harv. L. Rev. 313.

(56) Note, 114 Am. St. Rep. 717.

(58) Klink v. Val Blatz Brewing Co., 128 Minn. 144, 150 N. W. 398.

(60) Klink v. Val Blatz Brewing Co., 128 Minn. 144, 150 N. W. 398. See Elliott v. Barker, 127 Minn. 528, 149 N. W. 1070.

5408. Assignment—Action on a written agreement by the assignee of a lease to assume its obligations. Defence that there was a contemporaneous oral agreement that, if defendant should assign the lease to a certain corporation to be formed, his agreement should become inoperative. Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048.

An assignment contrary to the terms of the lease does not ipso facto terminate the lease, but merely gives the lessor an option to terminate it. An assignment assented to by the lessor is not a new leasing. Keegan v. G. Heilman Brewing Co., 129 Minn. 496, 152 N. W. 877.

The assignee of a lease, who assumes no obligation by contract to pay rent, is liable for rent during the time he holds the lease, but, after he makes a reassignment and delivers possession to a second assignee, his liability for rent thereafter to accrue ceases. This is on the principle that his liability during the time he holds the lease is founded on privity of estate, and, as soon as such privity of estate ceases, the liability ceases with it. A covenant in a lease requiring written consent of the lessor to any assignment of the lease may be waived by the lessor, and it is waived by acceptance of rent from the assignee with knowledge of the assignment. Cohen v. Todd, 130 Minn. 227, 153 N. W. 531. See Note, 10 Am. St. Rep. 557; 52 L. R. A. (N. S.) 968.

Waiver of provision for consent to assignment. Note, 36 L. R. A. (N. S.) 488.

(66) See 8 Col. L. Rev. 142.

(70) Cohen v. Todd, 130 Minn. 227, 153 N. W. 531.

See Digest, § 5406.

5411. Duration—(79) State v. Municipal Court, 123 Minn. 377, 143 N. W. 978 (farm lease for one season with provision that tenant should have use of premises for the next farming season, in case premises were not sold—premises were sold during first season—contract held not a lease for two seasons).

5412. Termination—Conditions subsequent—Provision in a lease of certain premises "for creamery purposes" that, if the lessee should cease to use them for such purposes, the lease "shall be canceled and annulled at once by said lessor" held not a special limitation upon the term, but a condition subsequent, vesting in the lessor a waivable option to terminate the lease upon the happening of the specified contingency. Hanley Falls Creamery Co. v. Milton Dairy Co., 126 Minn. 226, 148 N. W. 46.

Leases frequently contain a stipulation for a termination on notice in case of a sale of the property. Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4 (farm lease—stipulation for payment for plowing before notice to quit); State v. Municipal Court, 123 Minn. 377, 143 N. W. 978 (farm lease). See Note, L. R. A. 1915C, 234.

Leases sometimes stipulate for a termination thereof in case of the bankruptcy of the lessee. Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945.

Where a farm lease definitely fixed the duration thereof it was held proper to exclude evidence of a custom as to the time for the termination of such leases. Kees v. Christensen, 124 Minn. 230, 144 N. W. 766.

5413. Renewals—Where a lessee of property sublets a portion of the leased premises, and covenants for a renewal thereof on condition that his own lease be renewed, it is not material, in so far as concerns the right of the sublessee to a renewal, whether the original lease be renewed by formal written contract or be effected by operation of law. If the lessee's term be extended in either manner, the sublessee may demand a renewal of his lease as a matter of strict right. A new lease to the tenant, executed a short time after the expiration of the original lease, which contained a stipulation for a renewal, held in legal effect a renewal, vesting in the sublessee the right to a renewal under the terms of his contract. The subtenant continued in possession of the premises under the asserted right of renewal, and paid the rent as stipulated by his contract, which plaintiff accepted and received without objection. Held a waiver of compliance with conditions imposed by the

contract precedent to the right to demand a renewal. Hotel Allen Co v. Allen's Estate, 117 Minn. 333, 135 N. W. 812.

Where the lessee has the option to rent for an additional time, but the written lease is silent as to the terms and conditions of the optional tenancy, the terms and conditions of the original letting apply thereto, with the exception of the option provision, and in case of urban property the exercise of the option so given constitutes an express contract, under section 3333, R. L. 1905 (G. S. 1913, § 6812). Where the exercise of such option is conditioned upon giving notice prior to the expiration of the original term, the notice, being for the sole benefit of the lessor, may be waived by him. Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031.

Evidence held insufficient to sustain a claim that a payment of more than was due for the last two months of a tenancy operated to extend the lease for the period of another year. Kees v. Christensen, 124 Minn. 230, 144 N. W. 766.

(84) Hotel Allen Co. v. Allen's Estate, 117 Minn. 333, 135 N. W. 812; Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031; Lowry Realty Co. v. Wiles, 123 Minn. 297, 143 N. W. 738 (lease for five months with option of lessor to continue the lease for one year, if the tenant failed to give notice within thirty days of the expiration of the term that the premises would be vacated—held that option had reference to a year in addition to the term fixed by the contract—option exercised by allowing tenant to hold over).

(85) Note, 41 L. R. A. (N. S.) 387.

(87) Hotel Allen Co. v. Allen's Estate, 117 Minn. 333, 135 N. W. 812; Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031.

5417a. Breach of covenants—Measure of damages—Measure of damages for breach of a covenant releasing the tenant from his obligations for the remainder of a term. Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201.

The measure of damages recoverable by a lessor against the lessee for hauling away manure from a leased farm, instead of hauling and spreading it upon the farm as stipulated in the lease, is the reasonable cost or value of the manure spread as agreed. Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445.

5418. Pleading—An answer held to present an issue as to a surrender by the tenant and its acceptance by the landlord. Kingsted v. Wright County Co-operative Co., 116 Minn. 131, 133 N. W. 399.

A complaint held to state a cause of action for negligence in not notifying a lessee of dangerous and hidden defects in the premises. Keegan v. G. Heilman Brewing Co., 129 Minn. 496, 152 N. W. 877.

See Dunnell, Minn. Pl. 2 ed. §§ 695, 696.

RENT

5419a. Who entitled to—In the absence of express provision to the contrary rents follow the title to the land. Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

5423. Time of payment—(4) Lindeke v. McArthur's, 125 Minn. 1, 145 N. W. 399 (yearly rent at a specified amount with provision for an increase if lessee's sales exceeded a specified amount).

5424. Buildings destroyed or becoming untenantable — Statute — Whether a tenant may be relieved under the statute in so far as rent has become due or has been paid prior to the destruction or injury of the building is an open question in this state. Lindeke v. McArthur's, 125 Minn. 1, 145 N. W. 399. See 33 L. R. A. (N. S.) 540.

The statute is in derogation of common law and is sometimes construed rather strictly against the tenant. See Lindeke v. McArthur's, 125 Minn. 1, 145 N. W. 399.

The statute ought to be fairly construed to carry out its object to relieve a tenant from a harsh common-law rule. See Digest, § 8958.

Where a lease providing for a yearly rent terminated before the expiration of a year by reason of the destruction of the leased premises, the lessor was held entitled to recover a proportionate part of the yearly rent for the period of the lessee's occupancy. Lindeke v. McArthur's, 125 Minn. 1, 145 N. W. 399.

Under a lease which provides that, in case the building on the leased premises shall be so injured by the elements or any cause as to be untenantable or unfit for occupancy, the liability of the lessee for rent and all right of possession shall at once cease, if the tenant would avoid payment of rent because of the untenantable condition of the building, he must vacate and restore the premises to the lessor. Possession of a lessee's subtenant is the possession of the lessee himself, and continued possession by subtenants in such a case subjects the lessee to the same liability as though he were in personal possession of the premises. Weiss v. Zenith Realty Co., 129 Minn. 486, 152 N. W. 869.

(9) Bridgeman v. Giese, 120 Minn. 254, 139 N. W. 489 (findings as to retaining possession sustained); Weiss v. Zenith Realty Co., 129 Minn. 486, 152 N. W. 869. See Schmitt v. Standard Brewing Co., 111 Minn. 501, 127 N. W. 189.

(14) Weiss v. Zenith Realty Co., 129 Minn. 486, 152 N. W. 869.

(15) Schmitt v. Standard Brewing Co., 111 Minn. 501, 127 N. W. 189.

5425. Buildings untenantable—Constructive eviction—Surrender—

(16) See Note, 38 Am. St. Rep. 476; 26 Harv. L. Rev. 758.

(19) Cohen v. Conrad, 110 Minn. 207, 124 N. W. 992.

5426a. Effect of void covenants—(22) Cohen v. Conrad, 110 Minn. 207, 124 N. W. 992.

5427. Effect of re-entry by landlord—(23) See Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945.

5429. Assignment of lease does not relieve lessee—(28) Note, 52 L. R. A. (N. S.) 971.

5430. Liability of assignees of leases—See § 5408.

5432a. Failure to take possession no defence—Where a corporation takes a lease of premises and before the lease goes into effect the corporation is dissolved by judicial proceedings, it is bound by the lease and is liable for a breach of it, even if it does not take possession under the lease. In this case the lease and a prior lease constituted but one transaction. Elliott v. Barker, 127 Minn. 528, 149 N. W. 1070.

5432b. Effect of forfeiture for condition broken—Recovery of advance payments of rent—Upon the termination of a lease for conditions broken, the lessor is entitled to rent which had previously become due, but not, in the absence of an express agreement, entitled to recover rent subsequently to become due. Where rent has been paid in advance, under an agreement that it shall be so paid, and the lessor re-enters for conditions broken, he is entitled to retain the rent so paid, though the re-entry is before the expiration of the period for which the rent is paid. A stipulation in the lease that a re-entry by the lessor for conditions broken shall not work a forfeiture of the rent due or to become due is not invalid because providing a penalty for the lessee's breach of conditions. In this case, the lessee or his trustee in bankruptcy is not entitled to recover of the lessor any part of the advance payment so made. Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945. See 14 Col. L. Rev. 354.

5436a. Various defences—Fire escapes—Violation of liquor laws—It is a good defence to an action for rent that the landlord has failed to comply with the statute requiring the maintenance of fire escapes. Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856. See Wardwell v. Cameron, 126 Minn. 149, 148 N. W. 110.

Illegality of a lease, as contemplating violations of the liquor laws, held not available because not pleaded. Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

FORFEITURE AND RE-ENTRY

5437. In general—Forfeitures are disfavored and will never be enforced where injustice will result, if the language used will reasonably bear a different construction. Hanley Falls Creamery Co. v. Milton Dairy Co., 126 Minn. 226, 148 N. W. 46.

(42) Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945. See Note, 127 Am. St. Rep. 84.

5439. Waiver—Receipt of rent—(47) See Hanley Falls Creamery Co. v. Milton Dairy Co., 126 Minn. 226, 148 N. W. 46; Note, 47 Am. St. Rep. 197.

(48) Pappas v. Stark, 123 Minn. 81, 142 N. W. 1046.

NOTICE TO QUIT

5440. Necessity—(50) King v. Durkee-Atwood Co., 126 Minn. 452, 148 N. W. 297.

(54) Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4 (provision for notice to quit on sale of farm); Pappas v. Stark, 123 Minn. 81, 142 N. W. 1046.

5443. Length—(60) Anderson v. Meyer, 128 Minn. 534, 150 N. W. 1102.

5447. Waiver—Where the right of a tenant to a renewal is conditional on his giving notice to his landlord prior to the termination of the original term, the landlord may waive the notice. Kean v. Story & Clark Piano Co., 121 Minn. 198, 140 N. W. 1031.

A tenant under a lease from month to month gave notice to quit, but remained in possession for a month after the time specified in the notice for the termination of the tenancy. There was no new agreement, but the landlord elected to treat the tenancy as continued. Held, that by holding over after the time named the tenant waived the notice, and the case is as if no notice to quit had been given. The tenancy, by the election of the landlord to treat it as continuing, became or remained a tenancy from month to month. It could only be terminated by a new notice to quit. G. S. 1913, § 6812, does not operate to make such tenancy one for a single month. King v. Durkee-Atwood Co., 126 Minn. 452, 148 N. W. 297.

UNLAWFUL DETAINER

5448. Nature and object of action—The action is not designed for the recovery of rent. Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565.

(72) Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785; Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565. See Digest, § 5299.

See Note, 120 Am. St. Rep. 32.

5449. When action lies—(75) Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785 (contract held a lease and not a sale—action held to lie in case of default in payment); State v. Municipal Court, 123 Minn.

377, 143 N. W. 978 (contract for farming on shares held to create relation of landlord and tenant).

(78) State v. Municipal Court, 123 Minn. 377, 143 N. W. 978.

(80) Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565.

5454. Parties plaintiff—In an action by a married woman to recover her own property her husband is not a necessary party. Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785.

5458. Answer—Plea of not guilty—Facts inconsistent with the allegations of the complaint are admissible under a plea of not guilty. Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750.

(3) Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750.

5460. Defences—On appeal to the district court on questions of both law and fact it may be possible to plead and litigate defences which could not be interposed in the justice court. See Koch v. Fischer, 122 Minn. 123, 142 N. W. 18.

A judgment in the district court between the same parties in an action for the rent held conclusive as to the amount of rent due and unpaid. Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565.

(6) Koch v. Fischer, 122 Minn. 123, 142 N. W. 18; Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565.

5469. Findings—A recovery by the plaintiff sustained though the findings were inconsistent. Anderson v. Meyer, 128 Minn. 534, 140 N. W. 1102.

5470. Judgment on the pleadings—Under a lease giving to the vendee of the landlord the right of possession upon a sale, held error for the court to grant the defendant lessee's motion for judgment on the pleadings. Carlson v. Wenzel, 127 Minn. 460, 149 N. W. 937.

5472. Judgment—Effect as res judicata. Note, 112 Am. St. Rep. 21.

5474. Restitution—Appeal—Stay—(35) State v. Municipal Court, 123 Minn. 377, 143 N. W. 978.

ACTIONS FOR RENT

5477. Pleading—An answer held to present an issue as to a surrender of the premises by the tenant and an acceptance thereof by the landlord. Kingsted v. Wright County Co-operative Co., 116 Minn. 131, 133 N. W. 399.

Illegality in the lease must be specially pleaded. Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

See Dunnell, Minn. Pl. 2 ed. § 704.

5480. Variance—(57) Klink v. Val Blatz Brewing Co., 128 Minn. 144, 150 N. W. 398 (variance disregarded—objection first made on appeal).

5481. Burden of proof—In an action for rent, where the pleadings show a claim by the lessor of the right to retake possession of the leased premises, because of default by the lessee, without the re-entry working a forfeiture of the rent reserved, a prima facie case in favor of the lessor is not made by the introduction in evidence of the lease, without further testimony. Yale Realty Co. v. Olney, 111 Minn. 204, 126 N. W. 625.

5482a. Evidence—Sufficiency—Evidence held to justify findings for plaintiff. Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

Evidence held sufficient to prove the existence of the lease sued on. Klink v. Val Blatz Brewing Co., 128 Minn. 144, 150 N. W. 398.

RENTING ON SHARES—FARM CONTRACTS

5484. Rights of parties—In general—Under a lease giving to the vendee of the landlord the right of possession upon a sale, held error for the court in unlawful detainer proceedings to grant the defendant lessee's motion for judgment on the pleadings. Carlson v. Wenzel, 127 Minn. 460, 149 N. W. 937.

(63) Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750 (stipulation as to sale of farm—compensation of tenant for plowing in case of sale); State v. Municipal Court, 123 Minn. 377, 143 N. W. 978 (a contract for farming on shares held a lease).

(64) Johnson v. Stone, 111 Minn. 228, 126 N. W. 720; Lynch v. Monarch Elevator Co., 130 Minn. 248, 153 N. W. 597 (contract construed —meaning of "plowed land"—sale of part of crops to elevator company, —issue as to whether landlord had waived his rights and consented to sale). See Ripa v. Hogan, 127 Minn. 502, 150 N. W. 167.

(70) Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118; Anderson v. Wije, 112 Minn. 527, 127 N. W. 1134.

LARCENY

5486. Different forms—Statutory classification—(77) See, as to why trespass was an essential element of larceny at common law, 10 Harv. L. Rev. 469.

See Note, 88 Am. St. Rep. 559.

5488. What may be subject to larceny—Lost property—See Note, 129 Am. St. Rep. 400.

5490. Indictment for simple larceny—(1) Note, 36 L. R. A. (N. S.) 933 (requisite description of money).

(97) Note, L. R. A. 1915 B, 71.

5494. Claim of title—(10) Note, 41 L. R. A. (N. S.) 549.

5496. Possession of stolen goods as evidence of guilt—There is no burden on defendant to explain his possession of the stolen property. State v. Hutchinson, 121 Minn. 405, 141 N. W. 483.

(12) McNamara v. Henkel, 226 U. S. 520. See Note, 101 Am. St. Rep. 481.

5498. Evidence—Sufficiency—(14) State v. Fleetwood, 111 Minn. 70, 126 Minn. 485, 827 (grand larceny in second degree—goods ordered under an assumed name from Chicago—evidence as to shipment of goods held sufficient); State v. Snyder, 113 Minn. 244, 129 N. W. 375.

5499. Verdict—A verdict finding the defendant "guilty in manner and form as charged in the indictment," held sufficient. State v. Snyder, 113 Minn. 244, 129 N. W. 375.

5500. Conviction of lesser offence—Under an indictment which states facts constituting larceny in the first degree, but designating the offence as larceny in the second degree, the accused may be convicted of larceny in the second degree if the evidence warrants it. State v. Snyder, 113 Minn. 244, 129 N. W. 375.

LAW—See Maxims and General Principles, 6028a.

LEGISLATIVE DISTRICTS—See State, 8831a.

LIBEL AND SLANDER

IN GENERAL

5501. Definitions—The gist of an action for defamation is injury to plaintiff's reputation. Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147.

(31) Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

5503. Who liable—(33) Kuhl v. U. S. Health & Accident Ins. Co., 112 Minn. 197, 127 N. W. 628. See Note, 21 L. R. A. (N. S.) 873; 26 Harv. L. Rev. 175.

(38) Nava v. N. W. Telephone Exchange Co., 112 Minn. 199, 127 N. W. 935.

5504. Application of words to plaintiff—(40) The intention of the defendant is not the test, but what readers or hearers may reasonably infer. 27 Harv. L. Rev. 389.

5505. Intention—Good faith—See 60 Am. L. Reg. 365, 461.

5506. Malice—Evidence in proof of actual malice may be extrinsic, as of previous ill feeling or personal hostility; or intrinsic, inherent in the language itself or the mode of its publication. Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457.

(49) See 13 Col. L. Rev. 23.

(52) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 46, 142 N. W. 930; Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457.

See 60 Am. L. Reg. 365, 461.

5508. Damage essential—(59) Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

WHAT ACTIONABLE

5510. Construction of language—Neither in civil nor in criminal libel is the libelous character of the article to be tested by the interpretation placed thereon by the exceptional kindly disposed who are ever alert to protect the good name and fame of others by thought and deed, nor by that larger class who read every publication with eager desire to find some reflection or calumny against their fellow men. State v. Landy, 130 Minn. 138, 153 N. W. 258.

(61) Sweas v. Evenson, 110 Minn. 304, 125 N. W. 272.

(62, 63) Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

5513. Causing pecuniary damage—(72) Beek v. Nelson, 126 Minn. 10, 147 N. W. 668.

5514. Charging the commission of a crime—(73) Beek v. Nelson, 126 Minn. 10, 147 N. W. 668 (overruling dictum in Schaefer v. Schoenborn, 101 Minn. 67, 111 N. W. 843 on which statement of text was based).

(76) Roberts v. Butler, 122 Minn. 525, 142 N. W. 1134 (slander imputing act punishable under R. L. 1905, § 4953 [G. S. 1913, § 8704], held actionable).

5515. Words held actionable per se as charging a crime—Charging one with the commission of arson. Larson v. Krostue, 110 Minn. 337, 125 N. W. 262.

(89) Note, 48 L. R. A. (N. S.) 615.

5516. Words held not actionable per se as charging a crime—(9) Sweaas v. Evenson, 110 Minn. 304, 125 N. W. 272.

5517. Words tending to bring one into hatred, contempt or ridicule—It is libelous per se to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him or touch him with a ten-foot pole," if under all the circumstances the words used would expose the person written of to hatred or contempt, or injury in his business or occupation. Cole v. Millspaugh, 111 Minn. 159, 126 N. W. 626.

Held actionable per se to write of persons as "a precious bunch of crooks" and "as straight as a rail fence and as honest as Ananias." Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102.

(10) Cole v. Millspaugh, 111 Minn. 159, 126 N. W. 626; Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102.

5518. Defamation in relation to one's calling—In general—(31) Beek v. Nelson, 126 Minn. 10, 147 N. W. 668.

5519. Defamation of business men—Held actionable per se to say of a secretary of a business men's association designed to further the interests of the city that "he is a paid hireling of the creosoted block combine"—"he has never done a decent or respectable thing for St. Paul in the last twenty years"—"he was employed for twenty years to do the dirty work of the Jobbers Union." Beek v. Nelson, 126 Minn. 10, 147 N. W. 668.

A statement in writing by a bank concerning a grain buyer as follows: "Financially weak and is in the habit of borrowing from farmers whenever he can get it and all he can get. His credit at the above bank was shut off last June"—is prima facie libelous per se, if untrue. The statement being made in answer to a confidential communication from one who was contemplating loaning money on the security of the grain buyer's note, the occasion was qualifiedly privileged, and no action lies for the publication unless it was made with malice in fact. As to this the burden of proof is upon the plaintiff. Knowledge of the falsity of the statements is proof of malice. There is sufficient evidence in this case to sustain a finding of malice in fact. Froslee v. Lund's State Bank, 131 Minn. ——, 155 N. W. 619.

5520. Defamation of professional men—It is libelous per se to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him or touch him with a ten-foot pole," if under all the circumstances the words used would expose the person written of to hatred or contempt, or injury in his business or occupation. Cole v. Millspaugh, 111 Minn. 159, 126 N. W. 626.

5521. Defamation of public officers—A publication which charges by way of insinuations and comparisons that cause exists for the removal of a public official, because of favoritism, nepotism, and malfeasance in office, is libelous per se. An article stating that it is easy "to work" the county commissioners held actionable; for the word "work," in the connection and manner in which it appears in the publication, conveys a reflection upon the competency and integrity of the officials. Palmerlee v. Nottage, 119 Minn. 351, 138 N. W. 312.

PRIVILEGED COMMUNICATIONS

5523. Legislative proceedings—(56) Peterson v. Steenerson, 113 Minn. 87, 129 N. W. 147.

5524. Judicial proceedings—Allegations in a pleading are privileged, and cannot serve as a basis for a libel suit, unless it clearly appears that the same were not pertinent, material, or relevant to the controversy in litigation. All doubt should be resolved against a contention that the privilege has been exceeded. It is not important that the one claimed to have been libeled was not a party to the suit provided some fair legal basis may be suggested for the materiality of the allegations concerning him. Hammer v. Forde, 125 Minn. 146, 145 N. W. 810. See Note, 22 L. R. A. 649; 13 L. R. A. (N. S.) 820; 38 Id. 913.

(59) Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147. See Peterson v. Steenerson, 113 Minn. 87, 129 N. W. 147; Note, 123 Am. St. Rep. 631.

(63) 14 Col. L. Rev. 594.

5524a. Official reports—The general rule that libelous or slanderous statements uttered and published in the course of judicial or legislative proceedings are absolutely privileged does not extend or apply to public officers in general. Libelous publications, contained in reports of public officers other than in judicial or legislative proceedings, are only qualifiedly privileged. In such case the official character of the report prima facie protects the officer, and the burden is upon the person claiming to have been libeled to prove the falsity of the report and the malice of the author thereof. Peterson v. Steenerson, 113 Minn. 87, 129 N. W. 147. See 10 Col. L. Rev. 131; Note, 104 Am. St. Rep. 110.

5525. Criticism of public officers and candidates for office—An article in a newspaper containing a summary of an official report of a public

officer is not privileged if it is distorted, and accompanied by unfair comment and innuendoes not made in good faith. Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

A publication which purports to convey the meaning that a public official in an official report has charged a public servant with misconduct in office is libelous, if not true in substance. Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

A publication stating that a candidate for office has the backing of certain corporations in the state that are not in sympathy with the masses is not per se libelous. State v. Landy, 130 Minn. 138, 153 N. W. 258.

(66, 67) Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260; Lydiard v. Wingate, 131 Minn. —, 155 N. W. 212.

5526. Statements made in the discharge of duty—Statements regarding the character of servants. Note, 4 L. R. A. (N. S.) 1091.

(68) Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457; Froslee v. Lund's State Bank, 131 Minn. —, 155 N. W. 619.

(73) Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

(76, 77) Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457; Froslee v. Lund's State Bank, 131 Minn. —, 155 N. W. 619.

5527. Reports to commercial agency—(79) See 14 Col. L. Rev. 187, 296.

5528. Publication of news by newspaper—(80) Note, 15 Am. St. Rep. 333.

5529. Matter held privileged—A letter sent to the county superintendent of schools, by the father of a pupil in a district school, containing charges of impropriety by another pupil upon the school grounds during school or recess hours. Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457.

5530. Matter held not privileged—An article in a newspaper containing a distorted summary of an official report of a state board, with unfair comment not made in good faith. Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

JUSTIFICATION AND MITIGATION

5531. Justification—The truth as a defence—(4) See Note, 50 L. R. A. (N. S.) 1040; 91 Am. St. Rep. 285.

(6) Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

(10) Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897.

5532. Mitigation of damages—If defendant pleads the truth of the charge, or of a part thereof, but fails in his proof, this may be considered by the jury in aggravation of damages. If it appears that he presented such defence in good faith, believing it to be true, and had reason-

able ground for such belief, this may be considered by the jury on the issue of malice, and in mitigation of exemplary damages. Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897. See 29 Harv. L. Rev. 335.

(14) Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147.

(18) Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985; Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147; Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897. See Note, 38 L. R. A. (N. S.) 1176.

RETRACTION BY NEWSPAPERS

5533a. Application of statute—Exception—A libel charging in effect that a woman is keeping a house of prostitution imputes unchastity to her within the proviso to R. L. 1905, § 4269 (G. S. 1913, § 7901), relating to retraction by newspapers. Lysacker v. Bemidji Pioneer Pub. Co., 114 Minn. 179, 130 N. W. 850.

5535. Service of notice—Under G. S. 1913, § 7901, it is not indispensable that the notice of retraction specify each particular part of a published article which contains false and defamatory matter. It is sufficient if, from the article and the notice together, the publisher can, without difficulty, determine the words that contain the sting, and which it is expected to retract. Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102.

SLANDER OF PROPERTY OR TITLE

5538. In general—(39) See Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 46, 142 N. W. 930; 13 Col. L. Rev. 13, 121.

ACTIONS

5538a. Parties plaintiff—Where an article charged all the members of a state board with official misconduct it was held that a single member of the board might maintain an action. Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

5539. Inducement—Colloquium—Innuendo—(43) See Baker v. Warner, 231 U. S. 588.

5540. Alleging good reputation of plaintiff—(47) See Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147.

5545. Alleging facts showing application of words to plaintiff—(55, 58) Palmerlee v. Nottage, 119 Minn. 351, 138 N. W. 312.

5550. Alleging damages—(70) Lysacker v. Bemidji Pioneer Pub. Co., 114 Minn. 179, 130 N. W. 850; Beek v. Nelson, 126 Minn. 10, 147 N. W. 668.

5551. Alleging matter in mitigation—Where the complaint claims more than nominal damages to the reputation of plaintiff, defendant

may, under a general denial, prove the bad reputation of plaintiff at and prior to the time of the slander or libel, though the complaint does not specifically allege plaintiff's good reputation. Where the complaint alleges that defendant acted maliciously, and states a case for the recovery of punitive damages, defendant may, under a general denial, prove facts tending to show good faith and absence of malice on his part. Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147.

(75) Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

5553. Alleging justification—In order to justify, defendant must plead specific facts showing the truth of the charge, and may then prove specific acts of wrongdoing tending to establish such facts. Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897.

(83) See Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985.

5554. Variance—A variance as to the proprietor and publisher of a newspaper held not material. Argall v. Sutor, 114 Minn. 371, 131 N. W. 466.

5555. Evidence—Admissibility—In general—Where the article was called forth by a particular sale transaction, and in effect charges generally that plaintiffs were crooks and dishonest, and defendant pleads the truth of the charge, any evidence tending to prove that plaintiffs perpetrated a fraud in the sale is pertinent to the issue. It is proper to show that the thing sold was worth much less than the selling price, that plaintiffs knew it, and that they made false representations in the sale. Evidence of what the article sold for in the market is material evidence of its value. Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102.

(91) Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457 (actual malice how proved—certain evidence to prove actual malice held properly excluded).

5559. Burden of proof—(3) Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897 (plaintiff's reputation is presumed good and is not in issue unless attacked by defendant—if so attacked and put in issue, defendant presents the issue regardless of the form of the pleading).

5560. Law and fact—Whether the defendant was the publisher of the newspaper in which the libel appeared held a question for the jury. Argall v. Sutor, 114 Minn. 371, 131 N. W. 466.

(6) Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

(11, 12) Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

5562. Evidence—Sufficiency—(17) Argall v. Sutor, 114 Minn. 371, 131 N. W. 466; Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260.

(20) Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457 (privileged communication—evidence of actual malice insufficient).

5563. Exemplary damages—Evidence to justify—(29) Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897.

5564. Excessive damages—(30) Argall v. Sutor, 114 Minn. 371, 131 N. W. 466 (libel charging woman with keeping a house of prostitution—verdict for $4,500—reduced by trial court to $3,000); Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897 (charging a woman with unchastity—verdict for $1,500 sustained); Froslee v. Lund's State Bank, 131 Minn. ——, 155 N. W. 619 (defamation of business man—verdict for $500 held not excessive).

CRIMINAL LIABILITY

5565. What constitutes criminal libel—A publication stating that a candidate for office has the backing of certain corporations in the state that are not in sympathy with the masses is not per se libelous. State v. Landy, 130 Minn. 138, 153 N. W. 258.

LICENSES

5571. Nature—(38) Parol licenses. Note, 31 Am. St. Rep. 712.

5572. What constitutes—(40) See Bowe v. Cole, 129 Minn. 276, 152 N. W. 534 (contract giving right to take sand from land).

5573. Protection for acts—A license of a telephone company to place poles in a boulevard held not to justify taking possession by force. Souther v. N. W. Telephone Exchange Co., 118 Minn. 102, 136 N. W. 571.

5576. Revocation—(50) See 25 Harv. L. Rev. 191; 26 Id. 376.

LIENS

5577a. Compliance with statutes—Statutory liens can be perfected only by a strict compliance with the statutes creating and regulating them. State v. Johnson, 111 Minn. 10, 15, 126 N. W. 479.

5579. For labor on articles—A thresher, retaining in his possession part of the grain threshed as security for the payment of his charges, may have a lien thereon independent of statute. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

5579a. On motor vehicles—See In re McAllister-Newgord Co., 193 Fed. 265 (Laws 1911, c. 320—lien for materials for motor vehicle—priority—necessity of supplies being furnished for particular vehicle—time of filing lien claim—preservation of lien—effect of adjudication of bankruptcy after the furnishing of the materials and before the filing of the notice).

5584. Waiver—(68) National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

5584a. Conflict—Priority—Where a senior lien-holder consents to the conversion by the debtor of the property burdened with the lien, his right of priority over a junior lien-holder is lost; and the latter, whose claim is in the form of a chattel mortgage upon the property, may maintain an action against the mortgagor for the wrongful conversion of the property. In such an action the mortgagor cannot set up in defence the paramount lien of the senior creditor, for as to the junior creditor the right of priority ceased by reason of his consent to the wrongful conversion of the property. National Citizens Bank v. McKinley, 118 Minn. 162, 136 N. W. 579.

It is the general rule that the first in point of time takes precedence. Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

By Laws 1905, c. 328, as amended by Laws 1907, c. 114 (G. S. 1913, §§ 7036, 7037), giving a lien on personal property transported and stored at the request of the owner or legal possessor thereof, it was intended that one transporting and storing property at the request of a chattel mortgagor in legal possession should have a lien superior to the interest of the chattel mortgagee. The statute, so construed, is constitutional. Monthly Instalment Loan Co. v. Skellett Co., 124 Minn. 144, 144 N. W. 750. See Note, L. R. A. 1915D, 1147.

5584b. Appropriation to debt—Extinguishment—It is the general rule that a lien on specific property is extinguished upon an appropriation, in due proceedings, of the property to the payment of the debt secured. Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

5584c. Enforcement by equitable action—A lien created by statute, with no provision for its enforcement, may be foreclosed in an equitable action. United States & Canada Land Co. v. Sullivan, 118 Minn. 27, 128 N. W. 1112.

LIMITATION OF ACTIONS

IN GENERAL

5586. General policy of statute—A statute of limitation is based to a great extent on the proposition that if one person has a claim against another, or in property ostensibly in another's name or possession, it would be inequitable for him to assert such claim after an unreasonable lapse of time, during which such other has been permitted to rest in the belief that no such claim existed. Finley v. Erickson, 122 Minn. 235, 142 N. W. 198.

Who may invoke. Note, 104 Am. St. Rep. 742.

5588. Cannot compel party to bring action—(75) Fitger v. Alger Smith & Co., 131 Minn. —, 153 N. W. 997.

5589. Constitutional questions—Legislative discretion—Retroactive statutes—Vested rights—(76) Ochoa v. Hernandes, 230 U. S. 139.

(77) See Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 121 (thirty days a reasonable time for notice of claim to municipalities).

(80) See Whittier v. Farmington, 115 Minn. 182, 187, 131 N. W. 1079; Note, 111 Am. St. Rep. 455.

5591. A statute of repose—(83) Note, 95 Am. St. Rep. 656.

5595. Construction of statutes—(89) State v. Brooks-Scanlon Lumber Co., 128 Minn. 300, 150 N. W. 912 (statute removing all limitation to time for bringing an action for cutting timber on state lands without a permit, held retroactive).

5598. Invoking—Option of parties—Who may invoke the statute. Note, 104 Am. St. Rep. 742.

5600. Limitation by contract—Contract stipulations limiting the time within which an action may be brought thereon, when not unreasonable, are valid, though the period fixed be at variance with the statutory limitations. Stewart v. National Council, 125 Minn. 512, 147 N. W. 651.

Where the contract of the parties prescribes a limitation of time in which to bring action, which is shorter than the statutory period, such provision, if reasonable, is valid. Such provisions are, however, in derogation of law and are not especially favored, and should be construed strictly against the party invoking them. If the limitation applies only under certain conditions, such conditions must exist or it will not bar an action. Dechter v. National Council, 130 Minn. 329, 153 N. W. 742.

5601. Applicable to state and municipalities—(3) See, as to common-law rule, Note, 101 Am. St. Rep. 144.

RUNNING OF STATUTE

5602. In general—Demand—Conditions—Precedent—Operation of statute where a cause of action for nominal damages subsequently ripens into a right to actual damages. Note, 126 Am. St. Rep. 944.

(8) Trovaten v. Northern Pacific Ry. Co., 125 Minn. 88, 145 N. W. 799. See, for a case apparently in contravention of this rule, Kelly v. Ancient Order, 113 Minn. 355, 129 N. W. 846. The correctness of this decision is doubtful. See 24 Harv. L. Rev. 676.

(9) Note, 136 Am. St. Rep. 469.

(10) Fallon v. Fallon, 110 Minn. 213, 124 N. W. 994. See Digest, § 5606; Note, 136 Am. St. Rep. 469.

(11) Fallon v. Fallon, 110 Minn. 213, 124 N. W. 994. See Digest, § 5606; 10 Col. L. Rev. 482; Note, 32 L. R. A. (N. S.) 486; 136 Am. St. Rep. 469.

(13) Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 131 N. W. 855.

5604. When action is begun—Statute—The provisions of the code relating to the commencement of actions must be construed as a whole and so as to give effect to the intention to provide a single uniform course of procedure which shall apply alike to all civil actions. An action is deemed as commenced when the summons is delivered to the proper officer for service, if such service be completed within the prescribed time. Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

5605. In particular cases—Action on indemnity bond. Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067.

Action by administrator to set aside a transfer by the decedent procured by fraud. Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

Action to enjoin a redemption from a mortgage foreclosure sale. Burns v. Burns, 124 Minn. 176, 144 N. W. 761.

Action for the breach of a contract to convey realty. Trovaten v. Northern Pacific Ry. Co., 125 Minn. 88, 145 N. W. 799 (statute held to begin to run from the time of a sale to a third party).

Action for damages for the overflow of lands. Skinner v. Great Northern Ry. Co., 129 Minn. 113, 151 N. W. 968.

(35) Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 131 N. W. 855.

5606. Performance of condition precedent—(51) See State v. Murphy, 81 Minn. 254, 83 N. W. 991; Coates v. Cooper, 121 Minn. 11, 140 N. W. 120; Digest, § 5602.

5610. Absence from state—Statute—(55) See Casey v. American Bridge Co., 116 Minn. 461, 134 N. W. 111 (construction of Oklahoma statute).

(61) Tiller v. St. Louis etc. Co., 189 Fed. 994.

(63) See Lawson v. Adlard, 46 Minn. 243, 48 N. W. 1019; Note, 47 L. R. A. (N. S.) 309.

5613. Disabilities—Time of disability—Statute—(69) See Martz v. McMahon, 114 Minn. 34, 129 N. W. 1049 (actions by trustees—disability of cestuis que trust).

5616. Infancy—(76) See Martz v. McMahon, 114 Minn. 34, 129 N. W. 1049; 25 Harv. L. Rev. 567.

5617. Stay by paramount authority—(77) Seeger v. Young, 127 Minn. 416, 423, 149 N. W. 735.

NEW PROMISE AND ACKNOWLEDGMENT

5624. Sufficiency of promise or acknowledgment—(87) Note, 102 Am. St. Rep. 751.

PART PAYMENT

5635. Several debts—General payment—(9) Wilson v. Blackwood, 120 Minn. 227, 139 N. W. 151.

5636. Note and mortgage—The rule that a part payment of a note, secured by a mortgage, which tolls the statute as to the note, tolls it also as to the mortgage, has been changed by statute. See Digest, § 6431.

5640. Application of proceeds of collateral—(14) See 27 Harv. L. Rev. 593.

PARTICULAR ACTIONS

5648. Actions on contracts and obligations generally—An action for the breach of a contract to convey realty is subject to the six-year limitation. Trovaten v. Northern Pacific Ry. Co., 125 Minn. 88, 145 N. W. 799.

R. L. 1905, § 4076 (G. S. 1913, § 7701), held applicable to an action in the federal courts against an administrator by a religious society to recover assets of the estate claimed by it. Order of St. Benedict v. Steinhauser, 234 U. S. 640.

The six-year limitation applies to an action on a saloon-keeper's bond. Lynch v. Brennan, 131 Minn. ——, 154 N. W. 795.

(34) Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

5652. Actions for relief on the ground of fraud—Action by a judgment creditor of the defendant corporation to compel the defendant stockholders to make good, by paying the difference between the par value of their stock and what they paid for it, so far as may be necessary to satisfy the judgment, because of their false representation, relied on by the

plaintiff when he purchased the bonds of the corporation which are the basis of his judgment, that they had paid the full par value of their stock. The bonds contained an agreement that no stockholder should be in any wise liable for the payment thereof and that no bondholder should be entitled to any remedy to enforce payment thereof against any stockholder. Held, that it does not appear upon the face of the complaint that the action is barred by the statute of limitations, and that the bond agreement is not a defence to this action. Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777.

In an action by an administrator of the estate of a deceased person to recover the value of land conveyed by such person, on the ground that the deed was procured by fraud or undue influence where the facts alleged to constitute the fraud or undue influence are discovered by the heirs of the grantor, and the administrator is appointed and the suit commenced more than seven years after such discovery, the action is barred by the statute of limitations. Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

(58, 62) Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

5653. Actions involving trusts—Whenever the right of action in a trustee, who is vested with the legal estate and is competent to sue, is barred by limitation, the right of the cestui que trust is also barred, and this rule applies whether the cestui que trust be sui juris or under disability during the period of limitation, or whether entitled in possession or remainder. Martz v. McMahon, 114 Minn. 34, 129 N. W. 1049.

5653a. Actions involving injury to land—When the injury to land is a continuing one, but subject to remedy and not in its nature permanent, a recovery may be had for damages accruing within six years of suit brought, though the cause of the injury arose prior to such six-year period; and in such case one who purchases land after the cause of the injury arose may recover damages accruing while he was owner, not antedating the six-year period. Skinner v. Great Northern Ry. Co., 129 Minn. 113, 151 N. W. 968.

5654. Actions for personal injury—Negligence—An action against a physician for malpractice may be brought within six years. Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143.

(77) Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716.

(78) See Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 719 (the one-year limitation does not apply to an action by a servant of the municipality). The statute has been changed since the Quackenbush case. G. S. 1913, § 1787.

5655. Actions for various torts—An action for conversion is governed by the six-year limitation. Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474.

An action for malicious prosecution of a civil action is governed by the six-year limitation. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

PLEADING

5659. Demurrer—A general demurrer will lie whether the limitation is fixed by statute or contract. Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067.

It is not necessary to specify the point of the statute of limitations as the ground of a demurrer. A general demurrer is sufficient. Swing v. Barnard-Cope Mfg. Co., 115 Minn. 47, 131 N. W. 855.

The bar of the statute of limitations is not available on demurrer unless it clearly and unequivocally appears from the face of the pleading attacked that the statute has run against the cause of action alleged. Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943.

When it clearly appears from the complaint that, after the cause of action accrued, the time allowed by statute for bringing suit thereon expired before the suit was brought, and no fact is set forth avoiding the operation of the statute, a demurrer is rightly sustained. Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

If the defence of the statute is raised by demurrer the plaintiff has twenty days (if the trial will not be delayed) within which to amend his complaint as of course, and if it is a case where he is unable to state his cause of action without disclosing the bar of the statute, he should aver in the amended complaint the facts which tolled its running. Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

(96) Gulledge v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923. See Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

5660. Anticipating defence in complaint—Negativing exceptions—Fraud—(99) Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777; Howard v. Farr, 115 Minn. 86, 131 N. W. 1071; Sweet v. Lowry, 131 Minn. —, 154 N. W. 793.

5661. Waiver by not pleading—(5) Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

5662. Negativing exceptions—(8) Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

5664. Amended complaint—Assuming, without deciding, that where the original complaint states one cause of action, and an amended complaint, which takes the place of the original, states another and different cause, the action must be treated as begun at the time of the service of the amended complaint, the rule is not applicable to this case, for the original and amended complaints relate to one and the same cause of action in substance. So construed, the action stated in the amended com-

plaint must be treated as instituted at the time of the service of the summons, and a demurrer thereto upon the ground that the statute of limitations had run before the service of the amended complaint was rightly overruled. Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943.

(11) Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943.

LIS PENDENS

5668. General doctrine at common law—The common-law doctrine of lis pendens is inapplicable to commercial securities. Presidio County v. Noel-Young B. & S. Co., 212 U. S. 58.

(16) Jenson v. Anderson, 123 Minn. 199, 143 N. W. 361. See Note, 56 Am. St. Rep. 853.

5669. Statutory notice of lis pendens—The statute is applicable to a suit in equity in the federal courts. United States v. Chicago etc. Ry. Co., 172 Fed. 271.

A vendee of timber, his contract being of record, held not affected by a subsequent filing of notice of lis pendens. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. 176, 148 N. W. 43.

In an action under section 5817, G. S. 1894, to determine adverse claims to real property, in which the heirs of a record owner of the land were made defendants under the designation of "unknown persons" claiming an interest in the land, held that the failure to publish the notice of lis pendens as required by section 5818, G. S. 1894, was as to the unknown defendants fatal to the jurisdiction of the court, and as to their rights in the property that the judgment rendered in the action was void. The failure to publish the notice of lis pendens was not cured by the publication in connection with the summons of a notice of no personal claim, which notice did not by itself contain all the information required by statute to be set forth in the notice of lis pendens. Jenson v. Anderson, 123 Minn. 199, 143 N. W. 361.

A lis pendens filed in an action not of the authorized class may be canceled on motion. An action brought by plaintiff to abate a nuisance, consisting in the obstruction of a public highway, and to recover damages, is not an action of the authorized class; but a defendant not claiming ownership of the land included in the highway, and not an abutting owner, and having no interest in the highway except as he is a portion of the general public, is not in position to move for a cancelation of the lis pendens. Painter v. Gunderson, 123 Minn. 342, 143 N. W. 911.

5670. Duration—(29, 30) Voigt v. Woll, 110 Minn. 6, 124 N. W. 447.

LIVERY STABLE KEEPER

5673. Lien for services—(37) See Monthly Instalment Loan Co. **v. Skellet, 124** Minn. 144, 144 N. W. 750.

5673a. Liability for negligence of driver—Where a liveryman lets a **team for hire** and furnishes a driver, and the hirer exercises no control or supervision over the driver, except to direct him where to go, **and what route** to take and to caution him against improper driving, **the liveryman** is responsible for the negligence of the driver, and the **hirer may recover** from the liveryman in damages for an injury caused **by the driver's** negligence. See Meyers v. Tri-State Automobile Co., **121 Minn. 68**, 140 N. W. 184.

LOGS AND LOGGING

CONTRACTS AND CONVEYANCES

5675. Sale of standing timber—Conveyance of timbered land—License **to cut timber**—A written contract whereby the equitable owner of timber lands under contract of sale undertook to sell the timber held to **constitute a** sale of the timber, which was not reduced to a mere license **or right to cut** by a restriction, contained in the land contract, against **alienation of** less than the whole of the contract or the land, or without **the vendor's** approval; and hence the estate and rights of the timber **vendee, its** contract being of record, were not affected by subsequent attachment and lis pendens against the interest of the timber vendor, nor **by the latter's** subsequent assignment of its land contract and conveyances of the land, such, therefore, not constituting breaches of the timber sale contract. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. 176, 148 N. W. 43.

A conveyance of land by the owner, who has previously entered into **a contract** with another for the logging of the standing timber, does **not relieve** the vendor from liability for damages for having violated the **terms of the** logging contract. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923.

(46) Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. **176, 148 N.** W. 43.

(47) See 3 Mich. L. Rev. 407.

See Note, 128 Am. St. Rep. 868; 47 L. R. A. (N. S.) 870.

5676. Contracts for cutting, hauling and banking logs—Effect of expiration of time for removal of timber. Note, 47 L. R. A. (N. S.) 882.

(51) Blake v. J. Neils Lumber Co., 111 Minn. 513, 127 N. W. 450

(agreement to cut timber held to have a sufficient consideration); Brown v. Hall, 121 Minn. 61, 140 N. W. 128 (contract to remove "deadhead" logs from a river); Owen v. J. Neils Lumber Co., 125 Minn. 15, 145 N. W. 402 (stipulations for scaling and burning brush construed—effect of repeal of law requiring burning of brush on contract—no recovery for burning of brush not done—offset for failure of plaintiff to cut all the timber on the land—scale of private scaler not conclusive); O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865 (contract ambiguous as to scaler—oral evidence of negotiations and surrounding circumstances admitted—construction submitted to jury—wide discrepancy between two scalings—evidence as to the number of logs several years before the cutting and of the amount still standing held admissible as bearing on the amount cut).

LOG MARKS

5680. Recording—Evidence of title—Statute—A plaintiff's failure to have his log marks recorded held not a cause of the loss of certain logs, and hence not contributory negligence barring a recovery therefor. Cotton Lumber & Mercantile Co. v. St. Louis River Dam & Imp. Co., 115 Minn. 484, 132 N. W. 1126.

5681a. Unmarked logs—Floating—Statute—The statute has no application to logs not in the water, or which are in the possession or under the control of the owner. Cotton Lumber & Mercantile Co. v. St. Louis River Dam & Imp. Co., 115 Minn. 484, 132 N. W. 1126; Sheldon-Mather Timber Co. v. Itasca Lumber Co., 117 Minn. 355, 135 N. W. 1132.

(60) Astell v. McCuish, 110 Minn. 61, 124 N. W. 458.

5684. Impeachment of scale bills—(69) Fortier v. Skibo Timber Co., 111 Minn. 518, 127 N. W. 414; Owen v. J. Neils Lumber Co., 125 Minn. 15, 145 N. W. 402.

5688. Contracts relating to scaling—(73) Blake v. J. Neils Lumber Co., 111 Minn. 513, 127 N. W. 450 (written contract modified by a subsequent oral contract and acted upon as modified—contract held severable for each season's work); Fortier v. Skibo Timber Co., 111 Minn. 518, 127 N. W. 414 ("scale to be made by a man deputized by the surveyor general, said scale to be straight and sound"); Owen v. J. Neils Lumber Co., 125 Minn. 15, 145 N. W. 402 (stipulation for scaling by scaler appointed by defendant); O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865 (wide discrepancy between two scalings—contract ambiguous—oral evidence of negotiations and surrounding circumstances admitted—construction submitted to jury—action for balance due on contract).

5689. Fees of surveyor general—(74) Bennett v. Rainy Lake River Boom Corp. 115 Minn. 96, 131 N. W. 1059 (fees are chargeable to company operating boom—company may include fees in tolls, costs and expenses charged by it—complaint for fees sustained—unnecessary to negative payment of fees by owner of logs).

DRIVING, FLOATING, RAFTING AND BOOMING LOGS

5691. Boom companies—Powers and liabilities—Booms and piers—Dams—Overflowing lands—Persons operating dams in connection with the floating of logs down a stream navigable for such purpose have no legal right, without purchase or prescription, to discharge water in destructive quantities outside of the bed of the stream upon the lands of lower riparian owners, and negligence is not the gist of the cause of action for damages so occasioned. Where the overflow and damage are caused by a log jam in the river below, following discharge of water from the dam, the question is whether there was negligence in the operation of the dam or the handling of the jam. In an action for damages caused by the overflowing of lands lying below such a dam, evidence tending to show conditions preceding, during, and subsequent to the flood should be admitted liberally. Proof of the several items concerning value and condition of property destroyed should be admitted, though, under the issues, the ultimate fact to be proved is diminished rental value. The record in a prior action by another party for damages from the operation of the same dam is inadmissible. Torgeson v. Crookston Lumber Co., 123 Minn. 476, 144 N. W. 154.

(82–84) Torgeson v. Crookston Lumber Co., 123 Minn. 476, 144 N. W. 154.

See §§ 5692a, 5697.

5692. Charges for boomage—Lien—A boom company held not authorized to levy certain tolls under Laws 1889, c. 221, there being no contract between the parties and the logs not impeding the main drive. Namakan Lumber Co. v. Rainy Lake River Boom Corp., 115 Minn. 296, 132 N. W. 259.

(92) Namakan Lumber Co. v. Rainy Lake River Boom Corp., 115 Minn. 296, 132 N. W. 259; International Boom Co. v. Rainy Lake River Boom Corp., 112 Minn. 104, 127 N. W. 382.

5692a. Corporations for driving logs—Flooding dams—Damages—The rights of mill and other riparian owners upon navigable rivers are subordinate to the right of the state to improve the river for navigation, and to the rights conferred upon logging corporations organized under section 5263, G. S. 1913, with the limitation that the rights so conferred must be exercised in a reasonable manner and so as not unnecessarily

to injure or damage riparian rights. Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517.

The construction of flooding dams by such corporation is not unlawful, and no damages can be recovered therefor unless the construction thereof and the conduct of the same be unreasonable. Evidence held insufficient to justify recovery for the alleged negligence of defendant in conducting a drive of logs in consequence of which the logs were permitted to come in contact with the river bank, thus injuring plaintiff's riparian rights. Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517. See Johnson v. Wild Rice Boom Co., 127 Minn. 490, 150 N. W. 218; Juhl v. Wild Rice Boom Co., 127 Minn. 537, 148 N. W. 520.

The defendant had the right to accumulate and detain water by flooding dams for such time and in such quantities as was reasonably necessary to enable it to drive with reasonable efficiency and dispatch the logs which were to be floated by it upon that part of the stream over which it operated, and this notwithstanding that such detention of the water so lessened the supply in the stream that plaintiff meanwhile was unable to run his mill. Johnson v. Wild Rice Boom Co., 127 Minn. 490, 150 N. W. 218.

5695. Contracts for driving, floating and sorting logs—(13) Coleman v. Miss. & Rum River Boom Co., 114 Minn. 443, 127 N. W. 192, 131 N. W. 641 (contract to maintain a boom along a river bank held not to require maintenance against unavoidable, unprecedented and overwhelming natural forces—unprecedented flood); Blakeley v. J. Neils Lumber Co., 114 Minn. 523, 131 N. W. 1133 (contract for driving logs); Sheldon-Mather Timber Co. v. Itasca Lumber Co., 117 Minn. 355, 135 N. W. 1132 (agreement of lumber company to drive logs to its hoist and there scale them and pay for them at a certain price—disposition of logs contrary to agreement held a conversion—unmarked logs not abandoned); Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179 (the doctrine of substantial performance held applicable to a contract for driving logs).

LOGGING DAMS AND SLUICEWAYS

5697. In general—Plaintiff owned a sawmill, pier and boom on the Whiteface river. Defendant maintained and operated a sluicing dam across the river eight miles above the mill. In an action to recover damages to the mill, pier and boom, and for the loss of logs, caused by a flood of water alleged to have been negligently released from the dam, held that the evidence justified a verdict for plaintiff and that he was not guilty of contributory negligence in not having his logs marked. Cotton Lumber & Mercantile Co. v. St. Louis River Dam & Imp. Co., 115 Minn. 484, 132 N. W. 1126.

LIENS

5698. Lien for labor—The owner of horses who hires them to a contractor, who uses them in hauling and banking logs, the owner himself or his servants performing no manual labor in connection with the work, is not entitled to a lien. This applies to all who furnish instrumentalities for the work without performing labor on the work. McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781; Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216.

(26) McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781 (while the statute is to be liberally construed a court must not, by construction, do violence to the plain meaning of the language used); Horgan v. Duluth Log Co., 120 Minn. 244, 139 N. W. 491.

5699. Compliance with statute—(36) Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

5701. Assignment of lien—An assignee of a log lien, claimed under R. L. 1905, § 3524 (G. S. 1913, § 7058), and which had been properly perfected by filing of the lien statement required by section 3525 before the execution of the assignment, held entitled to maintain an action to enforce the same, notwithstanding that the assignment was not filed for record as provided by section 3525; there being, under the evidence, no question of the rights of bona fide purchasers. Horgan v. Duluth Log Co., 120 Minn. 244, 139 N. W. 491.

5702. Lien statement—A complaint held on demurrer to show a filing of the lien statement in the proper district. Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333.

It is not essential that the lien statement be verified by a person with personal knowledge of the facts. Small v. Smith, 120 Minn. 118, 139 N. W. 133.

Finding, in an action to enforce a log lien, that the work was done between October 1 and March 31 of the following year, thus allowing, under R. L. 1905, § 3526 (G. S. 1913, § 7060), until the last day of April next thereafter for the filing of the lien statement, held sustained by the evidence. Horgan v. Duluth Log Co., 120 Minn. 244, 139 N. W. 491.

Where work for which a log lien is claimed was begun prior to October 1, and completed thereafter in the course of continuous employment, only that portion done between the date mentioned and April 1 thereafter is within the provision of R. L. 1905, § 3526 (G. S. 1913, § 7060), that where the work is "wholly performed between October 1 and April 1 next thereafter" the statement may be filed on or before the last day of April. Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216.

(40) Horgan v. Duluth Log Co., 120 Minn. 244, 139 N. W. 491.

(42) Small v. Smith, 120 Minn. 118, 139 N. W. 133.

5703. Enforcement—Attachment—In an action to foreclose a laborer's lien under the log lien statute (section 3524 et seq. R. L. 1905), the return of the sheriff that he levied upon and attached "all the right, title, and interest" of defendants in and to the logs and timber involved in the action held sufficient as a levy upon the property itself. The return of the sheriff held sufficiently to describe the property, and that it was not fatal to the validity of the levy under the attachment that the number of feet of lumber contained in the logs attached was not given; the number of logs, with marks, being definitely stated. The service by a sheriff of a writ of attachment is presumed to have been made within the county of which he is sheriff. Smith v. Duluth Log Co., 118 Minn. 432, 137 N. W. 6.

(47) McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781 (attachment of logs essential).

5703a. Pleading—An answer held sufficient to raise an issue as to a due demand before suit. Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216.

5703b. Findings—Findings held insufficient in that they showed neither a demand for payment before the filing of the lien statement, *nor* that the labor for which the lien was claimed was terminated by the employer's act or by completion of the work. Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216.

5704. Judgment—A judgment in an action in which there has been no attachment of the logs will not conclude the defendant as to the existence of a lien. McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781.

LOST INSTRUMENTS

5711. Lost bill or note—Indemnity bond—(65) McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542.

See Note, 94 Am. St. Rep. 465 (actions on lost instruments).

5717. Evidence—Sufficiency—(72) Note, 134 Am. St. Rep. 1095.

LOTTERIES

5718. Definition—(74) See State v. Sperry, 110 Minn. 378, 126 N. W. 120.

5719. What constitutes—When issuing and redeeming trading stamps constitutes a lottery. State v. Sperry, 110 Minn. 378, 126 N. W. 120.

MAIMING

5722a. Conviction for lesser offence—Under an indictment for maiming the defendant may be convicted of an assault. State v. Wondra, 114 Minn. 457, 131 N. W. 496.

MAJORITY VOTE—See Elections, 2973a; Intoxicating Liquors, 4906.

MALICIOUS MISCHIEF

5723a. Indictment—An indictment under subdivision 1 of G. S. 1913, § 8934, held sufficient though it did not allege that defendant acted maliciously. State v. Ward, 127 Minn. 510, 150 N. W. 209.

5723b. Evidence—Sufficiency—Evidence held sufficient to justify a conviction for placing pieces of scrap iron in sheaves of grain to damage a threshing machine. State v. Rogne, 115 Minn. 204, 132 N. W. 5.

Evidence held sufficient to sustain a conviction under subdivision 1 of G. S. 1913, § 8934. State v. Ward, 127 Minn. 510, 150 N. W. 209.

MALICIOUS PROSECUTION

5727. Termination of proceeding—Voluntary abandonment of civil action. Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808.

(92) Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813 (criminal complaint fatally defective—prosecution abandoned—accused dismissed from custody); Hopkins v. Milaca State Bank, 120 Minn. 533, 139 N. W. 814.

(96) See Petruschke v. Kamerer, 131 Minn. ——, 155 N. W. 205.

See Note, 2 L. R. A. (N. S.) 927.

5728. Conviction of plaintiff—Reversal on appeal—(97) See 6 Col. L. Rev. 469.

5729. Institution or instigation of proceeding—Where defendant placed facts tending to show violation of the postal laws before the proper officials, but such officials, instead of proceeding thereon, made an independent investigation, by which they secured evidence tending to show the commission of a new and distinct offence, neither reported by nor known to defendant, and, without the knowledge of defendant, instituted a criminal prosecution for such new and distinct offence, defendant

cannot be held to have instigated such prosecution, and is not liable in damages therefor. Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093.

(1) See Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813.

(98) Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093 (laying facts before postal officials). See Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813.

5730. What constitutes probable cause—The existence of probable cause for a criminal prosecution is a complete defence to an action for damages for instituting the same, notwithstanding the fact that the prosecutor may have been actuated by malice. Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093.

(2) Lammers v. Mason, 123 Minn. 204, 143 N. W. 359; Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093.

(3) Hanowitz v. Great Northern Ry. Co., 122 Minn. 241, 142 N. W. 196; Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093.

(5) Hanowitz v. Great Northern Ry. Co., 122 Minn. 241, 142 N. W. 196.

5731. Advice of counsel—It is probably not necessary that the counsel whose advice is acted upon should be a member of the bar of this state. Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532.

(10) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(13) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359.

(14) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(17, 18) See Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093.

(20) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359; Price v. Minnesota D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532.

(21) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Price v. Minnesota D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532. See Note, 18 L. R. A. (N. S.) 1.

5734. Malice essential—Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or, to do a wrong and unlawful act knowing it to be such, constitutes legal malice. Lammers v. Mason, 123 Minn. 204, 143 N. W. 359.

(27) Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093.

5735. Malice inferable from want of probable cause—(34) Hanowitz v. Great Northern Ry. Co., 122 Minn. 241, 142 N. W. 196; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359.

5739. Guilt of accused a complete defence—(39) Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532.

5743. Burden of proof—(47) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Hanowitz v. Great Northern Ry. Co., 122 Minn. 241, 142 N. W. 196; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359; Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093; Williams v. Pullman Co., 129 Minn. 97, 151 N. W. 895.

5744. Law and fact—(50) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359; Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093; Williams v. Pullman Co., 129 Minn. 97, 151 N. W. 895; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532; Petruschke v. Kamerer, 131 Minn. —, 155 N. W. 205. See L. R. A. 1915D, 1.

(52) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532.

(54) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532; Petruschke v. Kamerer, 131 Minn. —, 155 N. W. 205.

5745. Damages—(63) Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532. See Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

5746. Evidence—Admissibility in general—Proof of an acquittal upon a trial for the crime charged is not prima facie evidence of want of probable cause. Williams v. Pullman Co., 129 Minn. 97, 151 N. W. 895.

(65, 66) Williams v. Pullman Co., 129 Minn. 97, 151 N. W. 895.

(67) Williams v. Pullman Co., 129 Minn. 97, 151 N. W. 895. See Hanowitz v. Great Northern Ry. Co., 122 Minn. 241, 142 N. W. 196.

5748. Evidence—Sufficiency—(95) Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532.

(96) Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093; Williams v. Pullman Co., 129 Minn. 97, 151 N. W. 895 (judgment ordered for defendant on appeal).

(97) Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813.

5749. Question of probable cause on appeal—(99) Williams v. Pullman Co., 129 Minn. 97, 151 N. W. 895.

5750. Malicious prosecution of a civil action—(1, 2) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(3) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808.

5750a. Same—Damages—Damages must be proved with reasonable certainty. To recover damages for injury to property, there must be fair proof of the existence and amount of damage. To recover for expenditure of time and money, there must be evidence of the necessity thereof, and of the value of such time. Upon proper proof there may be a recovery for injury to business, its reputation, standing, and good will. Such damages must not be speculative and conjectural; yet, where it is certain that damages have accrued to plaintiffs from defendants' wrongful acts, plaintiffs will not be denied a recovery of any damages whatever, solely because of uncertainty as to the amount of damages sustained. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

5751. Malicious attachment—(5) Carel v. Haedecke, 123 Minn. 435, 143 N. W. 1124 (record in a subsequent suit between plaintiff and one of the defendants held inadmissible).

MANDAMUS

IN GENERAL

5752. Definition and nature—(6) State v. Cook, 119 Minn. 407, 138 N. W. 432; State v. Brainerd, 121 Minn. 182, 141 N. W. 97.

(7) See State v. Brainerd, 121 Minn. 182, 141 N. W. 97.

(9) State v. Brainerd, 121 Minn. 182, 141 N. W. 97.

5753. Matters of discretion—Mandamus is a proper remedy to compel a court to proceed with the trial of an action, of which it has jurisdiction, when it refuses to proceed upon the ground that it is within its discretion to decline to exercise jurisdiction, when in fact it is without such discretion. State v. District Court, 126 Minn. 501, 148 N. W. 463.

(11) State v. Clarke, 112 Minn. 516, 128 N. W. 1008; State v. Jack, 126 Minn. 367, 148 N. W. 306.

5754. Other adequate remedy—(14) Other adequate remedy in equity. 14 Col. L. Rev. 457.

5762. Duties resulting from an office—The writ may be used to compel an officer to change his decision as to rival claimants to the benefit of a statute. State v. Iverson, 120 Minn. 247, 139 N. W. 498.

The officer of a private corporation may be compelled by mandamus to perform a clerical or ministerial duty pertaining to his office, but the remedy is a slow one because of the right of appeal. Where the law has been substantially complied with, or its object substantially obtained, the business of the corporation ought not to be interrupted by a writ of mandamus. Whipple v. Christie, 122 Minn. 73, 141 N. W. 1107.

(23) State v. Johnson, 111 Minn. 10, 126 N. W. 479; State v. Iverson, 120 Minn. 247, 139 N. W. 498; Hunt v. Hoffman, 125 Minn. 249, 146 N. W. 733; State v. Jack, 126 Minn. 367, 148 N. W. 306.

See Note, 98 Am. St. Rep. 863; 125 Id. 492.

5762a. Unincorporated societies and associations—Partnership—Mandamus does not lie to regulate the affairs of unincorporated societies, associations, or partnerships. State v. Cook, 119 Minn. 407, 138 N. W. 432.

ACTS WHICH MAY BE COMPELLED

5763. Right to office—Election contests—Use of writ to restore to office an officer illegally removed. Note, 19 L. R. A. (N. S.) 1.

Use of writ by de facto officer to compel payment of salary. 26 Harv. L. Rev. 555.

(27) Hunt v. Hoffman, 125 Minn. 249, 146 N. W. 733.

5766. Mandamus granted—Miscellaneous cases—To compel a treasurer of a city to pay a warrant for services rendered a water, light and building commission created under Laws 1907, c. 412. State v. McIlraith, 113 Minn. 237, 129 N. W. 377.

To compel a refundment of taxes. State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

To compel the common council of the city of Waseca to fix, pursuant to the city charter, the time, place and manner in which a vote for the office of alderman should be determined. State v. Common Council, 116 Minn. 40, 133 N. W. 67.

To compel the treasurer of a town to pay valid orders issued by the board of supervisors and to test the validity of such orders. State v. Clark, 116 Minn. 500, 134 N. W. 129.

To compel a street railway company to construct a new line. State v. St. Paul City Ry. Co., 117 Minn. 316, 135 N. W. 976.

To compel a public service corporation to furnish service to an individual applicant therefor. State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104.

To compel the state auditor to award to an association the aid provided by Laws 1911, cc. 280, 381, relating to the encouragement of county and district agricultural societies. State v. Iverson, 120 Minn. 247, 139 N. W. 498.

To compel a county auditor to issue to a dredging company a warrant on a drainage fund. State v. George, 123 Minn. 59, 142 N. W. 945 (held that it does not appear from the petition and writ that relators are in default or are not entitled to the amount specified in the engineer's certificate).

To compel a court to issue a writ of restitution in unlawful detainer proceedings. State v. Municipal Court, 123 Minn. 377, 143 N. W. 978.

To compel the clerk of a school district to draw orders on the treasurer for the payment of teachers' salaries as they become due, without requiring that a bill therefor be first presented to and allowed by the school board. State v. Jack, 126 Minn. 367, 148 N. W. 306.

To compel a court to proceed with the trial of an action, of which it has jurisdiction, when it refuses to proceed upon the ground that it is within its discretion to decline to exercise jurisdiction, when in fact it is without such discretion. State v. District Court, 126 Minn. 501, 148 N. W. 463.

To compel a city council to levy and enforce authorized special assessments for local improvements. State v. Ely, 129 Minn. 40, 151 N. W. 545.

To compel a municipal council to call an election for the submission of a proposed home rule charter. State v. Barlow, 129 Minn. 181, 151 N. W. 970.

(33) Beck v. Great Northern Ry. Co., 115 Minn. 259, 132 N. W. 1.

(46) See State v. District Court, 125 Minn. 522, 146 N. W. 480.

(71) State v. Monida & Yellowstone Stage Co., 110 Minn. 193, 124 N. W. 971, 125 N. W. 676; Id., 112 Minn. 530, 127 N. W. 400, 857.

(01) State v. Johnson, 111 Minn. 10, 126 N. W. 479.

5767. Mandamus denied—Miscellaneous cases—To compel a county board to approve an engineer's certificate of the completion of a ditch. State v. Clarke, 112 Minn. 516, 128 N. W. 1008.

To compel a city council to fix a time and place for a hearing upon charges against city officers and a demand for their removal. State v. Brainerd, 121 Minn. 182, 141 N. W. 97.

(16) See State v. District Court, 125 Minn. 522, 146 N. W. 480.

PROCEDURE

5767a. In general—In our practice mandamus is assimilated to an ordinary civil action. State v. Minneapolis & St. L. R. Co., 39 Minn. 219, 39 N. W. 153; State v. Chisago County, 115 Minn. 6, 131 N. W. 792; State v. Cook, 119 Minn. 407, 138 N. W. 432; Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66.

5768. Jurisdiction of supreme and district courts—In view of G. S. 1913, § 8276, giving the district court exclusive jurisdiction in mandamus, except where the writ is to be directed to a district court or judge thereof, an original application to the supreme court for a writ of mandamus directing the district court and judge and clerk thereof to transfer all records and files in an action to the court of another county, the clerk having refused to transmit same, will not be entertained; the clerk's refusal not constituting a refusal of the district court, and if he is to be coerced by mandamus the remedy is in the exclusive jurisdiction of the district court. State v. District Court, 125 Minn. 522, 146 N. W. 480.

5769. Parties defendant—The attorney general may appear and contest proceedings in mandamus, when the object sought is to compel the performance by a public officer of an official act in connection with the police laws of the state. State v. Village Council, Osakis, 112 Minn. 365, 128 N. W. 295.

(01) State v. Johnson, 111 Minn. 10, 126 N. W. 479.

(27) State v. Chisago County, 115 Minn. 6, 131 N. W. 792; Curtis v. Hutchinson, 126 Minn. 264, 148 N. W. 66.

See Note, 105 Am. St. Rep. 122; 64 L. R. A. 622.

5770. On whose information issued—The attorney general may appear and contest proceedings in mandamus, when the object sought is to compel the performance by a public officer of an official act in connection with the police laws of the state. State v. Village Council, Osakis, 122 Minn. 365, 128 N. W. 295.

Before the petitioner for a writ of mandamus is entitled thereto, he must show more than that there is a public wrong specially injurious to him. He must show that such wrong consists of some failure of official duty clearly imposed by law, and that there is no other adequate specific legal remedy. The duty must be positive, not discretionary, and the right must be so clear as not to admit of any reasonable controversy. Where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest, and his rights must clearly appear. On the other hand, where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result; it being sufficient to show that he is a citizen, and, as such, interested in the execution of the laws. State v. City Council, Brainerd, 121 Minn. 182, 141 N. W. 97.

(29, 30) State v. City Council, Brainerd, 121 Minn. 182, 141 N. W. 97.

See Note, 105 Am. St. Rep. 122.

5773. Demand before suit—(35) See State v. Welte, 125 Minn. 427, 147 N. W. 249 (reconsideration of claim by a county board and its disallowance held to excuse a further demand).

5775. Allowance of writ—Service—In an action against a benefit society, an admission of service of a writ by the state insurance commissioner sustained. Laws 1907, c. 345, regulating the service of process on foreign benefit societies held applicable to mandamus proceedings. Various objections to the service of an alternative writ of mandamus held not fatal to the jurisdiction of the court. State v. Brotherhood of American Yeomen, 111 Minn. 39, 126 N. W. 404.

(01) State v. Brotherhood of American Yeomen, 111 Minn. 39, 126 N. W. 404.

5776. Pleading—The petition and alternative writ take the place of a complaint in an ordinary civil action, and if the facts therein alleged are not in substance legally sufficient the respondent may demur thereto. State v. Cook, 119 Minn. 407, 138 N. W. 432; State v. City Council, Brainerd, 121 Minn. 182, 141 N. W. 97.

The effect of a demurrer is the same as in an ordinary civil action. It admits the facts well pleaded in the petition. If the demurrer is overruled without leave to answer judgment may be entered as upon default. State v. Jack, 126 Minn. 367, 148 N. W. 306.

On a motion for judgment on the pleadings, findings are not proper. In mandamus the pleadings are the writ and the return. When the motion is by the relator for judgment on the pleadings, the court looks to the allegations of the writ admitted by the return and the allegations of the new matter in the return. State v. Barlow, 129 Minn. 181, 151 N. W. 970.

(43) State v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136 (an answer held to present an issue upon the question of the reasonableness of an ordinance requiring a street railway company to construct a new line, and not subject to demurrer); State v. George, 123 Minn. 59, 142 N. W. 945 (petition to compel issue of county warrant in drainage proceedings sustained).

5778. Judgment—Relief allowable—Form of writ—An application to amend a judgment directing a corporation to allow a stockholder to examine its books, held properly denied. State v. Monida & Yellowstone Stage Co., 112 Minn. 530, 127 N. W. 400, 857.

A motion for judgment upon the return to an alternative writ of mandamus may be made at the place where the writ is returnable. State v. Common Council, Waseca, 116 Minn. 40, 133 N. W. 67.

An alternative writ did not state or recite the facts alleged in the petition, but recited that it appeared to the court by the petition of the relator that all matters alleged and set forth in the attached petition were

true. Held that the writ was sufficient. State v. Common Council, Waseca, 116 Minn. 40, 133 N. W. 67.

A peremptory writ of mandamus need not precisely follow the alternative writ. A peremptory writ may issue, directing that the true amount paid on account of a void tax sale and subsequent taxes be refunded, though in relator's application and alternative writ an item not recoverable was added to such amount. State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

The mandate of a writ of mandamus to compel an electric light company to furnish electric service to the relator should, under the established facts herein, be merely that the respondent must furnish such service, without specifying the manner in which such duty is performed. State v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104.

5781. Appeal—The attorney general may appeal when the state is interested. State v. Village Council, Osakis, 112 Minn. 365, 128 N. W. 295.

MARRIAGE

5784. Definition and nature—Contract—A contract of marriage is sui generis. The rules governing ordinary contracts have only a limited aplication. Marriage is a relation or status rather than a contract. State v. Yoder, 113 Minn. 503, 130 N. W. 10.

It is mutual, present consent, lawfully expressed, which constitutes a marriage. Cohabitation as husband and wife is evidence of marriage, but not conclusive evidence. It may be rebutted by the conduct of the parties. Le Suer v. Le Suer, 122 Minn. 407, 142 N. W. 593.

(63) See Travers v. Reinhardt, 205 U. S. 423.

5788. Competency of parties—(70) Note, 79 Am. St. Rep. 361.

5788a. Void and voidable marriages—Remarriage of divorced persons—A marriage contract is a nullity ab initio only where expressly so declared by statute. In such a case it is absolutely void, requiring no judicial decree for its dissolution. A voidable marriage contract arises where, though prohibited by law, it may be ratified or confirmed by the subsequent cohabitation and conduct of the parties, and is valid until dissolved by judicial decree. A remarriage of divorced persons within six months from the date of their divorce, though prohibited by section 3554, R. L. 1905 (G. S. 1913, § 7090), is valid until dissolved by judicial decree. State v. Yoder, 113 Minn. 503, 130 N. W. 10.

5793. Presumptions—The presumption of marriage from cohabitation as husband and wife may be overcome by the conduct of the parties. Le Suer v. Le Suer, 122 Minn. 407, 142 N. W. 593.

Presumption of termination of first marriage in case of a second marriage. Note, 89 Am. St. Rep. 198.

(76) Lando v. Lando, 112 Minn. 257, 127 N. W. 1125; Sy Joe Lieng v. Gregorio Sy Quia, 228 U. S. 335 (failure for a long time to assert rights under a former marriage).

5794. Mode of proving—Marriage cannot be proved by a judgment in an action between strangers. Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416.

5795. Common-law marriage—Degree of proof—General characteristics and validity of common-law marriage. Note, L. R. A. 1915E, 8, 60, 91, 113.

(87) See Note, 124 Am. St. Rep. 104; 2 L. R. A. (N. S.) 353; 27 Harv. L. Rev. 378.

5796. Evidence—Sufficiency—Evidence held insufficient to prove a ceremonial marriage. Le Suer v. Le Suer, 122 Minn. 407, 142 N. W. 593.

(88) Shattuck v. Shattuck's Estate, 118 Minn. 60, 136 N. W. 409.

(89) See Le Suer v. Le Suer, 122 Minn. 407, 142 N. W. 593.

MARSHALING ASSETS AND SECURITIES

5798. In general—(94) See Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748.

MASTER AND SERVANT

THE CONTRACT

5800a. Contract implied in fact—The contract may be implied from the acts of the parties and circumstances. It may be partly expressed in words and partly implied from acts and circumstances. The law imputes to a person an intention corresponding to the reasonable meaning of his words and actions. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

5801. When relation exists—Whether the plaintiff was in the employ of the defendant at the time of an accident is a question for the jury, unless the evidence is conclusive. Hoffer v. Powers, 112 Minn. 409, 128 N. W. 299; Johnston v. Illinois Central R. Co., 127 Minn. 531, 149 N. W. 1069.

A person working for a railroad company as a student brakeman held an employee and not a mere licensee. Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309.

See Digest, §§ 5834, 5835, 5857, 5858.

5807. Breach—Disabling one's self—Reduction of grade—(01) Cooper v. Stronge & Warner Co., 111 Minn. 177, 126 N. W. 541.

5808. Duration—Particular contracts construed—(8) O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677 (contract for services for a year from a certain date); Moe v. Kekos, 127 Minn. 117, 149 N. W. 8 (issue as to whether contract was for a definite period or as long as the servant's work was satisfactory—question for jury).

ABANDONMENT OF CONTRACT BY SERVANT

5810. For cause—Recovery—(11) Note, 28 L. R. A. (N. S.) 315.

WAGES

5812. Particular contracts construed—(14) Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905 (implied agreement to pay same compensation as for prior periods of service—contract partly expressed in words and partly implied from acts and circumstances).

5813. In absence of agreement—Presumption of continuance of prior compensation—Where an employment is continued after the expiration of the term without any express agreement as to the compensation, there is a rebuttable presumption of fact that the parties agreed that the original compensation should continue. In such a case the recovery is not on a quantum meruit but on an agreement, implied in fact. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

5816. Computation of period of service—Where a contract provides that the servant shall report for duty on a certain day that day will be deemed the commencement of the service in the absence of an express agreement to the contrary. O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677.

DISCHARGE OF SERVANT

5824. Grounds—(26) Note, 24 L. R. A. (N. S.) 814.

5825. Dissatisfaction with services—(31) See Moe v. Kekos, 127 Minn. 117, 149 N. W. 8.

5829. Duty to seek other employment—(35) Cooper v. Stronge & Warner Co., 111 Minn. 177, 126 Minn. 541.

5831. Discharge for cause—Recovery—(37) Note, 5 L. R. A. (N. S.) 524.

5832. Remedies of servant for wrongful discharge—(38) Marcotte v. Beaupre, 15 Minn. 152 (117). See Dunnell, Minn. Pl. 2 ed. § 915.
(39) Note, 6 L. R. A. (N. S.) 49.
See Note, 5 L. R. A. (N. S.) 579.

MASTER'S LIABILITY FOR SERVANT'S TORTS

5833. In general—Stated abstractly, the general rule is that a master is liable for the torts of his servant committed in the course and within the scope of his employment. McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

It is difficult, if not impossible, to frame a general rule applicable to all cases. The rule varies with the relation of the parties, the nature of the business, and the nature of the particular wrong. Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 127 N. W. 926; McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434; Burnham v. Elk Laundry, 121 Minn. 1, 139 N. W. 1069. See Huffcut, Agency, 2 ed. §§ 242–256.

The statement in the text of the Digest that "the test in all cases is whether the act was done by authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it," is taken from one of our earlier cases but is inaccurate. The test is not the intention of the master, but whether the act was done in the course and within the scope of the employment, regardless of whether it was specifically authorized or not. McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434; Sina v. Carlson, 120 Minn. 283, 139 N. W. 601. See, in support of the statement in the Digest, Morier v. St. Paul etc. Ry. Co., 31 Minn. 351, 17 N. W. 952; Theisen v. Porter, 56 Minn. 555, 58 N. W. 265.

While the abstract rule is well settled, some confusion has arisen in applying it concretely, especially with reference to the meaning of the term "the course of and within the scope of his employment." No hard and fast definition of the term, applicable to all cases, can be given. Some of the earlier cases in this court seemingly applied the rule with literal exactness; but the tendency of the later cases is to give the rule a more liberal and practicable application, especially in cases where the business of the master intrusted to his servants involved a duty owed by him to the public or third persons. McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434; Burnham v. Elk Laundry Co., 121 Minn. 1, 139 N. W. 1069.

The expression "in the course of his employment" means while engaged in the service of the master—that is, while engaged generally in the master's work. Sina v. Carlson, 120 Minn. 283, 139 N. W. 601.

The general rule of liability is given an enlarged scope when the business intrusted to the servant affects the public, especially where it is of such a nature that the acts of the servant must necessarily be relied upon by the public. McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315; Penas v. Chicago etc. Ry. Co., 112 Minn. 203,

127 N. W. 926; McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434.

If the act of the servant was done in the course and within the scope of his employment, it is immaterial that it was in excess of his authority or contrary to instructions. Sina v. Carlson, 120 Minn. 283, 139 N. W. 601; Helpie v. N. W. Drainage Co., 127 Minn. 360, 149 N. W. 461. See Note, 18 L. R. A. (N. S.) 416.

The generally accepted reason for the rule is that the master is liable for the torts of his servant, not because he has authorized them, nor because the servant in his conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. Standard Oil Co. v. Anderson, 212 U. S. 215; Pollock, Torts, 6 ed., 77. See Meyers v. Tri-State Automobile Co., 121 Minn. 68, 71, 140 N. W. 184.

The adoption of the rule was helped by the feeling that it was desirable to have some one who was able to pay. The Eugene F. Moran, 212 U. S. 466, 474.

A master may be liable though the wrongful act of the servant was not in furtherance of the master's business, if the servant was in the habit of committing such acts and the master failed to exercise reasonable care to prevent it. Hogle v. Franklin Mfg. Co., 199 N. Y. 388.

The testimony of the master and servant that the servant was acting without authority is not conclusive. Sina v. Carlson, 120 Minn. 283, 139 N. W. 601.

The general rule applies to servants driving an automobile. Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091; Provo v. Conrad, 130 Minn. 412, 153 N. W. 753.

Whether the owner of an automobile is liable for damages caused by negligence in driving it depends upon whether the driver was or was not the servant of the owner and engaged upon the business of the owner when the negligence occurred. Where a parent keeps an automobile, which he authorizes a child to use for pleasure at any time, and the child operates it so negligently as to cause injury to others, it is error to rule that, as a matter of law, the parent is not responsible for such negligence. The fact that a servant, driving his master's car upon the master's business, permits a stranger riding with him to drive it temporarily, while upon such business, does not absolve the master from responsibility. Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091.

The defendant intrusted to its employees the work of driving lumber products down a stream and through the land of the plaintiff. The work during its progress was interfered with by a stump in the stream at a point near the plaintiff's house. The foreman and a driver, another employee, then went into the stream and sawed out the obstruction, and in doing so both were wet. The driver, upon reaching the

shore, built a fire on the bank of the stream on plaintiff's land for the purpose of drying his clothes. He negligently failed to put the fire out, whereby the plaintiff sustained damages. Held, that the question whether the act of the driver in setting the fire was in the course of and within the scope of his employment was one of fact for the jury, and that the court did not err in refusing to direct a verdict for the defendant. McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434.

While one carrying on a private business may be answerable for the torts of another to whom he intrusts part of the work, he is not answerable for the torts of one whom he cannot select, control, or discharge. Guy v. Donald, 203 U. S. 399.

Liability of master for malicious acts of servant. 9 Mich. L. Rev. 87, 181.

Liability of master for sportive acts of servant. Note, 13 L. R. A. (N. S.) 1193.

(40) Nava v. N. W. Tel. Exchange Co., 112 Minn. 199, 127 Minn. 935; Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 127 N. W. 926; McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434; Sina v. Carlson, 120 Minn. 283, 139 N. W. 601; Burnham v. Elk Laundry Co., 121 Minn. 1, 139 N. W. 1069; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Kuehmichel v. Western Union Tel. Co., 125 Minn. 74, 145 N. W. 788; Helppie v. N. W. Drainage Co., 127 Minn. 360, 149 N. W. 461.

(42) Sina v. Carlson, 120 Minn. 283, 139 N. W. 601.

5834. Volunteers—When relation of master and servant exists—In general—Where a servant is permitted, during the course of his employment, to use his master's vehicle for his own errands, the relation of master and servant is not interrupted. Sina v. Carlson, 120 Minn. 283, 139 N. W. 601.

Where a servant, without authority from the master, permits a stranger to assist him in his work for the master, and such stranger, in the presence of the servant and with his consent, negligently does such work, the master is liable for such negligence. Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611.

The right to control is the test by which to determine whether the relation of master and servant exists. Meyers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184.

One to whom the servant of another is temporarily hired has for the time being the responsibility of a master in so far, and only in so far, as he may exercise the authority of a master. In determining whether the wrongdoer is the servant of the person to whom he has been thus hired, the general test is whether the wrongdoer is under his control

so that he can at any time determine the way in which the wrongdoer shall perform his work, not merely in reference to the result to be reached, but in reference to the method of reaching the result, and not merely in the general business which the act is intended to promote, but also in the particular act out of which the injury arose. Where the owner of a team hires out the team and a driver to another, the hirer having under the contract nothing to do with the driving of the team, the relation of master and servant still exists between the owner and the driver as regards the driving and care of the team. There is a general consensus of authority that, though a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Chapman v. People's Ice Co., 125 Minn. 168, 145 N. W. 1073.

Where a parent keeps an automobile which he authorizes a child to use for pleasure at any time, and the child operates it so negligently as to cause injury to others, it is error to rule that, as a matter of law, the parent is not responsible for such negligence. Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091.

One in the general service of another may be so transferred to the service of a third person as to become the latter's servant with all the legal consequences of the new relation; but to change the relation and relieve the master requires more than the mere fact that the servant is sent to do work pointed out by such third party who has made a bargain with the master for his services. Standard Oil Co. v. Anderson, 212 U. S. 215; Philadelphia etc. Co. v. Barrie, 179 Fed. 50.

(44) See Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611.

5834a. Liability of letter of vehicles for hire—Negligence of driver— Where a dealer in automobiles and owner of a garage lets a car for hire and furnishes a driver, and the hirer exercises no control or supervision over the driver, except to direct him where to go, and what route to take and to caution him against improper driving, the owner is responsible for the negligence of the driver, and the hirer may recover from the owner in damages for an injury caused by the driver's negligence. The driver of an automobile drove over an embankment on the left side of the road. It was broad daylight. The road was hard, dry, and smooth, and wide enough for two vehicles. There was no obstruction, and no other vehicle on the road. The car was in good condition. There was evidence that he had at times before been driving carelessly and too near the edge of the road. It was a hot day, and the driver's explanation was that he was taken with a period of dizziness

which came on suddenly, and lasted but a moment. Held, that the question of his negligence was for the jury, and that the evidence was sufficient to sustain their finding that he was negligent. Meyers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184.

5835. Independent contractors—Where the issue is whether one has absolved himself from liability by turning over control of a mill or factory to an independent contractor, it is error to permit evidence that prior to the making of the contract the owner had taken out employer's liability insurance. Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161.

Doctrine of independent contractor held inapplicable where a servant of a contractor was killed, while painting a bridge constructed by the city of Winona across the Mississippi river, by a "brush" discharge from heavily charged electric wires on the bridge. Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577.

Where the owner or occupant of lands causes or permits fire to be set thereon to accomplish a desired result under such conditions that the act of then setting such fire necessarily endangers the property of others unless proper precautions are taken, a duty arises to take such precaution, which cannot be avoided by delegating the work to an independent contractor. Carlton County Farmers Mutual Fire Ins. Co. v. Foley Bros., 117 Minn. 59, 134 N. W. 309.

A tinner engaged by defendant to instal gutters in a house held an independent contractor and not a servant of defendant. Resnikoff v. Friedman, 124 Minn. 343, 144 N. W. 1095.

The general test applies in determining whether one is an employee within the Workmen's Compensation Act. State v. District Court, 128 Minn. 43, 150 N. W. 211.

The "independent contractor" doctrine does not apply where the work that the contractor does amounts in itself to a nuisance or necessarily operates to destroy the property of another. Weinman v. De Palma, 232 U. S. 571. See Carlton County Farmers Mutual Fire Ins. Co. v. Foley Bros., 117 Minn. 59, 134 N. W. 309.

(46) Winters v. American Radiator Co., 128 Minn. 508, 151 N. W. 277 (transfer or delivery company held an independent contractor). See Hoppe v. Winona, 113 Minn. 232, 262, 129 N. W. 577; Note, 76 Am. St. Rep. 382.

(47) Winters v. American Radiator Co., 128 Minn. 508, 151 N. W. 277. See Resnikoff v. Friedman, 124 Minn. 343, 144 N. W. 1095.

(48) Aarnes v. Great Northern Ry. Co., 129 Minn. 467, 152 N. W. 866.

(49) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987; State v. District Court, 128 Minn. 43, 150 N. W. 211; Winters v. American Radiator Co., 128 Minn. 508, 151 N. W. 277; Aarnes v. Great Northern

Ry. Co., 129 Minn. 467, 152 N. W. 866. See Chapman v. People's Ice Co., 125 Minn. 168, 145 N. W. 1073 (teamster loaned by third party to defendant).

(50) State v. District Court, 128 Minn. 43, 150 N. W. 211; Aarnes v. Great Northern Ry. Co., 129 Minn. 467, 152 N. W. 866. See Kuehmichel v. Western Union Tel. Co., 125 Minn. 74, 145 N. W. 788.

(52) See State v. District Court, 128 Minn. 43, 150 N. W. 211; Aarnes v. Great Northern Ry. Co., 129 Minn. 467, 152 N. W. 866.

(55) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161; Carlton County Farmers Mutual Fire Ins. Co. v. Foley Bros., 117 Minn. 59, 134 N. W. 309; State v. District Court, 128 Minn. 43, 150 N. W. 211. See Aarnes v. Great Northern Ry. Co., 129 Minn. 467, 152 N. W. 866; Zuponcic v. Val Blatz Brewing Co., 131 Minn. —, 154 N. W. 790.

5838. Pleading—The allegations "scope of employment" and "course of employment" are allegations of fact and not mere conclusions of law, and are sufficient as against a demurrer. Kuhl v. United States H. & A. Ins. Co., 112 Minn. 197, 127 N. W. 628. See Foran v. Levin, 76 Minn. 178, 78 N. W. 1047.

An act of the servant may be pleaded as the act of the master. Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

(60) See Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462 (complaint for negligent driving of carriage by servant sustained).

5839. Burden of proof—Presumptions—Where a person is driving the team of another in a public street, there is a reasonable presumption that he is doing so as the agent of the owner, who may show that the contrary is the fact. Langworthy v. Owens, 116 Minn. 342, 133 N. W. 866.

5840. Evidence—Sufficiency—Evidence that the person causing the injury was a servant of defendant held insufficient. Nelson v. Saari, 123 Minn. 492, 144 N. W. 137 (plaintiff claimed that he loaned to defendant a team and driver—defendant claimed that driver was the servant of plaintiff).

5841. Law and fact—The present tendency of the courts is to submit the question of the master's liability to the jury as one of fact. Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 127 N. W. 926; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

Whether a driver of a team was the servant of the defendant held a question for the jury. Langworthy v. Owens, 116 Minn. 342 133 N. W. 866.

Whether a master was negligent in retaining an unfit servant held a question for the jury. Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703.

(63) Nava v. N. W. Tel. Exchange Co., 112 Minn. 199, 127 N. W. 935; Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 127 N. W. 926; Rudd v. Fox, 112 Minn. 477, 128 N. W. 675 (master held liable for any negligence of a servant as a matter of law); Sina v. Carlson, 120 Minn. 283, 139 N. W. 601; Burnham v. Elk Laundry Co., 121 Minn. 1, 139 N. W. 1069; Meyers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461; Provo v. Conrad, 130 Minn. 412, 153 N. W. 753 (evidence that servant was acting outside the scope of his employment held conclusive as a matter of law); Zuponcic v. Val Blatz Brewing Co., 131 Minn. —, 154 N. W. 790; Donovan v. Tilden Produce Co., 131 Minn. —, 155 N. W. 104.

See Digest, § 5835.

5842. **Master held liable**—Where a servant collided with a team while turning an automobile about in a street. Thomas v. Armitage, 111 Minn. 238, 126 N. W. 735.

Where a general manager of defendant wrote on defendant's letterheads to third parties that plaintiff, a former employee of defendant, had stolen certain amounts of money from defendant. Nava v. N. W. Telephone Exchange Co., 112 Minn. 199, 127 N. W. 935.

Where an owner of an automobile livery furnished a servant with an automobile with which to go on the streets and seek business for the owner and the servant negligently collided with plaintiff. Rudd v. Fox, 112 Minn. 477, 128 N. W. 675.

Where a physician employed by the master was negligent in subjecting the person of a servant to X-rays. Jones v. Tri-State Tel. & Tel. Co., 118 Minn. 217, 136 N. W. 741.

Where a servant engaged in driving timber down a stream got his clothes wet in the course of his work and built a fire on shore to dry them, and the fire spread to the damage of plaintiff. McLaughlin v. Cloquet Tie & Post Co., 119 Minn. 454, 138 N. W. 434.

Where a farm hand, driving the master's team, collided with a carriage which he was attempting to pass. Sina v. Carlson, 120 Minn. 283, 139 N. W. 601.

Where a servant of the proprietor of a garage wrongfully took and drove the car of a patron of the garage and injured it. Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703.

Where a stranger, with the consent of a servant of defendant, but without the latter's knowledge or consent, was driving an automobile of defendant. Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611.

Where a clerk in the office of a laundry company assaulted a patron of the company in a dispute over a debt claimed by the clerk to be due the company from the patron for past work, the assault occurring when the patron called at the office for his laundry. Burnham v. Elk Laundry Co., 121 Minn. 1, 139 N. W. 1069.

Where a driver of an automobile, let for hire by the defendant to plaintiff, drove over an embankment on the left side of the road and thereby injured the plaintiff. Meyers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184.

Where a member of a family was using an automobile. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

Where a servant of defendant, superintending the construction of a silo, negligently caused a plank of a platform near the top of the silo to fall, thereby injuring a servant of the purchaser of the silo, who was assisting in the work of erecting it. Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938.

Where a telegraph messenger, riding his own bicycle to the local office of the company in response to an order of his superior officer, negligently ran into a pedestrian. Kuehmichel v. Western Union Tel. Co., 125 Minn. 74, 145 N. W. 788.

Where a foreman of a factory used more force than was reasonably necessary to quell a fight between plaintiff and another employee, striking plaintiff in the face and knocking out several teeth. Nettle v. Flour City Ornamental Iron Works, 126 Minn. 530, 148 N. W. 43.

Where a foreman in charge of a walking-dredge cut poles from the land of another to be used for a footing for the dredge in wet lands. Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

Where a driver for a brewing company left his delivery wagon backed against the curb of a street in the rear of a saloon to which he was making a delivery, and a child was injured by the fall of a barrel of beer from the wagon as the horses started in the absence of the driver. Zuponcic v. Val Blatz Brewing Co., 131 Minn. —, 154 N. W. 790.

Where a bartender in a saloon poured alcohol on the shoe of a guest in the saloon and then ignited the alcohol. Lynch v. Brennan, 131 Minn. —, 154 N. W. 795.

Where a servant was delivering eggs and butter at a grocery and opened the door of a refrigerator to put in the butter. Plaintiff, the proprietor, was stooping near to examine the eggs. As she rose she struck the back of her neck against the corner of the open door. Donovan v. Tilden Produce Co., 131 Minn. —, 155 N. W. 104.

(65) See Rudd v. Fox, 112 Minn. 477, 128 N. W. 675.

(69) See Note, 47 L. R. A. (N. S.) 959.

(71) See Philadelphia etc. Co. v. Barrie, 179 Fed. 50.

5843. Master held not liable—Where a chauffeur, driving his master's automobile out of the course of his employment and in furtherance of his own personal affairs, collided with a cyclist. Provo v. Conrad, 130 Minn. 412, 153 N. W. 753.

See § 5835; Note, 54 Am. St. Rep. 71.

SERVANT'S LIABILITY FOR NEGLIGENCE

5844. To master—One who holds himself out as an expert accountant and accepts employment as such impliedly represents that he possesses the ability and skill of the average person engaged in that branch of skilled labor. An action to recover damages arising from the negligence of an expert employed to audit certain accounts is founded on breach of contract, and not in tort. The cause of action is the breach of the contract, and the different items of damage resulting therefrom do not constitute separate causes of action. If from lack of proper skill, or from negligence, an expert accountant fails to disclose the true status of accounts he is employed to audit, he is liable for the damages naturally and proximately resulting from such failure; but losses resulting from a subsequent embezzlement by a city officer, or from the subsequent bankruptcy of a surety for such officer, in the absence of any circumstances tending to show that such contingency was in contemplation of the parties at the making of the contract as likely to occur, are too remote to be recovered as a consequence of such default. Compensation paid an expert accountant in reliance upon his report that he has made a complete and correct audit may be recovered back, on proof that through his negligence the audit is in substance false. East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181.

An engineer is bound to exercise the degree of care and skill usually exercised by members of that profession under similar circumstances. Cowles v. Minneapolis, 128 Minn. 452, 151 N. W. 184.

See Digest, § 5847.

5845. To fellow servants—(94) Morey v. Shenango Furnace Co., 112 Minn. 528, 127 N. W. 1134.

ACTIONS FOR BREACH OF CONTRACT AND FOR WAGES

5846. Action for breach of contract—Complaint—A complaint construed as one for breach of contract of employment. Lasher v. Liberty Assn., 115 Minn. 230, 132 N. W. 11.

5846a. Action for wages or value of services—See Work and Labor, §§ 10366–10379.

5847. Recoupment—Negligence of servant—(98) Cowles v. Minneapolis, 128 Minn. 452, 151 N. W. 184 (engineer—duty to exercise such care,

skill and diligence as men engaged in that profession ordinarily exercise under similar circumstances—inspection of bridge—piles not driven deep enough—finding of due care on part of engineer sustained).

5848. Seeking other employment—A servant wrongfully discharged is bound to be reasonably diligent in seeking other employment. Cooper v. Stronge & Warner Co., 111 Minn. 177, 126 N. W. 541.

(99) Schommer v. Flour City Ornamental Iron Works, 129 Minn. 244, 152 N. W. 535.

5849a. Sale of business—Change of employers—When a master disposes of his business to another without notifying the servant of the change, and the servant remains ignorant of the change, the master continues liable for the servant's wages. The burden of showing that the servant had notice is on the original master. Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774.

5850. Damages—(2) Cooper v. Stronge & Warner Co., 111 Minn. 177, 126 N. W. 541.

(3) Crozier v. B. F. Nelson Mfg. Co., 120 Minn. 524, 139 N. W. 353. See Digest, § 2537.

5851. Burden of proof—Where a discharged servant sues for loss of time, the burden is upon the master to show that he was discharged for cause, or obtained, or could have obtained, other employment. Schommer v. Flour City Ornamental Iron Works, 129 Minn. 244, 152 N. W. 535.

5852. Evidence—Admissibility—(6) Barnes v. Spencer, 113 Minn. 101, 129 N. W. 140 (evidence of character of work admissible as bearing on the probability of the contract—collateral written contract admissible for same purpose). See Note, L. R. A. 1915C, 1208 (customary compensation as evidence of amount agreed upon).

5853. Evidence—Sufficiency—Evidence, in an action to recover for services rendered by plaintiff at defendants' request, in nursing a patient at a sanatorium, held sufficient to sustain a recovery as upon an express contract, established by reference to the terms under which prior services of the same general character were rendered by plaintiff for defendants, supplemented by the conduct of the parties. Dybvig v. Minneapolis Sanatorium, 128 Minn. 292, 150 N. W. 905.

(8) Barnes v. Spencer, 113 Minn. 101, 129 N. W. 140; Stebbins v. Northern Holt Co., 114 Minn. 187, 130 N. W. 849; Lasher v. Liberty Assn., 115 Minn. 230, 132 N. W. 11.

INDEMNIFYING SERVANT

5854. In general—The general rule is that where one is employed or directed by another to do an act in his behalf, not manifestly wrong, the

law implies a promise of indemnity by the principal for damages resulting proximately from the good-faith execution of the agency. Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715. See Digest, § 208.

WORKMEN'S COMPENSATION ACT

5854a. Constitutionality—The act of 1913 has been sustained against various constitutional objections. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71; State v. District Court, 128 Minn. 221, 150 N. W. 623.

See Note, 34 L. R. A. (N. S.) 162, 37 Id. 466; 29 Harv. L. Rev. 199.

5854b. Construction—The act is of a remedial nature and to be liberally construed in favor of workmen. Still, it must not be given a strained construction—one that the language of the act will not fairly and reasonably bear. State v. District Court, 128 Minn. 43, 150 N. W. 211; State v. District Court, 129 Minn. 156, 151 N. W. 910; State v. District Court, 129 Minn. 176, 151 N. W. 912; State v. District Court, 131 Minn. —, 155 N. W. 103.

The right of action for death given by the statute is a new and distinct cause of action created by the death. The law of the date of the death governs rather than the law of the date of the injury. State v. District Court, 131 Minn. —, 154 N. W. 661.

5854c. Election not to accept act—An employee accepts the provisions of the act until he makes an election not to accept. An employee injured on October 15, 1913, who perfected his election not to be bound by the act on October 29, 1913, held not entitled before the latter date, to maintain an action at common law for his injury. Harris v. Hobart Iron Co., 127 Minn. 399, 149 N. W. 662. See Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620.

5854d. Who are employees within act—The test for determining whether one person is the employee of another, within the rule making the employer responsible for injuries resulting from the negligence of his employee, is whether such person possessed the power to control the other in respect to the transaction out of which the injury arose. The court cannot determine, as a question of law, that the rule of respondeat superior does not apply, unless the evidence shows conclusively that the alleged employer possessed no such power of control. The Workmen's Compensation Act is remedial in its nature, and must be given a liberal construction, to accomplish the purpose intended. The provisions defining when the relation of employer and employee exists bring within the act all cases in which, under the above rule, such relation is found to exist. State v. District Court, 128 Minn. 43, 150 N. W. 211.

In proceedings for compensation under part 2 of the Workmen's Com-

pensation Act held, that the evidence supports the findings of the trial court to the effect that at the time of the accident and death complained of the relation of employer and employee existed between defendant and decedent; that the cause of death was accidental and while decedent was engaged in the course of his employment, and was not caused by decedent's intoxication. State v. District Court, 128 Minn. 221, 150 N. W. 623.

An employee of a city was injured while loading gravel used by the city for improving and repairing its streets. Though the employment may have been casual, it was in the usual course of the business of the city, and the Workmen's Compensation Act was applicable. State v. District Court, 131 Minn. —, 155 N. W. 103.

5854e. Injury must arise out of and in the course of employment—The terms "out of" and "in the course of" the employment are not synonymous. An injury may be received in the course of the employment, and still have no causal connection with it, so that it can be said to arise out of it. State v. District Court, 129 Minn. 176, 151 N. W. 912.

The supreme court will not lay down any general abstract rules for determining what accidents arise out of the employment, but holds itself free to decide each case on its own facts. State v. District Court, 129 Minn. 502, 153 N. W. 119.

It is not essential that the accident should be a common one in the employment, or one that might reasonably have been anticipated, or one that is peculiar to the particular employment. State v. District Court, 129 Minn. 502, 153 N. W. 119.

A driver for an ice company was required to follow a fixed route, in substantial disregard of weather conditions, though permitted to seek shelter in times of necessity. When a severe rain storm, accompanied by lightning, was in progress he left his team and went to a tall tree just within the lot line, either for protection or in the performance of his duties soliciting orders. Lightning struck the tree, and the same bolt struck him, and he was killed. Held, that the evidence sustains a finding that the death of the decedent was the result of an accident "arising out of" his employment within the meaning of the Workmen's Compensation Act. State v. District Court, 129 Minn. 502, 153 N. W. 119.

Findings that an accident occurred in the course of and arose out of the employment sustained. State v. District Court, 128 Minn. 221, 150 N. W. 623; State v. District Court, 129 Minn. 176, 151 N. W. 912.

See 25 Harv. L. Rev. 328–348, 401–427, 517–547; 27 Id. 390, 766.

5854f. Compensation to injured workmen—Disability—What constitutes—In a hearing under the Workmen's Compensation Act to ascertain the compensation to be awarded to an injured employee, where there are permanent injuries to the hand and arm below the elbow, the court

should determine the percentage of total disability of the hand and fix the compensation accordingly. Where the same accident results also in permanent partial disability to the arm above the elbow, the court should determine the percentage of total disability of the arm as a whole, including the forearm and hand, and fix the compensation accordingly. It is improper in such a case to divide the injuries into two units, those to the hand, and those to the arm. State v. District Court, 129 Minn. 91, 151 N. W. 530.

Section 15 of the Workmen's Compensation Act limits the liability of an employer for accidental injury to an employee, where such employee had before entering the service suffered an injury which resulted in permanent partial disability, to the compensation provided for by section 13 for a permanent partial disability, though both injuries result in permanent total disability. Prior to the time relator entered respondent's service he had lost the sight of one eye by accidental means. After entering respondent's service he lost by accident happening during the course of his employment the sight of his other eye, thus rendering him totally blind. Held, that under section 15 of the Compensation Act the last employer is liable for a permanent partial disability only, for that was the extent of the injury which the employee suffered while in his service. State v. District Court, 129 Minn. 156, 151 N. W. 910.

A finding that the claimant was totally disabled at the time of the hearing held not justified by the evidence. State v. District Court, 129 Minn. 423, 152 N. W. 838.

See § 4832.

5854g. Dependents—Who are—A finding that plaintiffs, the parents of a deceased workman, were "wholly dependent" upon him for support, within the meaning of the Workmen's Compensation Act held sustained by the evidence. State v. District Court, 128 Minn. 338, 151 N. W. 123.

A widowed mother, without means, who is supported by her son, partly by the wages of his employment and partly by the yield of his land, is wholly dependent upon her son for support, within the meaning of the act. To constitute "total dependency," within the meaning of the act, it is not necessary that the dependent be supported wholly out of the wages of the employee's employment. State v. District Court, 131 Minn. —, 154 N. W. 509.

5854h. Allowance to dependents—The purpose of part 2 of the Workmen's Compensation Act was to secure the widow, or dependent next of kin, of an employee who should meet an accidental death while engaged in the line of his employment, a percentage income based upon their pecuniary loss, and the salary or compensation actually received by such employee at the time of his death represents such loss. Where an employer pays to an employee having general charge of the affairs of

the employer's business a fixed sum of money each month, from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed upon between the employee and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer. State v. District Court, 128 Minn. 486, 151 N. W. 182.

In determining compensation under the statute it is immaterial whether the claimant inherited anything from the estate of the employee. Under G. S. 1913, § 8208, the minimum compensation to a person wholly dependent on the deceased employee is $6 a week for 300 weeks. State v. District Court, 131 Minn. —, 154 N. W. 509.

5854i. Demand on employer unnecessary—The court has jurisdiction of all proceedings arising under the act, and the making of a demand upon the employer for compensation is not a condition precedent to the power of the court to entertain such proceedings. State v. District Court, 129 Minn. 423, 152 N. W. 838.

The statute does not require written notice where the employer has actual knowledge. Knowledge of a mayor is knowledge of the city. State v. District Court, 131 Minn. —, 155 N. W. 103.

5854j. Hearings—Place—Notice—Hearings under the Workmen's Compensation Act are to be held at the time and place fixed by the judge, regardless of the time and place of holding the regular terms of court. Where the employer has actual knowledge of the happening of the accident and of the resulting injury, the giving of notice thereof is not necessary. State v. District Court, 129 Minn. 423, 152 N. W. 838.

5854k. Costs—Attorney's fees—The allowance of attorney's fees is not authorized by the act, but the court may allow statutory costs, although designated in the order as attorney's fees. State v. District Court, 129 Minn. 423, 152 N. W. 838.

5854*l*. Similar acts of sister states—Plaintiff, on April 2, 1913, entered defendant's employ upon railroad construction work. He worked at two different places in this state. On June 26th of the same year he was asked to go to Wisconsin on similar work there being done by defendant. He accepted, and was injured four days thereafter. His original hiring was for no definite time, and for no particular place. On June 10th defendant had elected to accept the provisions of the Workmen's Compensation Act of Wisconsin. In this action to recover damages for the injury, alleged to have been caused by defendant's negligence, held, that plaintiff's right to damages or compensation depends upon the law of Wisconsin, where the injury was received. The defendant being under the act when plaintiff was requested to go to work in

Wisconsin, the latter also elected to accept the provisions of the act, since he failed to give written notice to the contrary. The contract of hiring, as referred to in the Wisconsin act, must be considered made when the employment in Wisconsin was accepted. Plaintiff cannot plead ignorance of the laws of the state wherein his employment was performed, and under which alone his right to redress for the injury must be asserted. Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620.

MASTER'S LIABILITY TO SERVANT FOR NEGLIGENCE

IN GENERAL

5855. Duty of master—In general—The master is only required to exercise reasonable care. He is not bound to anticipate improbable accidents. See Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323.

(11) Headline v. Great Northern Ry. Co., 113 Minn. 74, 128 N. W. 1115 (conveying a bridge carpenter to his work on a train); Coleman v. Minneapolis St. Ry. Co., 113 Minn. 364, 129 N. W. 762 (conveying servant to his work in an auto car); Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625 (dangerous gravel bank—duty to inspect); Bark v. Dixson, 115 Minn. 172, 131 N. W. 1078 (giving servant tainted food); Suprenant v. Great Northern Ry. Co., 123 Minn. 170, 143 N. W. 320 (threshing machine separators loaded on flat cars in freight train—attachments to separators used by brakemen as handholds—duty of master who had furnished no other handholds to see that these were reasonably safe); Nilsson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789 (servant set to work at foot of a high ore dock—duty of master to see that objects did not fall from dock so as to injure servant); Jones v. Massolt Bottling Co., 126 Minn. 364, 148 N. W. 278 (duty to avoid dangerous methods of work—duty to furnish safety appliances); Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177 (duty to keep a lookout from engines so as not to injure sectionmen); Jones v. St. Paul, 130 Minn. 260, 153 N. W. 516 (pail of hot tar put into a wagon in which servants rode).

(13) Koury v. Chicago, G. W. R. Co., 125 Minn. 78, 145 N. W. 786; Schultz v. Duel, 128 Minn. 213, 150 N. W. 786; Clymer v. Kellogg, Spencer & Sons, 130 Minn. 327, 153 N. W. 602 (evidence held not to show any negligence on the part of the master as a matter of law). See Strunk v. Wells Bros. Co., 120 Minn. 77, 138 N. W. 1030.

(14) Schultz v. Duel, 128 Minn. 213, 150 N. W. 786.

5857. Who are servants—Volunteers—A person visiting the premises of defendant was requested by an engineer of defendant to go into the engine house on the premises and stop the engine. It was held that the defendant was liable for the want of reasonable care of such person

while he was in the act of carrying out the request. Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434; Id., 129 Minn. 449, 152 N. W. 753.

A servant is not a mere volunteer because he is not specifically directed to do a thing incident to the work in which he is engaged. Veline v. Lauer Bros., 128 Minn. 10, 150 N. W. 169.

Whether one is in the general service of another or not, if he is rendering the latter a service even as a volunteer and comes under his orders he becomes his servant, and fellow servant of the other employees. Brooks v. Central Sainte Jeanne, 228 U. S. 688.

(18) Richardson v. Babcok, 175 Fed. 897.

5857a. Same—Transfer of business—As between the parties, the relation of master and servant does not necessarily terminate by the sale and transfer by the master to a third person of the property and business in connection with which the relation arose and exists. Where there is no actual change in the management of the business, and it is continued in the same general way after the sale, by the same servants and employees, and the servants are in no way expressly or otherwise informed of the transfer and the consequent change of proprietors, the relation is presumed to continue for a reasonable time, and the master remains liable to them to the same extent as though no sale or transfer had taken place. The burden to show knowledge on the part of the servant is upon the master. Decedent was in the employ of defendant for several years. Defendant transferred its business to a third person on March 1. The management of the business thereafter continued as before. He was fatally injured on March 13, by a defective instrumentality furnished by defendant. Held, that the question whether decedent knew of the change of ownership was one of fact for the jury. Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774. See 27 Harv. L. Rev. 222.

5857b. Same—Servant loaned to another—An employer may loan his servant to another so that for the time being he becomes a servant of the latter. Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938.

5857c. Same—Servants being carried to or from their work—The general duty of a master to exercise due care toward his servants applies while he is carrying them to or from their work. Wallin v. Eastern Ry. Co., 83 Minn. 149, 86 N. W. 76; Headline v. Great Northern Ry. Co., 113 Minn. 74, 128 N. W. 1115; Coleman v. Minneapolis St. Ry. Co., 113 Minn. 364, 129 N. W. 762; Kuehmichel v. Western Union Tel. Co., 125 Minn. 74, 145 N. W. 788; Dayton C. & I. Co. v. Dodd, 188 Fed. 597. See Rosenbaum v. St. Paul & Duluth R. Co., 38 Minn. 173, 36 N. W. 447.

5857d. Same—Servants riding from one part of work to another—The relation of master and servant continues while servants are riding in a wagon of the master, with his consent or acquiescence, from one place of work to another. Jones v. St. Paul, 130 Minn. 260, 153 N. W. 516.

5858. Same—Servants off duty—Acting outside scope of employment—Whether a servant was acting within the scope of his duty at the time of an accident is a question for the jury, unless the evidence is conclusive. Rickers v. Mission Furniture Co., 110 Minn. 156, 124 N. W. 641; Delaware & Hudson Co. v. Beemer, 171 Fed. 821.

No narrow view can be taken as to the scope of the servant's work. Something must be left to his judgment as to the scope of his work. Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488.

A brakeman leaving a caboose, in which he was accustomed to sleep upon the invitation of the railroad company, and walking over the tracks of the company to obtain a meal, held a servant of the company while in such act within the provisions of a statute making railroad companies liable for the negligence of fellow servants. Moore v. Minneapolis & St. L. R. Co., 123 Minn. 191, 142 N. W. 152, 143 N. W. 326.

A servant is not only such while actually at work on the service for which he is specially employed, but also during its progress while absent from the location for the purpose of, and in connection with, such work. Brooks v. Central Sainte Jeanne, 228 U. S. 688.

The relation of master and servant held not to have been terminated when a servant was injured while going to a shed on the master's premises to get his coat at the close of the day's work. Willmarth v. Cardoza, 176 Fed. 1.

(23) See Keenan v. Chicago etc. Ry. Co., 116 Minn. 107, 133 N. W. 789 (car repairer walking over tracks on his way home after the day's work).

(24) See Small v. Brainerd Lumber Co., 95 Minn. 95, 103 N. W. 726; Rickers v. Mission Furniture Co., 110 Minn. 156, 124 N. W. 641; McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118; Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113 (using machine other than the one he was directed to use); State v. District Court, 128 Minn. 221, 150 N. W. 623 (deviating from regular route of travel); Note, 85 Am. St. Rep. 622.

(25) See Petterson v. Butler Bros., 123 Minn. 516, 144 N. W. 407 (servants seated under the edge of cars while eating their lunch).

See 25 Harv. L. Rev. 401–427.

5859. Employing children without a certificate—(28) Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115.

5860. Failure to give customary signals—(29) Steele v. Red River **Lumber Co.**, 110 Minn. 219, 124 N. W. 978; Byrne v. Great Northern **Ry. Co., 111** Minn. 198, 126 N. W. 627; Schoen v. Chicago etc. Ry. Co., **112 Minn. 38,** 127 N. W. 433; Cornell v. Great Northern Ry. Co., 112 **Minn. 341, 128** N. W. 22; Breske v. Minneapolis & St. L. R. Co., 115 **Minn. 386, 132** N. W. 337; Gjorvad v. Minneapolis etc. Ry. Co., 116 **Minn. 233, 133** N. W. 609; Torkelson v. Minneapolis & St. L. R. Co., **117 Minn. 73,** 134 N. W. 307; Brown v. Chicago, B. & Q. R. Co., 117 **Minn. 149, 134** N. W. 315; Wickstrom v. Whitney, 118 Minn. 416, 136 **N. W. 1099;** Evans v. Drake & Stratton Co., 119 Minn. 55, 137 N. W. **189; Grbich v.** Pittsburgh Iron Ore Co., 119 Minn. 365, 138 N. W. 309; **Burke v. Ash,** 120 Minn. 388, 139 N. W. 705; Elenduck v. Crookston **Lumber Co.,** 121 Minn. 53, 140 N. W. 125; Hanson v. Red Wing Sewer **Pipe Co., 122** Minn. 415, 142 N. W. 805; Hagen v. Chicago etc. Ry. Co., **123 Minn. 109,** 143 N. W. 121; Petterson v. Butler Bros., 123 Minn. 516, **144 N. W. 407;** Sheehy v. Minneapolis & St. L. R. Co., 126 Minn. 133, **147 N. W. 964;** McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446; **Boos** v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. **660; Johnson** v. Sartell Bros. Co., 128 Minn. 239, 150 N. W. 784; **Arveson v. Boston** Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810; **Cherpeski v.** Great Northern Ry. Co., 128 Minn. 360, 150 N. W. 1091.

5861. Failure to conform to customary practice—(31) Arnold v. **Dauchy, 115** Minn. 28, 131 N. W. 625; Denoyer v. Railway Transfer **Co., 121 Minn.** 269, 141 N. W. 175; Hagen v. Chicago etc. Ry. Co., 123 **Minn. 109, 143** N. W. 121; Sheehy v. Minneapolis & St. L. R. Co., 126 **Minn. 133, 147** N. W. 964; Jones v. St. Paul, 130 Minn. 260, 153 N. W. 516.

5862. Duty to care for injured servant—Medical care—The master is **not ordinarily** liable, in the absence of express contract, for medical services **rendered** his servants, even though rendered at the request of the **master. Bigelow** v. Hill, 129 Minn. 399, 152 N. W. 763. See Note, 4 L. R. A. (N. S.) 49.

(33) **See Mitton** v. Cargill Elevator Co., 129 Minn. 449, 152 N. W. 753.

5866. Notice to servant notice to master—Notice to a servant relating **to a matter of** which he has management or control is notice to the **master. Lindgren** v. William Bros. Boiler Mfg. Co., 112 Minn. 186, 127 N. W. 626.

See Digest, §§ 215, 777, 2119.

5867. Proximate cause—(39) Coultas v. Hennepin Paper Co., 114 **Minn. 309, 131** N. W. 319; Pounds v. Chicago, G. W. R. Co., 114 Minn. **312, 131 N. W.** 329; Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637; **Healy** v. Hoy, 115 Minn. 321, 132 N. W. 208; Jacobson v.

Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142; Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713; Casey v. Pillsbury Flour Mill Co., 122 Minn. 474, 142 N. W. 726; McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613; Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106; Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165; Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177; Knapp v. Great Northern Ry. Co., 130 Minn. 405, 153 N. W. 848; Winters v. Minneapolis & St. L. R. Co., 131 Minn. —, 154 N. W. 964; Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093.

PERSONAL OR ABSOLUTE DUTIES OF MASTER

5868. In general—The fact that a servant delegated by the master to perform one of the absolute duties of the master neglects to perform it out of a spirit of wantonness or mischief does not absolve the master. La Foucre v. Nickel, 115 Minn. 40, 131 N. W. 852.

These general duties involve subsidiary duties. Thus, the general duty to furnish a safe place to work involves the subsidiary duty to adopt a safe method of conducting the business when reasonable care for the safety of the servant requires it. Savino v. Griffin Wheel Co., 118 Minn. 290, 136 N. W. 876.

Where a master reserves to himself the performance of a particular act he cannot avoid liability for its nonperformance by delegating it to another. Headline v. Great Northern Ry. Co., 113 Minn. 74, 128 N. W. 115.

Reasonable care of the servant may require the master to avoid an unsafe method of doing the work and to provide the servant with safety appliances, as, for example, goggles or masks, as a means of protection against dangers. Jones v. Massolt Bottling Co., 126 Minn. 364, 148 N. W. 278.

(01) Beyer v. Hamburg-American S. S. Co., 171 Fed. 582.

DUTY TO FURNISH SAFE PLACE IN WHICH TO WORK

5869. In general—The duty to furnish a safe place in which to work involves the duty to adopt a safe method of conducting the business when reasonable care for the safety of the servant requires it. Savino v. Griffin Wheel Co., 118 Minn. 290, 136 N. W. 876.

(51) Nilsson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789.

(52) Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119; Hanson v. Great Northern Ry. Co., 128 Minn. 122, 150 N. W. 380 (the master is only required to use reasonable care). See Strunk v. Wells Bros. Co.,

120 Minn. 77, 138 N. W. 1030; Schultz v. Duel, 128 Minn. 213, 150 N. W. 786.

(53) See Schultz v. Duel, 128 Minn. 213, 150 N. W. 786.

(54) Nilsson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119.

5870. A personal or absolute duty—(56) Johnson v. St. Paul Foundry Co., 112 Minn. 352, 128 N. W. 293 (plaintiff ordered to go upon a defective scaffold by a foreman); Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306; Nilsson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119.

5871. A continuing duty—Inspection and repairs—In determining whether the master has discharged his duty it is proper to consider not only the safety of the place in and of itself, but also as it becomes through the work carried on there under the master's supervision. When inflammable materials are used, regard must be had to the precautions to be taken, and to the provisions for escape in case of accident. Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323.

(57) Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323.

(58) See, as to inspection of gravel bank, Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625.

(59) Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323. See Henry v. Hudson etc. Ry. Co., 201 N. Y. 140.

5871a. Effect of rules—One of the absolute duties of the master is to use reasonable care to provide a safe place to work. This duty is not violated where the unsafety is caused by acts of coservants in carrying out the details of the work. The master may adopt rules to facilitate the carrying on of his business, and these rules may operate for the protection of servants exposed to dangers. The question then arises whether the enforcement of such rules is an absolute duty of the master. It is not the absolute duty of the master to see that every rule of his business is observed. His obligation in respect to mere details of the work is not rendered more extensive by the mere fact that he has systematized those details by adopting rules. If, however, the office of the rule is to provide a method for the discharge of some non-delegable duty of the master, then his duty to see that the rule is observed is absolute and non-delegable. Where the servant is required to work in a place which is necessarily rendered dangerous by the doing of some independent work of the master, then the master is required to control such independent work while the servant is so engaged. If he adopt rules or sanction customs designed to effect this end, it is his duty to see that such rules or customs are observed, and he is liable for the negligent failure of those charged with that duty. Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

5872. Duty of railroad companies as to tracks, etc.—In general—A recovery sustained where a railroad company was negligent in allowing a crew of sectionmen to operate a handcar upon its tracks without giving proper signals. Steele v. Red River Lumber Co., 110 Minn. 219, 124 N. W. 978.

A railroad company owes a duty to sectionmen working on the right of way to keep a proper lookout from its trains to avoid injuring them. A recovery has been sustained where a train struck a trespassing horse and threw it against a sectionman who was working on the right of way. Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177.

(60) See Digest, §§ 5873, 5874, 5883 (79).

(61) Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220 (whether a railroad company was negligent in placing a pole for a tell-tale between certain tracks held a question for the jury); Quesnell v. Great Northern Ry. Co., 114 Minn. 276, 130 Minn. 1104 (low overhead bridge—servants not bound to keep constantly in mind the location of obstacles near track—assumption of risk not to be charged to railroad servants engrossed in the discharge of their duties); McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177 (prong of switch handle struck plaintiff as he was riding on the side of a freight car); West v. Chicago etc. Ry. Co., 179 Fed. 801 (overhead bridge low enough to strike brakeman walking on box cars); St. Louis etc. Ry. Co. v. Conley, 187 Fed. 949 (post in tunnel too near tracks). See Digest, § 5883(79).

5873. Snow and ice in railroad yards—The general rule is that a railway company is not liable to its employees for injuries resulting from climatic conditions, such as snow and ice; but within its yard limits it must exercise a degree of care commensurate with the risks to prevent the accumulation of snow or ice in such quantity, form, and location as to be a menace to the safety of its employees working in its yards. Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057.

A recovery sustained where a brakeman in attempting to board a moving car in switching yards was injured by his feet catching in a hard and crusted snow drift near the tracks. The drift had existed for some length of time, and was formed partly by the drifting of snow and partly by snow thrown from the tracks in cleaning them. Burdick v. Chicago etc. Ry. Co., 123 Minn. 105, 143 N. W. 115.

5875a. Fire escapes—Provision is made by statute for fire escapes and precautions in factories. G. S. 1913, §§ 3878, 3879. See Rademacher v. Pioneer Tractor Mfg. Co., 127 Minn. 172, 149 N. W. 24 (evidence held to show negligent failure to provide sufficient means of escape from a factory in case of fire).

5876. Place unsafe from nature of work—(66) See Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625 (gravel bank); Murphy v. Duluth Crushed

Stone Co., 115 Minn. 308, 132 N. W. 294 (testing self-propelling steam hoist); Beaton v. Great Northern Ry. Co., 123 Minn. 178, 143 N. W. 324 (railroad employee sweeping out box car liable to be struck by other cars in switching operations); Hanson v. Great Northern Ry. Co., 128 Minn. 122, 150 N. W. 380 (stone parapet of high bridge—mason required to stand in close quarters while chipping rock); Henry v. Hudson etc. Ry. Co., 201 N. Y. 140.

5877. Servant in improper place—(68) Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856.

5878. Place rendered unsafe by fellow servant—Details of work—A master is not bound to see that no servant in the discharge of his duties as such creates a place of danger for a fellow servant. Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306.

If a servant is engaged in the performance of the master's absolute duties in making repairs, the master is not only responsible for the manner in which such repairs are made, but also for such negligence of the servant while so attempting to do the work which renders the place of work for another servant unsafe, to the latter's injury. Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306.

The master is not liable where the place is inherently safe, and is rendered unsafe only through the negligence of a fellow servant in carrying out details of the work, but the master is liable if he negligently allows his servants to adopt customary practices which render the place unsafe. Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323.

(69) Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104; Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306; Nylund v. Duluth & N. E. Ry. Co., 123 Minn. 249, 143 N. W. 739; Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810 (place rendered unsafe by act of fellow servant in carrying out mere details of the work); Olson v. Hoy & Elzy Co., 129 Minn. 135, 151 N. W. 893.

(70) Savino v. Griffin Wheel Co., 118 Minn. 290, 136 N. W. 876 (whether an accident in an elevator was due to the negligence of the master in failing to adopt a safe method of operating it or to the negligence of a fellow servant in starting it without warning held a question for the jury); Nilsson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789; Beneson v. Swift & Co., 127 Minn. 432, 149 N. W. 668; Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323; Kreigh v. Westinghouse, 214 U. S. 249.

5879. Place rendered unsafe by independent contractor—(71) Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

5880. Place rendered unsafe by master or foreman—Starting machinery without warning—If a master orders a servant into a place of danger to do some specified work, he owes the servant the affirmative duty to exercise reasonable care to protect him from injury while so engaged. Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310; Wiggin v. Northwest Paper Co., 119 Minn. 273, 137 N. W. 1113; Grbich v. Iron Ore Co., 119 Minn. 365, 138 N. W. 309; Kempfert v. Gas Traction Co., 120 Minn. 90, 139 N. W. 145; Nilsson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789; Maloof v. Chicago, G. W. R. Co., 127 Minn. 272, 149 N. W. 284; Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938; Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

Where the master orders his servant into a particular place to do and perform certain work, which place will be rendered dangerous and unsafe to the servant if the machinery connected therewith be without notice or warning set in motion, the master owes the servant so situated the duty of exercising reasonable care in protecting him from harm while so engaged. The act of a foreman having charge of the work, and who orders the servant into the place, in starting the machinery in motion without notice or warning, thus endangering the safety of the servant, is the act of the master, for which, if a negligent act, he is liable. Kempfert v. Gas Traction Co., 120 Minn. 90, 139 N. W. 145; Hartikka v. D. G. Cutler Co., 117 Minn. 344, 135 N. W. 1005; Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306; McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446; Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938; Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810; Johnson v. Sartell Bros. Co., 128 Minn. 239, 150 N. W. 784. See Burke v. Ash, 120 Minn. 388, 139 N. W. 705; Hayne v. Tenn. etc. Co., 175 Fed. 55, 46 L. R. A. (N. S.) 766.

(72) Tendall v. Great Northern Ry. Co., 113 Minn. 473, 130 N. W. 22; Hartikka v. D. G. Cutler Co., 117 Minn. 344, 135 N. W. 1005; McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446.

(73) See cases supra.

5881. Servant may assume that place is safe—Where a servant is ordered to work in a place he has a right to assume that the master will not negligently render it unsafe without warning him. Kempfert v. Gas Traction Co., 120 Minn. 90, 139 N. W. 145.

A recovery sustained where the master directed a servant to leave the place where he was working, it having become temporarily dangerous because of the moving of machinery in the natural progress of the work, and afterwards, and while it was still dangerous directed him to work there again, assuring him that it was safe. Kowatch v. Pittsburgh Construction Co., 130 Minn. 174, 153 N. W. 326.

(74) Wickham v. Chicago etc. Ry. Co., 110 Minn. 74, 124 N. W. 639; Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561. See Kowatch v. Pittsburgh Construction Co., 130 Minn. 174, 153 N. W. 326.

(75) Wickham v. Chicago etc. Ry. Co., 110 Minn. 74, 124 N. W. 639; Johnson v. MacLeod, 111 Minn. 479, 127 N. W. 497, 1120; Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561; Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137.

5882. Leased premises—Railroad traffic agreements—A master is not ordinarily responsible for injuries to his servant caused by the unsafe condition of premises owned and controlled by third parties. Circumstances may, however, impose upon the master the duty of inspecting the premises of another, or of refraining from giving a servant orders to use them, or of giving the servant warning of danger in connection with their use. Lindgren v. William Bros Boiler Mfg. Co., 112 Minn. 186, 127 N. W. 626. See Note, 45 L. R. A. (N. S.) 271.

(77) Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220; Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772.

5883. Particular places—A bin in a brickyard used for materials for the pressman. Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561.

A mortar box placed in a dangerous position directly under a derrick on a building in the course of construction. Workman at mortar box struck by plank falling from derrick. Foley v. Hoy, 113 Minn. 186, 129 N. W. 215.

A passage-way rendered unsafe by adjacent metallic waste paper box with heavy doors likely to strike persons nearby when moved. McVay v. Mannheimer Bros., 113 Minn. 225, 129 N. W. 371.

The deck of a steamer with open hatches. Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104.

A self-propelling steam hoist. Murphy v. Duluth Crushed Stone Co., 115 Minn. 308, 132 N. W. 294.

A pit under a skip at the bottom of a shaft in a mine. Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310.

A place on a tender to a locomotive where a fireman was required to stand in shoveling coal into the firebox. Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759.

The end of a wrecked box car being raised by a crane. Tendall v. Great Northern Ry. Co., 113 Minn. 473, 130 N. W. 22.

A drift in an iron mine. Koivula v. Adriatic Mining Co., 118 Minn. 262, 136 N. W. 856.

A ladder used as a stair in a mill. O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399.

A railroad box car. Beaton v. Great Northern Ry. Co., 123 Minn. 178, 143 N. W. 324.

A place between a flat car and a river for unloading logs from the car. Nylund v. Duluth & N. E. Ry. Co., 123 Minn. 249, 143 N. W. 739.

A place on ice at foot of ore dock. Nilsson v. Barnett & Record, 123 Minn. 308, 143 N. W. 789.

An ice house with insufficient light for the work carried on. Marfia v. Great Northern Ry. Co., 124 Minn. 466, 145 N. W. 385.

An elevated platform for icing refrigerator cars. Beneson v. Swift & Co., 127 Minn. 432, 149 N. W. 668.

A cramped place at the end of a bridge. Hanson v. Great Northern Ry. Co., 128 Minn. 122, 150 N. W. 380.

A hoisting rig of a coal dock. Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

A running board for unloading freight cars. Stash v. Great Northern Ry. Co., 128 Minn. 329, 151 N. W. 124.

A railroad right of way. Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177.

A floor of a garage in which there was a pit to enable workmen to get under cars. Cady v. Twin City Taxicab Co., 129 Minn. 70, 151 N. W. 537.

A place where a door was being cut through a brick wall. Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137.

A basement of a building without proper exits in case of fire. Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323.

A stairway in a store. Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100.

A place where an engine and derrick were being moved. Kowatch v. Pittsburgh Construction Co., 130 Minn. 174, 153 N. W. 326.

(5) Wickham v. Chicago etc. Ry. Co., 110 Minn. 74, 124 N. W. 639, 994.

(79) See Digest, §§ 5872–5875.

(87) Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628. See Digest, § 6021.

(92) Johnson v. Klarquist, 114 Minn. 165, 130 N. W. 943.

(93) See Digest, § 5910.

(94) Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119 (excavation for building—defective pile sheeting to prevent caving in); Olson v. Hoy & Elzy Co., 129 Minn. 135, 151 N. W. 893. See Digest, §§ 5975, 5976.

DUTY TO FURNISH SAFE INSTRUMENTALITIES

5884. In general—The safety of an instrumentality may depend on its location and use. McVay v. Mannheimer Bros., 113 Minn. 225, 129 N. W. 371.

The fact that the person delegated by the master to furnish an instrumentality furnishes a defective or dangerous one in a wanton or mischievous spirit does not absolve the master. La Doucre v. Nickel, 115 Minn. 40, 131 N. W. 852.

The general rule applies where a servant is injured by reason of a defective instrumentality in the hands of a fellow servant. Pearson v. Norling, 117 Minn. 527, 135 N. W. 1134.

To render the master liable the defect in the instrumentality must be the proximate cause of the injury. Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637; Casey v. Pillsbury Flour Mill Co., 122 Minn. 474, 142 N. W. 726.

(6) Hamlin v. Lanquist & Illsley Co., 111 Minn. 491, 127 N. W. 490; Sturm v. Northwest Mills, 114 Minn. 420, 131 N. W. 472 (instructions defining duty inaccurate but not prejudicial); Johnson v. Finch, 115 Minn. 252, 132 N. W. 276; Suprenant v. Great Northern Ry. Co., 123 Minn. 170, 143 N. W. 320; Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774; Schultz v. St. Paul, 124 Minn. 257, 144 N. W. 955.

(7) Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637.

(10) Berg v. Pittsburg Construction Co., 128 Minn. 408, 150 N. W. 1092.

5885. Duty absolute or personal—(12) Hamlin v. Lanquist & Illsley Co., 111 Minn. 491, 127 N. W. 490; La Doucre v. Nickel, 115 Minn. 40, 131 N. W. 852; Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431; Hutchins v. Wolfe, 127 Minn. 337, 149 N. W. 543.

5888. Duty continuing—Inspection and repair—Whether the nature of the work requires inspection in the exercise of reasonable care is a question for the jury, unless the evidence is conclusive. Jacobsen v. Minneapolis, 115 Minn. 397, 132 N. W. 341.

Where it is the specific duty of a servant to make the inspection the master is relieved of liability as respects that servant. Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774 (whether it was the duty of the servant in this case to make inspection held a question for the jury).

(15) Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637; Rose v. Minneapolis etc. Ry. Co., 121 Minn. 363, 141 N. W. 487; Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774. See Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85 (defects not discoverable except by use—tendency of a stepladder to "creep").

(16) See Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774.

(17) Pearson v. Norling, 117 Minn. 527, 135 N. W. 1134 (rule held inapplicable where fellow servant was injured by the instrumentality). See Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85; O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399.

(19) Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637; Rose v. Minneapolis etc. Ry. Co., 121 Minn. 363, 141 N. W. 487; Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774.

5889. Notice to master of defects—Whether a defect existed for so long a time as to charge defendant with notice thereof is a question for the jury, unless the evidence is conclusive. McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613.

5890. Master's knowledge of defect—(22) Hamlin v. Lanquist & Illsley Co., 111 Minn. 491, 127 N. W. 490; Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472.

5893. Best and safest instrumentalities not required—(27) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161. See Clymer v. Kellogg, Spencer & Sons, 130 Minn. 327, 153 N. W. 602.

5894. Latest inventions and improvements not required—(32) See McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613.

5895. Guards or fences for dangerous machinery—Statute—The plaintiff has the burden of proving that he was acting in the line of his duty when he was injured. Rickers v. Mission Furniture Co., 110 Minn. 156, 124 N. W. 641.

Statute held applicable to machinery in a railroad pumphouse. Thompson v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297.

The degree of diligence required of the owner of dangerous machinery, in guarding it as provided by statute, is greater than is ordinarily required of a master to see that machinery and appliances furnished by him are free from defects. Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161.

The owner of a mill owes the statutory duty to guard dangerous machinery, not only to his servants, but to a servant of an independent contractor, when such servant is employed in the mill about such dangerous machinery, with the owner's knowledge, and where the independent contractor has no control over such machinery. Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643. See Note, 36 L. R. A. (N. S.) 269.

The supreme court has little sympathy with the doctrine of assumption of risk, when applied to dangerous machinery negligently left unguarded by a master. Lundberg v. Minneapolis Iron Store Co., 115 Minn. 174, 131 N. W. 1016.

Under the statute it is sufficient for the plaintiff to prove that the **accident happened** by reason of the unguarded machinery; it is not necessary for him to prove precisely how it happened. Gilbert v. Tracy, 115 **Minn.** 443, 132 N. W. 752.

To justify a recovery under the statute the failure to guard the machinery must be the proximate cause of the injury. Whether it is such **cause is a question** for the jury, unless the evidence is conclusive. Berland v. Duluth Brewing & Malting Co., 116 Minn. 418, 133 N. W. 961; Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434.

Where a machine, with dangerous parts thereof exposed was in actual operation at the time plaintiff, who was in the defendant's employ, caught his foot in such parts and was injured, and had been in operation for two weeks prior thereto, the defendant was not relieved of liability for failure to guard such dangerous parts of the machine, as required by the statute merely because he had instructed his employees, other than the plaintiff, to cover such dangerous parts. Falconer v. Sherwood, 118 Minn. 357, 136 N. W. 1039.

The statute applies to charitable corporations. McInerny v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837.

Statute held applicable to bottling machine in a brewery. Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045.

Whether a person going about unguarded machinery at the request of a servant of defendant is entitled to the benefit of the statute is an open question. Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434.

The rule that the doctrine of assumption of risk does not apply where a servant is accidentally thrown against an unguarded appliance has no application where the servant is operating the appliance and receives the injury from the source of danger to which he knew he was exposed. Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628.

The statute does not require the car of a freight elevator to be enclosed. Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628.

Evidence held to justify a finding that defendant was liable for a failure to guard the knives of a hand jointer as required by an order of the industrial commission of Wisconsin. Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175.

The statute is probably inapplicable to a boom and sluiceway in a river. See Daily v. St. Anthony Falls Water Power Co., 129 Minn. 432, 152 N. W. 840.

(33) Green v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6 (toggle clutch in a bull wheel); McInerny v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837 (ironing mangle in laundry); Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 65; Id. 129 Minn. 449, 152 N. W. 753 (stairway leading to an engine room); Knapp v. Great

Northern Ry. Co., 130 Minn. 405, 153 N. W. 848 (engine in pumphouse at railroad station—setscrews and crank unguarded).

(34) Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113. See, as to what machinery is within the statute, Note, 30 L. R. A. (N. S.) 36.

(36) Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534; Graseth v. Northwestern Knitting Co., 128 Minn. 245, 150 N. W. 804. See Healy v. Hoy, 112 Minn. 138, 127 N. W. 482; Lundberg v. Minneapolis Iron Store Co., 115 Minn. 174, 131 N. W. 1016; Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045; Graseth v. Northwestern Knitting Co., 128 Minn. 245, 150 N. W. 804 (mangle for dry-pressing new underwear); Erdman v. Deer River L. Co., 182 Fed. 42; Maki v. Union Pacific Coal Co., 187 Fed. 389.

(37) Snyder v. Waldorf Box Board Co., 110 Minn. 40, 124 N. W. 450; Thomas v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297; Snyder v. Waldorf Box Board Co., 112 Minn. 431, 128 N. W. 468; Healy v. Hoy, 112 Minn. 138, 127 N. W. 482; Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856; Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643; Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752; Lundberg v. Minneapolis Iron Store Co., 115 Minn. 174, 131 N. W. 1016; Berland v. Duluth Brewing & Malting Co., 116 Minn. 418, 133 N. W. 961; Falconer v. Sherwood, 118 Minn. 357, 136 N. W. 1039; Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628; Knapp v. Northern Ry. Co., 130 Minn. 405, 153 N. W. 848.

(38) Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856; Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045.

(01) Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534.

(39) Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856; Falconer v. Sherwood, 118 Minn. 357, 136 N. W. 1039.

(40) Sorseleil v. Red Lake Falls Milling Co., 111 Minn. 275, 126 N. W. 903; Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161; Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856; Falconer v. Sherwood, 118 Minn. 357, 136 N. W. 1039; Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115; Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045.

(41) Snyder v. Waldorf Box Board Co., 110 Minn. 40, 124 N. W. 450; Ricker v. Mission Furniture Co., 110 Minn. 156, 124 N. W. 641; Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856; Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643; Lundberg v. Minneapolis Iron Store Co., 115 Minn. 174, 131 N. W. 1016; Berland v. Duluth Brewing & Malting Co., 116 Minn. 418, 133 N. W. 961; Fyle v. Minn. Bee Supply Co., 117 Minn. 92, 134 N. W. 501; Lut-

zer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115; Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804.

(42) Rickers v. Mission Furniture Co., 110 Minn. 156, 124 N. W. 641.

(43) Sorseleil v. Red Lake Falls Milling Co., 111 Minn. 275, 126 N. W. 903 (evidence of customary equipment); Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643 (evidence as to change in location of shaft, sprocket wheels and holes in slasher after accident admissible—evidence of construction and location of similar machinery in another mill admissible).

(47) Erickson v. Great Northern Ry. Co., 117 Minn. 348, 135 N. W. 1129. See Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643; Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434.

(48) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161.

5896. Barriers for elevator shafts—Statute—Failure to comply with the statute constitutes negligence per se. Healy v. Hoy, 112 Minn. 138, 127 N. W. 482; Security Trust Co. v. St. Paul Building Co., 116 Minn. 295, 133 N. W. 861; Diebel v. Wolpert, Davis & Co., 129 Minn. 77, 151 N. W. 541.

Contributory negligence is a defence and is a question for the jury, unless the evidence is conclusive. Tostason v. Minneapolis Threshing Machine Co., 113 Minn. 394, 129 N. W. 593; Healy v. Hoy, 112 Minn. 138, 127 N. W. 482; Security Trust Co. v. St. Paul Building Co., 116 Minn. 295, 133 N. W. 861.

Assumption of risk is a defence and is a question for the jury, unless the evidence is conclusive. Tostason v. Minneapolis Threshing Machine Co., 113 Minn. 394, 129 N. W. 593.

Openings left in the second floor of a barn in process of construction, to be used for putting down hay, held not within the statute. Johnson v. Klarquist, 114 Minn. 165, 130 N. W. 943.

The statute is applicable to hoists erected on the outside and adjacent to a building in the course of construction. It is designed to prevent persons on a hoist from getting off under dangerous circumstances, as well as for the protection of persons liable to fall into the shaft from the building. Security Trust Co. v. St. Paul Building Co., 116 Minn. 295, 133 N. W. 861.

The statute does not require the car of a freight elevator to be enclosed. Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628.

(55) Diebel v. Wolpert, Davis & Co., 129 Minn. 77, 151 N. W. 541.

5897. Belt shifters—Statute—The statute is remedial and to be liberally construed. It is applicable to owners of grain elevators. A failure to comply with the statute constitutes negligence per se. Evidence of

customary practice is admissible on the question of practicability. Sorseleil v. Red Lake Falls Milling Co., 111 Minn. 275, 126 N. W. 903.

That it is inconvenient, or expensive, or necessitates more space to comply with the statute is not conclusive that it is impracticable to do so. Whether it is practicable is a question for the jury, unless the evidence is conclusive. Skarpmoen v. Cloquet Box Co., 114 Minn. 278, 130 N. W. 1106.

Contributory negligence and assumption of risk are defences, but they are questions for the jury unless the evidence is conclusive. Skarpmoen v. Cloquet Box Co., 114 Minn. 278, 130 N. W. 1106.

5898. Automatic couplers—Grab-irons—(57) Breske v. Minneapolis & St. L. R. Co., 115 Minn. 386, 132 N. W. 337.

5899. Loose pulleys—Exhaust fans—Statute—That it is inconvenient, or expensive, or necessitates more space to comply with the statute is not conclusive that it is impracticable to do so. Whether it is practicable is a question for the jury, unless the evidence is conclusive. Skarpmoen v. Cloquet Box Co., 114 Minn. 278, 130 N. W. 1106.

Contributory negligence and assumption of risk are defences, but they are questions for the jury unless the evidence is conclusive. Skarpmoen v. Cloquet Box Co., 114 Minn. 278, 130 N. W. 1106.

5899a. Steam boilers—Inspection—Statute—The statute provides for the inspection of steam boilers. A failure to comply with the statute constitutes negligence per se. G. S. 1913, § 4741; Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674.

5903. Duty of servant to make repairs—If the defect is one which it is the duty of the servant to repair he cannot recover for an injury therefrom. Bauer v. Great Northern Ry. Co., 128 Minn. 146, 150 N. W. 394. See Thomas v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297.

5905. Adjustment of machinery—(65) See Hamlin v. Lanquist & Illsley Co., 111 Minn. 491, 127 N. W. 490; Connelly v. Barnett & Record Co., 116 Minn. 86, 133 N. W. 87; Stage v. C. H. Young Co., 120 Minn. 205, 139 N. W. 298.

5906. Instrumentalities constructed by servant—(66) Jacobsen v. Minneapolis, 115 Minn. 397, 132 N. W. 341; Sweeney v. Poppenberger, 116 Minn. 134, 133 N. W. 474; Berg v. Pittsburg Construction Co., 128 Minn. 408, 150 N. W. 1092 (temporary staging). See Hamlin v. Lanquist & Illsley Co., 111 Minn. 491, 127 N. W. 490; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119 (pile sheeting in an excavation to prevent caving in held not within rule); Block v. Minnesota Farmers Brick & Tile Co., 128 Minn. 71, 149 N. W. 954; Quinn v. St. Paul Boiler & Mfg. Co., 128 Minn. 270, 150 N. W. 919; Digest, § 5910.

5907. Temporary instrumentality selected by servant—A master may sanction customary practice of his servants to use temporary instrumentalities so as to render him bound to use reasonable care to see that such instrumentalities are reasonably safe for his servants. Suprenant v. Great Northern Ry. Co., 123 Minn. 170, 143 N. W. 320 (machinery loaded on flat cars used as handholds by brakemen passing over cars). (67) Berg v. Pittsburg Construction Co., 128 Minn. 408, 150 N. W. 1092 (temporary staging).

5908. Latent defects—(68) See Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 138 N. W. 1011.

5910. Scaffolds—Recovery sustained where plaintiff was injured while removing a scaffold by taking it apart. Evidence held to justify a finding that the proximate cause of the accident was the failure of the master to furnish the requisite number of men to move the scaffold and in failing to warn plaintiff of the dangers. Dougherty v. Minneapolis Steel & Machinery Co., 110 Minn. 497, 126 N. W. 136.

Recovery sustained where a foreman of defendant negligently ordered the plaintiff to work on an unsafe scaffold, with the construction of which he had nothing to do. The defendant was a subcontractor and the scaffold was erected by the principal contractor. A knotty board broke, causing plaintiff to fall. Johnson v. St. Paul Foundry Co., 112 Minn. 352, 128 N. W. 293.

An employer, who has erected a safe scaffold, on which loose planks are to be placed by his employees for staging, which are to be shifted from point to point as the necessities of the work require, is bound to furnish therefor, at places within a reasonable distance of the point where they are to be used, planks suitable in quantity and quality; but he is not required to see that they are adjusted and kept in place. Rihmann v. George J. Grant Const. Co., 114 Minn. 484, 131 N. W. 478.

When a master sets apart and designates specific material for scaffold building, he is required to exercise due care in seeing that it is free from defects; and the workmen who construct a scaffold from such materials are justified in assuming that the material is reasonably suitable for the purpose. Lee v. H. N. Leighton Co., 113 Minn. 373, 129 N. W. 767.

Plaintiff held chargeable with contributory negligence and assumption of risk, as a matter of law, in using a scaffold made by placing a plank on stepladders. One of the stepladders "walked" or "creeped." Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85.

Plaintiff, a plasterer, held chargeable with contributory negligence, as a matter of law, in using a defective scaffold with full knowledge of the defect. Sweeney v. Poppenberger, 116 Minn. 134, 133 N. W. 474.

Plaintiff was in the employ of defendant as painter and decorator. He used a scaffold, consisting of a plank stretched upon ladders. Planks

and ladders were furnished by defendant. There is evidence that in the course of the work it became necessary to use a plank of different length from any that had been furnished, and that defendant directed plaintiff's foreman to go to an employee of defendant in charge of another job and that such employee would furnish one. The foreman acted accordingly and the plank was so furnished. It was unfit for the purpose by reason of a knot near the center. This knot was somewhat obscured by lime, plaster, and dirt. The duty of defendant to furnish suitable plank for scaffolding was absolute, and could not be delegated. The evidence is sufficient that this plank was, in contemplation of law, furnished by defendant, and that defendant was negligent in not furnishing a suitable plank. The question of whether plaintiff assumed the risk of the use of this defective plank was for the jury. The test is whether the defect was known to or plainly observable by him, and whether he understood, or by the exercise of ordinary observation ought to have understood, the risk incident to its use. In view of the manner in which this defect was obscured by lime, plaster, and dirt, the question of assumption of risk was one of fact. The question of his contributory negligence was also for the jury. Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431.

If an independent contractor employed by the defendant to perform work on a building uses a scaffold constructed by another independent contractor in connection with his work on the building, the defendant is not ordinarily liable for injuries resulting from defects in the scaffold. Resnikoff v. Friedman, 124 Minn. 343, 144 N. W. 1095. See Lauritsen v. American Bridge Co., 87 Minn. 518, 92 N. W. 475.

Where the master selects and furnishes material for scaffolding purposes, to be used for that purpose only, the servants may assume that in selecting the same the master exercised due care, and they are not required, before using it, to determine whether it is suitable for the purpose. Hutchins v. Wolfe, 127 Minn. 337, 149 N. W. 543.

The defendant was constructing a silo, and the plaintiff was working for it on a staging. A timber, which was not defective, broke, and the plaintiff was precipitated to the ground and injured. The silo, and the staging used in its construction, were built under the supervision and direction of the defendant's foreman. Held, the accident having occurred prior to the enactment of Laws 1913, c. 316, § 13 (G. S. 1913, § 3874), relative to scaffolds, etc., that the defendant did not owe the plaintiff the absolute duty of seeing that a proper plan of construction of the staging was used, and that, it having furnished sufficient and proper material for the staging, it was not negligent. Block v. Minnesota Farmers Brick & Tile Co., 128 Minn. 71, 149 N. W. 954.

(72) See Berg v. Pittsburg Construction Co., 128 Minn. 408, 150 N. W. 1092.

(73) **Quinn v.** St. Paul Boiler & Mfg. Co., 128 Minn. 270, 150 N. W. 919.

(74) **Rihmann** v. George J. Grant Const. Co., 114 Minn. 484, 131 N. W. 478; **Reid v.** N. W. Fuel Co., 116 Minn. 96, 133 N. W. 161.

See Digest, § 5906.

5913. Law and fact—Whether the defect was one which it was the duty of the plaintiff to repair, held a question for the jury. Bauer **v.** Great Northern Ry. Co., 128 Minn. 146, 150 N. W. 394.

(78) **Sturm v.** Northwest Mills Co., 114 Minn. 420, 131 N. W. 472; **Denchfield v. Minneapolis** etc. Ry. Co., 114 Minn. 58, 130 N. W. 551.

5914. Connecting carriers—(79) See Hill v. Republic Iron & Steel Co., 112 Minn. 244, 127 N. W. 925; Digest, § 1354.

5915. Particular instrumentalities—A dumping bucket. Johnson v. MacLeod, 111 Minn. 479, 127 N. W. 497, 1120.

A planing machine in a furniture factory. Blomquist v. Minneapolis Furniture Co., 112 Minn. 143, 127 N. W. 481.

A large metallic waste paper box so placed in a store that the movement of its doors was dangerous to persons nearby. McVay v. Mannheimer Bros., 113 Minn. 225, 129 N. W. 371.

A large metallic curtain. Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472.

A swinging coal chute for coaling locomotives. Denchfield v. Minneapolis etc. Ry. Co., 114 Minn. 58, 130 N. W. 551.

A toggle clutch in a bull wheel connected with a coal chute. Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6.

A fid hook binding chains in logging. Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637.

A tin can used to catch red-hot rivets. Powder left in can by fellow servant to cause explosion for fun. La Doucre v. Nickel, 115 Minn. 40, 131 N. W. 852.

Cross timbers in a trench used by workmen to lower themselves in the trench. Jacobsen v. Minneapolis, 115 Minn. 397, 132 N. W. 341.

A file. Nordberg v. Hall, 116 Minn. 71, 133 N. W. 168.

A ladder. Larson v. Swift & Co., 116 Minn. 509, 134 N. W. 122.

An ax with a defective handle. Pearson v. Norling, 117 Minn. 527, 135 N. W. 1134.

A ladder used as a stairway. O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399.

A boiler of an engine in a municipal water and light plant. Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674.

A lantern supplied with improper oil. Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142.

An air hose connecting brake rods between railroad cars. Rose v. Minneapolis etc. Ry. Co., 121 Minn. 363, 141 N. W. 487.

A taxicab. Murphy v. Twin City Taxicab Co., 122 Minn. 363, 142 N. W. 716.

Insufficient guy ropes for pulley ropes in hoisting tackle. Casey v. Pillsbury Flour Mill Co., 122 Minn. 474, 142 N. W. 726.

A coal chute connected with coal docks. Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774.

Hydraulic jacks. Schultz v. St. Paul, 124 Minn. 257, 144 N. W. 955; Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106; Id., 131 Minn. —, 154 N. W. 964.

A trap door of the vestibule of railroad passenger car. McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613.

A railway draw-bar. Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427.

A sewing machine. Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541.

A hand jointer. Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175.

A machine for cutting and stamping shoe patterns. Zeuli v. Foot, Schulze & Co., 130 Minn. 184, 153 N. W. 310.

A maul. Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093.

A wagon used by servants to go from one place of work to another. Jones v. St. Paul, 130 Minn. 260, 153 N. W. 516.

A device for gluing barrels. Clymer v. Kellogg, Spencer & Sons, 130 Minn. 327, 153 N. W. 602.

Overhead railroad structures. Note, 47 L. R. A. (N. S.) 483.

(1) Schultz v. St. Paul, 124 Minn. 257, 144 N. W. 955; Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106.

(3) Marfia v. Great Northern Ry. Co., 124 Minn. 466, 145 N. W. 385.

(13) See § 5910.

(14) See Stage v. C. H. Young Co., 120 Minn. 205, 139 N. W. 298.

(24) Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175; Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113.

(28) Senro v. Chicago & N. W. Ry. Co., 115 Minn. 110, 131 N. W. 1011 (defective flue plugged with wood).

(30) McInerny v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837. See Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804 (mangle for dry pressing new underwear).

(32) See Digest, § 6021.

(35) Stanich v. Pearson Mining Co., 122 Minn. 29, 141 N. W. 1100.

(82) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987 (footboard); Schwartzbauer v. Great Northern Ry. Co., 112 Minn. 356, 128

N. W. 286 (boiler); Kitman v. Chicago, B. & Q. Ry. Co., 113 Minn. 350, 129 N. W. 844 (engine and tender without proper safety chain connections and brakebeam supports); Smith v. Great Northern Ry. Co., 131 Minn. —, 153 N. W. 513 (defective step on tender).

(83) Bruckman v. Chicago etc. Ry. Co., 110 Minn. 308, 125 N. W. 263 (defective footboard on gondola car); Suprenant v. Great Northern Ry. Co., 123 Minn. 170, 143 N. W. 320 (flat car loaded with threshing machine separators—no handholds except parts of separators—brakeman took hold of a part of machinery to steady himself as he was passing over the car—part gave way); Bauer v. Great Northern Ry. Co., 128 Minn. 146, 150 N. W. 394 (door of freight car); Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165 (brake-step).

(84) Bruckman v. Chicago etc. Ry. Co., 110 Minn. 308, 125 N. W. 263.

(85) Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772 (open switch).

(92) Hamlin v. Lanquist & Illsley Co., 111 Minn. 491, 127 N. W. 490; Connelly v. Barnett & Record Co., 116 Minn. 86, 133 N. W. 87.

DUTY TO EMPLOY FIT SERVANTS

5916. In general—The rule of liability applies where the master negligently retains in his employ an incompetent servant, though he exercised due care in originally employing the servant. Pullaman v. Bangor Mining Co., 121 Minn. 216, 141 N. W. 114.

Where a servant has been in the employ of a master for four or five years without complaint having been made by any one as to his efficiency, character, or habits, the master cannot be charged with negligence in retaining him. Jackson v. Chicago etc. Ry. Co., 178 Fed. 432.

(47) McVay v. Mannheimer Bros., 113 Minn. 225, 129 N. W. 371 (woman employed in a department store struck on the head by the door of a large waste paper box—door of box moved by inexperienced and incompetent boy); Francoeur v. Gribben Lumber Co., 115 Minn. 200, 132 N. W. 199 (question whether servants employed to pile lumber were incompetent held one of fact for jury); Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W. 12 (general rule as to master's duty stated); Pullaman v. Bangor Mining Co., 121 Minn. 216, 141 N. W. 114 (engineer operating an elevator in a mining shaft). See Pittsburgh Ry. Co. v. Thomas, 174 Fed. 591.

5918. Assumption of risk—(51) Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W. 12; Jackson v. Chicago etc. Ry. Co., 178 Fed. 432.

5919. Promise of master to dismiss incompetent servant—(53) See Note, 47 L. R. A. (N. S.) 1220.

5920. Burden of proof—(58) Stanich v. Pearson Mining Co., 122 Minn. 29, 141 N. W. 1100.

5921. Evidence of incompetency—Reputation as evidence of incompetency. Note, 33 L. R. A. (N. S.) 751.

(61) See Pittsburgh Rys. Co. v. Thomas, 174 Fed. 591.

DUTY TO EMPLOY SUFFICIENT SERVANTS

5923. In general—(63) Dougherty v. Minneapolis Steel & Machinery Co., 110 Minn. 497, 126 N. W. 136 (insufficient men to move a scaffold).

(64) Marshall v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 208.

DUTY TO ADOPT RULES

5924. In general—(65) Nature of duty and minuteness of rules. Larsen v. O'Rouke, 178 Fed. 541. See Note, 43 L. R. A. 306; 54 Id. 86.

5925. Rules must be reasonable—Law and fact—(69) Great Northern Ry. Co. v. Hooker, 170 Fed. 154; Chicago etc. Ry. Co. v. Ship, 174 Fed. 353.

(70) Great Northern Ry. Co. v. Hooker, 170 Fed. 154.

5926. Effect of rules—Duty of master to enforce rules—The master may adopt rules to facilitate the carrying on of his business, and these rules may operate for the protection of the servants exposed to danger. The question then arises whether the enforcement of such rules is an absolute duty of the master. It cannot be said that an employer owes to his employee an absolute duty to see that every rule of his business is observed. The obligation of the employer in respect to the supervision of mere details is not rendered more extensive by the fact that he has systematized the execution of those details by adopting suitable rules. Such rules do not alter the character of the acts to which they relate. If, however, the office of the rule is to provide a method for the discharge of some non-delegable obligation, the duty of the employer to see that the rule is observed is absolute and non-delegable. Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

DUTY TO WARN AND INSTRUCT

5929. In general—Warnings and instructions must be brought home to the individual servant. Murphy v. Gross, 118 Minn. 311, 136 N. W. 868.

It is the duty of the master not merely to advise the servant of existing conditions, but to see to it that the servant appreciates the risks. Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

Where a crew of men are working together in an excavation and are ordered hither and thither in the course of the work, the master is not bound to warn a servant that a fellow servant has been ordered

to work near or with him, at least in the absence of special circumstances. Olson v. Hoy & Elzy Co., 129 Minn. 135, 151 N. W. 893.

(75) Dougherty v. Minneapolis Steel & Machinery Co., 110 Minn. 497, 126 N. W. 136 (danger in moving scaffold by taking it apart); Bell v. Northern Pacific Ry. Co., 112 Minn. 488, 128 N. W. 829 (general rule of liability stated—danger in removing rails from railroad track); Lindgren v. William Bros Boiler Mfg. Co., 112 Minn. 186, 127 N. W. 626 (danger from falling objects in a building in course of construction); Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577 (danger from heavily charged electric wires on a bridge to one working about them); Jacobson v. Minneapolis, 115 Minn. 397, 132 N. W. 341 (no evidence that defendant knew of danger hence no error in failing to warn servant of danger); Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W. 12 (danger from use of dynamite in blasting); Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466 (duty to warn as to explosions caused by an independent contractor); Veline v. Lauer Bros., 128 Minn. 10, 150 N. W. 169 (danger in removing a cornice—passing rope through cornice—building being torn down); Daily v. St. Anthony Falls Power Co., 129 Minn. 432, 152 N. W. 840 (working on a boom in a river—guiding logs to sluiceway). See Gagnon v. Klauder, 174 Fed. 477 (danger of heating piston head without making a vent in it); Duluth Elevator Co. v. Wallin, 174 Fed. 955 (danger from loose board in building above where servant was working)

5930. Duty absolute—(76) Lindgren v. William Bros Boiler Mfg. Co., 112 Minn. 186, 127 N. W. 626; Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099; Elenduck v. Crookston Lumber Co., 121 Minn. 53, 140 N. W. 125; Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Gagnon v. Klauder, 174 Fed. 477.

5931. Instructions and warnings must be plain and servant must appreciate dangers—Instructions and warnings must be brought home to the individual servant. Murphy v. Gross, 118 Minn. 311, 136 N. W. 868.

It is not enough for the master merely to advise the servant of conditions; he must see to it that the servant appreciates the dangers thereof. Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Uggen v. Bazille & Partridge, 127 Minn. 364, 149 N. W. 459; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804.

The master cannot relieve himself by posting notices. Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804.

(77) Uggen v. Bazille & Partridge, 127 Minn. 364, 149 N. W. 459. See, as to duty toward servant not understanding English, Morovich v. Inland Steel Co., 131 Minn. ——, 154 N. W. 735.

5932. Obvious dangers—(78) Tomczek v. Johnson, 110 Minn. 320, 125 N. W. 268; Johnson v. Klarquist, 114 Minn. 165, 130 N. W. 943. See Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85; Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790; Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739; Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804; Burmister v. P. C. Giguere & Son, 130 Minn. 28, 153 N. W. 134 (danger in attempting to move a loaded wagon stalled on a pile of crushed stone by taking hold of the wheels held not obvious so as to relieve the master of duty to warn).

(79) Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790.

5933. Servants with knowledge—(80) Murphy v. Duluth Crushed Stone Co., 115 Minn. 308, 132 N. W. 294; Stanich v. Pearson Mining Co., 122 Minn. 29, 141 N. W. 1100. See Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739.

5934. Immature servants—(81) McVay v. Mannheimer Bros., 113 Minn. 225, 129 N. W. 371; Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804.

(82) See Bell v. Northern Pacific Ry. Co., 112 Minn. 488, 128 N. W. 829.

5935. Instructions and warnings as to machinery, etc.—The duty to instruct is limited to such machines as the servant is directed to use. Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113.

(84) Hill v. Republic Iron & Steel Co., 112 Minn. 244, 127 N. W. 925 (operation of ore cars on gravity track); Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6 (operation of a coal chute); Johnson v. Finch, Van Slyck & McConville, 115 Minn. 252, 132 N. W. 276 (operation of elevator); Nordberg v. Hall, 116 Minn. 71, 133 N. W. 168 (danger of hammering a file); McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118 (operation of a derrick—release of clutch or dog); Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115 (operation of wood shaper); Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045 (bottling machine in brewery); Novak v. Great Northern Ry. Co., 124 Minn. 141, 144 N. W. 751 (hydraulic bolt-driver); Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804 (mangle for dry pressing new underwear); Montana C. & C. Co. v. Kovec, 176 Fed. 211 (inexperienced coal miner directed by his superior to operate an electric engine without instructions).

5936. Duty to warn sectionmen—In a switching yard, where men are constantly working on the tracks, an engineer is bound to keep a lookout for them. His duty is that of reasonable care. Kludzinski v. Great Northern Ry. Co., 130 Minn. 222, 153 N. W. 529.

(88) Brown v. Chicago, B. & Q. R. Co., 117 Minn. 149, 134 N. W. 315; Lindstrom v. Great Northern Ry. Co., 129 Minn. 512, 152 N. W. 875.

(89) Brown v. Chicago, B. & Q. R. Co., 117 Minn. 149, 134 N. W. 315; Kludzinski v. Great Northern Ry. Co., 130 Minn. 222, 153 N. W. 529. See Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307.

(91) Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385; Kludzinski v. Great Northern Ry. Co., 130 Minn. 222, 153 N. W. 529.

5937. Servant ordered to dangerous place without warning—(93) Wickham v. Chicago etc. Ry. Co., 110 Minn. 74, 124 N. W. 639, 994; Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389; Tendall v. Great Northern Ry. Co., 113 Minn. 473, 130 N. W. 22; Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739; Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112; Burmister v. P. C. Giguere & Son, 130 Minn. 28, 153 N. W. 134 (servant ordered to take hold of a wagon stalled on a load of crushed stone and help to move it); Rocky Mountain Bell Tel. Co. v. Bassett, 178 Fed. 768.

5938. Duty to give warning of impending danger—Where signals are employed in the general work of the master, and are used solely in directing the movement of machinery or instrumentalities connected with the employment, the signals are mere details of the work, and the failure on the part of servants to give them does not charge the master with liability. But where the place of work is inherently dangerous, and signals are required by orders of the master or, by common custom, for the protection of the employees and to provide and to maintain for them the safety of their place of work, and are relied upon by the employees as a means of saving themselves from harm, it becomes the absolute duty of the master to give them, and a failure to do so, though the failure be the neglect of a servant engaged in the common employment, renders the master liable to a servant who is injured in consequence of the neglect. Elenduck v. Crookston Lumber Co., 121 Minn. 53, 140 N. W. 125; Burke v. Ash, 120 Minn. 388, 139 N. W. 705; Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

The duty to warn of impending dangers is not limited to such as occur in the master's business, but extends to those arising from extraneous sources, when they are known to the master, or would be known to him if he exercised reasonable care for the safety of his servants, and they are not known to them. Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

Evidence held sufficient to sustain a finding charging defendant railroad company with notice of excavating operations being conducted on

and near its right of way by another company, through a subcontractor, and also of the manner in which the work was being done, including the use of dynamite, so as to impose upon defendant the duty of warning plaintiff, its employee, before putting him at work on a semaphore pole located dangerously near the place where the blasting was going on. Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

Where defendant's employees, engaged in taking up and loading upon a car the sections forming the track for the steam shovel in a mine, were accustomed to bring such sections to the car and drop or deposit them without receiving or expecting any direction or signal as to when they should drop them except such as the men about to drop a section gave to each other, no duty rested upon defendant to direct, by signal or otherwise, when the men holding a section should drop it; and, for that reason, a "straw boss," who gave the signal for dropping the section which injured plaintiff, was not acting as a vice principal in so doing, but as a fellow servant of plaintiff, and defendant was not responsible for his negligence. Morovich v. Inland Steel Co., 131 Minn. —, 154 N. W. 735.

Where the court instructs the jury that plaintiff cannot recover unless a custom existed to give warning of a danger and there is no evidence tending to prove the existence of such custom, a verdict for plaintiff cannot stand. Marshall v. Chicago etc. Ry. Co., 127 Minn. 244, 149 N. W. 296.

(94) Duff v. Bayne, 112 Minn. 44, 127 N. W. 385 (raising and lowering beams in the construction of a bridge); Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310 (cleaning out the bottom of a shaft in a mine under a "skip" or elevator—position dangerous if skip was moved without warning); Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099 (unloading timbers from car to skidway—dropping timber from car without warning dangerous); Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306 (repairing machinery—duty to warn operators before moving machinery); Grbich v. Pittsburgh Iron Ore Co., 119 Minn. 365, 138 N. W. 309 (blasting operations dangerous without warning); Elenduck v. Crookston Lumber Co., 121 Minn. 53, 140 N. W. 125 (cutting timber in lumber camp—letting trees fall without warning to men working nearby); Hanson v. Red Wing Sewer Pipe Co., 122 Minn. 415, 142 N. W. 804 (prying off large pieces of clay at the top of a clay pit dangerous to workmen below without warning); Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466 (blasting operations conducted by a third party near right of way of defendant); Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810 (hoisting rig for unloading coal from vessels to dock—starting machinery while workman was on rig to oil the machinery). See Nylund v. Duluth & N. E. Ry. Co., 123 Minn. 249, 143 N. W. 739 (unloading logs from flat car—

evidence sufficient to sustain finding that warning was given); Note, 26 L. R. A. (N. S.) 624.

(95) See Morovich v. Inland Steel Co., 131 Minn. —, 154 N. W. 735.

(96) Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099 (unloading timbers from car to skidways—customary for workmen on top of car to give warning to workmen on skidway before dropping a timber from the car—failure to give warning—evidence held to justify a finding that it was the duty of the defendant to give the warning independent of custom); Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 510 (hoisting rig for unloading coal from vessels to dock—starting machinery without customary signals while oiler was on rig to oil it).

See Digest, § 5880 (starting machinery without warning); § 5939 (explosions).

5939. Explosions—Dynamite—It is the absolute duty of the master to give his servants warning of explosions, when reasonable care for their safety requires it. Hjelm v. Western Granite Contracting Co., 94 Minn. 169, 102 N. W. 384; Grbich v. Pittsburgh Iron Ore Co., 119 Minn. 365, 138 N. W. 309; Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466 (duty to warn as to explosions caused by third parties near premises of master).

(97) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590 (dangers of "gopher holing" in iron mines); Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W. 12 (use of dynamite in blasting).

5940. Change of conditions unknown to servant—Plaintiff was one of a large crew of men engaged in excavating a cellar. Under orders of the foreman he had made an excavation and left a pillar of earth to support the soil above. Thereafter the foreman ordered another workman to go and work with plaintiff. This workman, without the knowledge of plaintiff, picked away the pillar, causing the earth above to fall upon and injure plaintiff. It was held that the master was not bound to warn plaintiff that another workman had been sent to work with him. Olson v. Hoy & Elza Co., 129 Minn. 135, 151 N. W. 893.

(98) Lyons v. Dee, 88 Minn. 490, 93 N. W. 899 (shifting of elevator); Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306 (repairing machinery—duty to warn operators before moving machinery); Titus v. Crookston Lumber Co., 130 Minn. 312, 153 N. W. 599 (removal of platform on a trestle into a lake used for unloading logging trains).

5942. Law and fact—(1) McVay v. Mannheimer Bros., 113 Minn. 225, 129 N. W. 371; Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Veline v. Lauer Bros., 128 Minn. 10, 150 N. W. 169; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804.

DUTY TO SUPERVISE WORK

5943. In general—(3) Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561 (duty to adopt a safe method of loosening material in a bin used in a brickyard). See Johnson v. Oakes, 110 Minn. 94, 124 N. W. 633 (unsafe method adopted for removing caps from bents); Fieck v. Chicago, G. W. R. Co., 116 Minn. 47, 133 N. W. 66 (unsafe method of removing an automobile from a freight car); Evans v. Drake & Stratton Co., 119 Minn. 55, 137 N. W. 189 (stripping a mine—master must do the work in a reasonably safe way).

DUTY TO ISSUE ORDERS

5944. In general—(5) Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389; Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625.

FELLOW SERVANTS

5945. Fellow-servant rule stated—(6) Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

5946. Basis of rule—Not to be extended—The fellow-servant rule does not rest on any very satisfactory basis and it is not to be extended. The present tendency of the courts is to restrict it by extending the absolute duties of masters. Schoen v. Chicago etc. Ry. Co., 112 Minn. 38, 42, 127 N. W. 433; Headline v. Great Northern Ry. Co., 113 Minn. 74, 79, 128 N. W. 1115; Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306; Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

(8) Headline v. Great Northern Ry. Co., 113 Minn. 74, 79, 128 N. W. 1115; 25 Harv. L. Rev. 357–371. See Pollock, Genius of the Common Law, 102.

5947. Who are fellow servants—In general—Where a master reserves to himself the performance of a particular act he cannot avoid liability for its non-performance by delegating it to another. Headline v. Great Northern Ry. Co., 113 Minn. 74, 128 N. W. 1115.

The fact that servants are working in different departments is not decisive against their being fellow servants, but it should be given some consideration in determining the scope of the master's absolute duties in a given case. Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306.

It is an open question in this state whether acts of servants before plaintiff enters the service are chargeable to him under the fellow-servant doctrine, when they result in injury to him after he enters the service. Hutchins v. Wolfe, 127 Minn. 337, 149 N. W. 543.

(14) Schoen v. Chicago etc. Ry. Co., 112 Minn. 38, 127 N. W. 433 (servants must be engaged in a common enterprise and under identical control—railroad yards operated jointly by railroad company and brewing company—a janitor of an adjacent building belonging to one of the companies not a fellow servant of men in charge of yard locomotive); Headline v. Great Northern Ry. Co., 113 Minn. 74, 79, 128 N. W. 1115 (not essential that they be in same department); Jacobsen v. Minneapolis, 115 Minn. 397, 132 N. W. 341 (workmen engaged in construction of sewer); Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306 (not essential that they should be in the same department); Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938 (one superintending the construction of a silo sold by A to B held a servant of A and not a fellow servant of C, a servant of B, assisting in the erection of the silo).

(15) Beutler v. Grand Trunk Junction Ry. Co., 224 U. S. 85. See Note, 52 L. R. A. (N. S.) 1082, 1106, 1115, 1117, 1123, 1127.

5949. Vice-principals—A negligent act of a servant while engaged in the ordinary work of his employment, which he knows or has reason to believe may expose a fellow servant to injury, is not necessarily an act of negligence for which the master is liable. To render the master responsible for such an act it should appear: (1) That it was committed by the servant in the discharge of the duties assigned him by the master; and (2) by reason of the nature of the duties so assigned, and the nature and character of the employment, that it involved in some measure the absolute duties of the master respecting the safety of the other servants, for the discharge of which the master could not relieve himself by delegating the performance to the servant. Burke v. Ash, 120 Minn. 388, 139 N. W. 705. See Fieck v. Chicago, G. W. R. Co., 116 Minn. 47, 133 N. W. 66.

(18) Lindgren v. William Bros Boiler Mfg. Co., 112 Minn. 186, 127 N. W. 626; Johnson v. St. Paul Foundry Co., 112 Minn. 352, 128 N. W. 293; Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119; Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938. Morovich v. Inland Steel Co., 131 Minn. —, 154 N. W. 735.

(19) Headline v. Great Northern Ry. Co., 113 Minn. 74, 80, 128 N. W. 1115; Burke v. Ash, 120 Minn. 388, 139 N. W. 705; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119; Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938.

5950. Superintendents, foreman, etc.—Superior-servant doctrine—The order of a foreman to an experienced servant under his control to perform an act, which is merely incidental to and a detail of the servant's employment, and not known to the foreman to be attended with hidden

danger, is, though coupled with an assurance of safety, the direction of a superior servant, and not that of a vice principal. Reid v. N. W. Fuel Co., 116 Minn. 96, 133 N. W. 161.

A superintendent or foreman is presumptively charged with the performance of all the absolute duties of the master in respect to furnishing and maintaining a reasonably safe place in which the servants under his control are engaged at work. Burke v. Ash, 120 Minn. 388, 139 N. W. 705.

Under the law of the state of Washington an engineer of a train and a brakeman thereof are not fellow servants if the engineer is in control of the train and vested with authority to control its movements and its rate of speed. The rule is otherwise in this state. Walson v. McGregor, 120 Minn. 233, 139 N. W. 353.

(20) Morovich v. Inland Steel Co., 131 Minn. —, 154 N. W. 735.

(21) Burke v. Ash, 120 Minn. 388, 139 N. W. 705.

(22) Reid v. N. W. Fuel Co., 116 Minn. 96, 133 N. W. 161.

5952. Negligence of master and fellow servant concurring—(25) Stage v. C. H. Young Co., 120 Minn. 205, 139 N. W. 298; Novak v. Great Northern Ry. Co., 124 Minn. 141, 144 N. W. 751; Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772; Schultz v. St. Paul, 124 Minn. 257, 144 N. W. 955.

See Digest, §§ 5878, 5887, 5917.

5953. Law and fact—(26) Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306; Walson v. McGregor, 120 Minn. 233, 139 N. W. 353 (under law of Washington—whether an engineer was so in control of a train as not to be a fellow servant of a brakeman thereof held a question for the jury).

(27) Casey v. Pillsbury Flour Mill Co., 122 Minn. 474, 142 N. W. 726; Olson v. Hoy & Elzy Co., 129 Minn. 135, 151 N. W. 893. See Beutler v. Grand Trunk Junction Ry. Co., 224 U. S. 85.

5954. Held fellow servants—Members of a crew digging a trench and cementing it. Jacobsen v. Minneapolis, 115 Minn. 397, 132 N. W. 341.

One cutting holes in stone for the grab hooks of a traveling crane, and one using the crane. Stage v. C. H. Young Co., 120 Minn. 205, 139 N. W. 298.

A signalman stationed on the bank of a gravel pit to signal the engineer of the crew when to raise or lower a "scale" connected with a derrick, and a servant working about the scale in the pit. Burke v. Ash, 120 Minn. 388, 139 N. W. 705.

Servants working a windlass to hoist machinery and a servant working the tackle. Casey v. Pillsbury Flour Mill Co., 122 Minn. 474, 142 N. W. 726.

Members of a crew in an iron mine engaged in moving sections of a track for a steam shovel. Morovich v. Inland Steel Co., 131 Minn. —, 154 N. W. 735.

Members of a crew excavating a cellar. Olson v. Hoy & Elzy Co., 129 Minn. 135, 151 N. W. 893.

(43) See Walson v. McGregor, 120 Minn. 233, 139 N. W. 353 (rule in the state of Washington).

(56, 57, 59) See Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938.

STATUTORY RULE AS TO RAILROAD FELLOW SERVANTS

5955. Statute constitutional—The federal statute is constitutional. Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011; Second Employers' Liability Cases, 223 U. S. 1.

A statute is not unconstitutional merely because it applies to all railroad employees and is not limited to those exposed to railroad hazards. Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806.

(62) See Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806.

5957. Construction of statute—Railroad hazards—Rule of haste—Where the work is necessarily done with great and unusual haste by reason of its relation to the operation of a railroad, and such haste is an essential element in causing the accident, the statute applies. It is immaterial whether there was necessity in fact for haste in a particular case, if the injured servant was acting in haste by order of his foreman. Blomquist v. Great Northern Ry. Co., 65 Minn. 69, 67 N. W. 804; Tay v. Willmar & Sioux Falls Ry. Co., 100 Minn. 131, 110 N. W. 433; Janssen v. Great Northern Ry. Co., 109 Minn. 285, 123 N. W. 664; Pylaczinski v. Great Northern Ry. Co., 120 Minn. 74, 139 N. W. 147; Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843.

The "rule of haste" has application only when the work in which the employee is engaged is required to be done with unusual haste by reason of its relation to the operation of a railroad, and such haste is an essential element in causing the accident. Nylund v. Duluth & N. E. Ry. Co., 123 Minn. 249, 143 N. W. 739.

(66) Nylund v. Duluth & N. E. Ry. Co., 123 Minn. 249, 143 N. W. 739. See Note, 47 L. R. A. (N. S.) 113, 129, 135.

(68) Hoveland v. Chicago etc. Ry. Co., 110 Minn. 329, 125 N. W. 266.

5958. Who liable under statute—Statute held applicable to joint operation of a railroad by a brewing company and a railroad company in yards of former company. Schoen v. Chicago etc. Ry. Co., 112 Minn. 38, 127 N. W. 433.

(73) Cook v. Modern Brotherhood, 114 Minn. 299, 131 N. W. 334.

5959. Held within statute—A janitor run down by a locomotive. Schoen v. Chicago etc. Ry. Co., 112 Minn. 38, 127 N. W. 433.

A sectionman loading ties on a push car on a main track. Pylaczinski v. Great Northern Ry. Co., 120 Minn. 74, 139 N. W. 147.

A sectionman removing a stone from under a rail, hit by tie let fall by fellow servants. Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843.

(77) Hider v. Minneapolis etc. Ry. Co., 115 Minn. 325, 132 N. W. 316; Vaneff v. Great Northern Ry. Co., 120 Minn. 18, 138 N. W. 1027.

(97) Hoveland v. Chicago etc. Ry. Co., 110 Minn. 329, 125 N. W. 266.

5960. Held not within statute—A servant unloading logs from a flat car detached from an engine. Nylund v. Duluth & N. E. Ry. Co., 123 Minn. 249, 143 N. W. 739.

5963. Law and fact—(8) Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759 (laborer shoveling coal from tender of locomotive into firebox injured by falling coal piled high above gate).

(9) Hoveland v. Chicago etc. Ry. Co., 110 Minn. 329, 125 N. W. 266.

5963a. Statutes of other states—An action under the statute of Wisconsin held improperly submitted to the jury under the federal Employers' Liability Act. Creteau v. Chicago & N. W. Ry. Co., 113 Minn. 418, 129 N. W. 855.

The 1907 statute of North Dakota held constitutional. Majavis v. Great Northern Ry. Co., 121 Minn. 431, 141 N. W. 806.

Under the 1907 Wisconsin statute shop employees are excepted. Machinists regularly employed to repair locomotives in a roundhouse are shop employees within the statute. Koecher v. Minneapolis etc. Ry. Co., 122 Minn. 458, 142 N. W. 874.

ASSUMPTION OF RISK

5964. General rule—(10) Beaton v. Great Northern Ry. Co., 123 Minn. 178, 143 N. W. 324 (sweeping out box car liable to be struck without warning by other cars in switching operations); Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431 (painter and decorator); Davison v. Ressler, 128 Minn. 204, 150 N. W. 802 (washing outside of windows); Lindstrom v. Great Northern Ry. Co., 129 Minn. 512, 152 N. W. 875 (sectionman assumes risks of the customary way in which trains are run—train run through country district in a dense fog without giving warnings); Clymer v. Kellogg, Spencer & Sons, 130 Minn. 327, 153 N. W. 602 (gluing barrels); Marshall v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 208 (removing defective piling from under a bridge).

5965. Basis of doctrine—The doctrine of assumption of risk is not confined to the relation of master and servant. See Fox v. Minneapolis

& St. L. R. Co., 114 Minn. 336, 131 N. W. 374; Digest, § 1289; 25 Harv. L. Rev. 355.

(11) See comments of Roscoe Pound in 45 Am. L. Rev. 822.

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. Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Falconer v. Sherwood, 118 Minn. 357, 136 N. W. 1039; Knapp v. Great Northern Ry. Co., 130 Minn. 405, 153 N. W. 848. See 28 Harv. L. Rev. 183.

(17, 18) Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137 (distinction between two defences noted—finding on one issue not a finding on the other); Schlemmer v. Buffalo etc. Ry. Co., 220 U. S. 590.

5967. Disfavored—To be applied cautiously—The doctrine of assumption of risk is not favored and is to be applied cautiously. Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628; Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465; Davison v. Ressler, 128 Minn. 204, 150 N. W. 802; Johnson v. United Flour Mills Co., 128 Minn. 297, 150 N. W. 902.

While the doctrine is not favored it is always applied in cases which are fairly within the rule. Davison v. Ressler, 128 Minn. 204, 150 N. W. 802.

The question of assumption of risk is not to be determined from the point of view of the court room and a strict adherence to the principle that every one must look out for himself, but from the point of view of those who are compelled to work in dangerous employments and do as they are told by their superiors or lose their jobs. Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590.

5969. Effect of statutes—(22) See §§ 5895–5899, 6000.

5970. Servant must appreciate risk—The presumption that a person was in the exercise of due care at the time of an accident must be applied in determining whether he appreciated the risk. Uggen v. Bazille & Partridge, 127 Minn. 364, 149 N. W. 459.

A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working, and yet not know the nature or extent of the risks to which he is exposed by its use. Woutilla v. Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551; Bell v. Northern Pacific Ry. Co., 112 Minn. 488, 128 N. W. 829.

(23) Dougherty v. Minneapolis Steel & Machinery Co., 110 Minn. 497, 126 N. W. 136; Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534; Bell v. Northern Pacific Ry. Co., 112 Minn. 488, 128 N. W. 829; Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643; Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6; Murphy v. Gross, 118

Minn. 311, 136 N. W. 868; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045; Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431; McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613; Veline v. Lauer Bros., 128 Minn. 10, 150 N. W. 169; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539; Knapp v. Great Northern Ry. Co., 130 Minn. 405, 153 N. W. 848; Whitney v. Kaliske, 131 Minn. —, 154 N. W. 1100; Gila Valley etc. Ry. Co. v. Hall, 232 U. S. 94.

5971. Age and intelligence of servant—(25) Wickham v. Chicago etc. Ry. Co., 110 Minn. 74, 124 N. W. 639, 994; McCutcheon v. Virginia & Rainy Lake Co., 114 Minn. 226, 130 N. W. 1023; Denchfield v. Minneapolis etc. R. Co., 114 Minn. 58, 130 N. W. 551; Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643; Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6; Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628; Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804. See Note, 52 L. R. A. (N. S.) 175 (minors).

5972. Unsafe methods of business—The rule that a servant assumes the risk of the unsafe methods of his master in conducting the business is not favored and is to be cautiously applied. See Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561; Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Evans v. Drake & Stratton, 119 Minn. 55, 137 N. W. 189; Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300; Jones v. Massolt Bottling Co., 126 Minn. 364, 148 N. W. 278; Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660; Clymer v. Kellogg, Spencer & Sons, 130 Minn. 327, 153 N. W. 602.

Unless the method of doing the business is manifestly unsafe the servant may assume that it is safe. Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590.

A servant does not assume the risks of customary negligent methods of doing the business unless he knows of them. Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843.

(28) Beaton v. Great Northern Ry. Co., 123 Minn. 178, 143 N. W. 324 (sweeping out box car liable to be struck by other cars in switching operations); Johnson v. United Flour Mills Co., 128 Minn. 297, 150 N. W. 902 (elevator consisting of a continuous belt).

5974. Obvious dangers—The rule that a servant assumes the risk of obvious dangers is not favored and is to be applied cautiously. See Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561; Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759; Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300; McMillan

v. Northern Pacific Ry., 125 Minn. 7, 145 N. W. 613; Benenson v. Swift & Co., 127 Minn. 432, 149 N. W. 668; Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804; Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137.

(30) Tomczek v. Johnson, 110 Minn. 320, 125 N. W. 268; McCutcheon v. Virginia & Rainy Lake Co., 114 Minn. 226, 130 N. W. 1023; Murphy v. Duluth Crushed Stone Co., 115 Minn. 308, 132 N. W. 294; Hider v. Minneapolis etc. Ry. Co., 115 Minn. 325, 132 N. W. 316; Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85; Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465; Davison v. Ressler, 128 Minn. 204, 150 N. W. 802 (standing on ledge of window to wash glass); Petra v. Crookston Lumber Co., 128 Minn. 479, 151 N. W. 183; Utah Col. Mining Co. v. Bateman, 176 Fed. 57.

5975. Law of gravitation—(31) Tomczek v. Johnson, 110 Minn. 320, 125 N. W. 268; Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739. See Digest, § 5976.

5976. Gravel pit cases—Caving in of earth, etc.—The rule of the "gravel pit" cases does not apply where the embankment consists of material of such adhesiveness, or so placed or supported, that it may reasonably be expected to withstand the effect and operation of the law of gravitation. Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078.

(32) Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465. See Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625; Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119; Olson v. Hoy & Elzy Co., 129 Minn. 135, 151 N. W. 893 (servant held to have assumed the risk of a cave-in due to the negligence of a fellow servant).

5977. Extraordinary dangers—(33) Note, 97 Am. St. Rep. 884.

5978. Risk of unsafe place in which to work—In giving the general rule to the jury the court should be careful to add that it is not the duty of the servant to exercise ordinary or reasonable care to discover dangers not obvious to ordinary observation. The measure of the servant's duty is ordinary observation. Rase v. Minneapolis etc. Ry. Co., 107 Minn. 260, 271, 272, 120 N. W. 360. See §§ 5881, 5981.

The general rule is to be applied very cautiously where a trainman is injured by a structure placed dangerously near the tracks. Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 273; West v. Chicago etc. Ry. Co., 179 Fed. 801. See cases under §§ 5872, 6017.

(34) Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104; McCutcheon v. Virginia & Rainy Lake Co., 114 Minn. 226, 130 N. W.

1023; Murphy v. Duluth Crushed Stone Co., 115 Minn. 308, 132 N. W. 294; Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465; Johnson v. United Flour Mills Co., 128 Minn. 297, 150 N. W. 902.

5979. Risk of defective instrumentalities—As regards the knowledge of the defect by the servant the test is not whether he exercised care to discover it, but whether it was known to him or plainly observable to him. Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431. See § 5981.

(35) Johnson v. McLeod, 111 Minn. 479, 127 N. W. 497, 1120; McCutcheon v. Virginia & Rainy Lake Co., 114 Minn. 226, 130 N. W. 1023; Lundberg v. Minneapolis Iron Store Co., 115 Minn. 174, 131 N. W. 1016; Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431; Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628; Johnson v. United Flour Mills Co., 128 Minn. 297, 150 N. W. 902.

(36) Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431.

5980. Snow and ice—(37) See Burdick v. Chicago etc. Ry. Co., 123 Minn. 105, 143 N. W. 115 (assumption of risk of snow drift near tracks held a question for the jury).

5981. Negligence of master—Duty of master and servant not the same—The servant is not under the same duty to exercise care in the inspection of appliances as the master. Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431.

(38) Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6. See Note, 28 L. R. A. (N. S.) 1215.

(40) Lee v. H. N. Leighton Co., 113 Minn. 373, 129 N. W. 767; Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431.

(41) Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431.

(42) Johnson v. MacLeod, 111 Minn. 479, 127 N. W. 497, 1120; Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431; Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137; Whitney v. Kaliske, 131 Minn. —, 154 N. W. 1100.

5983. Promise of master to remedy defects—(44) Orcutt v. J. Neils Lumber Co., 114 Minn. 331, 131 N. W. 464; Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162. See Note, 119 Am. St. Rep. 434; 40 L. R. A. 782; 4 L. R. A. (N. S.) 971; 22 Id. 472; 27 Id. 1052; 29 Id. 598.

(46) Orcutt v. J. Neils Lumber Co., 114 Minn. 331, 131 N. W. 464.

5984. Assurance that repairs have been made—(53) Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541.

5985. Repairs—Assumption of sufficiency—(54) Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541.

5986. Assurance of no danger by superior—Where the master directs the servant to perform specific work at a specific place and assures him that he can do so in safety, and the servant, pursuant to such order and in reliance upon such assurance, proceeds to do the work and is injured, his conduct does not, ordinarily, amount either to contributory negligence or to a voluntary assumption of the risks incident to the performance of the work. The servant is usually justified in assuming that the knowledge, experience, and judgment of the master is superior to his own; and, even if the undertaking appear to him to be hazardous, he may rely upon the assurances of the master, presumably based upon such superior knowledge, without being chargeable either with contributory negligence or with a voluntary assumption of the risks, unless the danger be so obvious and imminent and so apparent to the ordinary mind that it would be unreasonable to rely upon the master's assurances of safety. Whether it would be unreasonable for the servant to rely upon the assurances given him is a question for the jury, unless the court can say that reasonable minds could reach only one conclusion. Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078.

(56) Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739. See Connelly v. Barnett & Record Co., 116 Minn. 86, 133 N. W. 87; Reid v. N. W. Fuel Co., 116 Minn. 96, 133 N. W. 161 (order of superior coupled with an assurance of safety).

5988. Acting under orders—The order of a foreman to an experienced servant under his control to perform an act, which is merely incidental to and a detail of the servant's employment, and not known to the foreman to be attended with hidden danger, is, though coupled with an assurance of safety, the direction of a superior servant, and not that of a vice principal. Reid v. N. W. Fuel Co., 116 Minn. 96, 133 N. W. 161.

Where a chauffeur was ordered by his master to ride in an automobile driven by the master, it was held that he did not assume the risk as a matter of law. Patterson v. Adan, 119 Minn. 283, 137 N. W. 1112.

(58) See Johnson v. St. Paul Foundry Co., 112 Minn. 352, 128 N. W. 293; Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Tendall v. Great Northern Ry. Co., 113 Minn. 473, 130 N. W. 22; Beier v. Aberdeen Hotel Co., 118 Minn. 237, 136 N. W. 757 (servant ordered to put head in elevator shaft—held negligent to obey); Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739; Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078; Rocky Mountain Bell Tel. Co. v. Bassett, 178 Fed. 768.

(60) Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078; Beneson v. Swift & Co., 127 Minn. 432, 149 N. W. 668. See Note, 48 L. R. A. 753; 30 L. R. A. (N. S.) 436.

5990. Making repairs—(62) Marshall v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 208.

5991. Overtaxing one's strength—(63) Creamus v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 616.

5992a. Railroad employees absorbed in work—The general rule requiring a servant to exercise reasonable care for his safety applies to railroad employees, but where the nature of their service requires them to act hastily and to become absorbed in their work, they are not required to exercise the same deliberate care in keeping a lookout for trains or other dangers of their situation as a person not so employed. Jordan v. Chicago etc. Ry. Co., 58 Minn. 9, 59 N. W. 633; Graham v. Minneapolis etc. Ry. Co., 95 Minn. 49, 103 N. W. 714; Joyce v. Great Northern Ry. Co., 100 Minn. 225, 110 N. W. 975; Floan v. Chicago etc. Ry. Co., 101 Minn. 113, 111 N. W. 957; Cornell v. Great Northern Ry. Co., 112 Minn. 341, 128 N. W. 22; Lynch v. Great Northern Ry. Co., 112 Minn. 382, 128 N. W. 457; Kortefka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482; Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307; Brown v. Chicago, B. & Q. R. Co., 117 Minn. 149, 134 N. W. 315; Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660. See Raiolo v. Northern Pacific Ry. Co., 108 Minn. 431, 122 N. W. 489; Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180; Shoen v. Chicago etc. Ry. Co., 112 Minn. 38, 127 N. W. 433; Hammer v. Great Northern Ry. Co., 113 Minn. 212, 129 N. W. 219; Quesnell v. Great Northern Ry. Co., 114 Minn. 276, 130 N. W. 1104; Bennett v. Great Northern Ry. Co., 115 Minn. 128, 131 N. W. 1066; Kennan v. Chicago etc. Ry. Co., 116 Minn. 106, 133 N. W. 789; Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790; Evans v. Drake & Stratton Co., 119 Minn. 55, 137 N. W. 189.

This qualification of the general rule does not apply where the employee is not absorbed in his work and has full opportunity to select a place obviously more safe than the one chosen. Hammer v. Great Northern Ry. Co., 113 Minn. 212, 129 N. W. 219; Kotefka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482; Hagen v. Chicago etc. Ry. Co., 123 Minn. 109, 143 N. W. 121.

5993. Working outside scope of employment—(65) Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113.

5997. Burden of proof—The defendant has the burden of proving not only that the servant knew, or ought to have known, the defect or danger, but also that he appreciated the nature and extent of the risk involved. Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539.

(69) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Johnson v. United Flour Mills Co., 128 Minn. 297, 150 N. W. 902; Skow v. Dahl

Punctureless Tire Co., 129 Minn. 324, 152 N. W. 755; Whitney v. Kaliske, 131 Minn. —, 154 N. W. 1100.

5998. Law and fact—Where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question (of the assumption of the risk) becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Englund v. Minneapolis etc. Ry. Co., 108 Minn. 380, 122 N. W. 454; Davison v. Ressler, 128 Minn. 204, 150 N. W. 802.

(70) Wickham v. Chicago etc. Ry. Co., 110 Minn. 74, 124 N. W. 639, 994; Dougherty v. Minneapolis Steel & Machinery Co., 110 Minn. 497, 126 N. W. 136; Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534; Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561; Thomas v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297; Johnson v. St. Paul Foundry Co., 112 Minn. 352, 128 N. W. 293; Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220; Tendall v. Great Northern Ry. Co., 113 Minn. 473, 130 N. W. 22; Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856; Denchfield v. Minneapolis etc. Ry. Co., 114 Minn. 58, 130 N. W. 551; Pounds v. Chicago, G. W. R. Co., 114 Minn. 312, 131 N. W. 329; Skarpmoen v. Cloquet Box Co., 114 Minn. 278, 130 N. W. 1106; Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643; Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6; Hider v. Minneapolis etc. Ry. Co., 115 Minn. 325, 132 N. W. 316; Fieck v. Chicago, G. W. R. Co., 116 Minn. 47, 133 N. W. 66; Connelly v. Barnett & Record Co., 116 Minn. 86, 133 N. W. 87; Brookman v. Chicago, G. W. R. Co., 116 Minn. 409, 133 N. W. 969; Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739; Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759; Koivula v. Adriatic Mining Co., 118 Minn. 262, 136 N. W. 856; Murphy v. Gross, 118 Minn. 311, 136 N. W. 868; O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399; Evans v. Drake & Stratton Co., 119 Minn. 55, 137 N. W. 189; Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300; Patterson v. Adan, 119 Minn. 283, 137 N. W. 1112; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Burdick v. Chicago etc. Ry. Co., 123 Minn. 105, 143 N. W. 115; Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431; Schultz v. St. Paul, 124 Minn. 257, 144 N. W. 955; McMillan v. Northern Pacific Ry. Co., 125 Minn. 7,

145 N. W. 613; Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119; Jones v. Massolt Bottling Co., 126 Minn. 364, 148 N. W. 278; Uggen v. Bazille & Partridge, 127 Minn. 364, 149 N. W. 459; Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660; Beneson v. Swift & Co., 127 Minn. 432, 149 N. W. 668; Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175; Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804; Cady v. Twin City Taxicab Co., 129 Minn. 70, 151 N. W. 537; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539; Wheeler v. Tyler, 129 Minn. 206, 152 N. W. 137; Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323; Knapp v. Great Northern Ry. Co., 130 Minn. 405, 153 N. W. 848; Whitney v. Kaliske, 131 Minn. —, 154 N. W. 1100.

(71) Tostason v. Minneapolis Threshing Machine Co., 113 Minn. 394, 129 N. W. 593; McCutcheon v. Virginia & Rainy Lake Co., 114 Minn. 226, 130 N. W. 1023; Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104; Lundberg v. Minneapolis Iron Store Co., 115 Minn. 174, 131 N. W. 1016; Murphy v. Duluth Crushed Stone Co., 115 Minn. 308, 132 N. W. 294; Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85; Beier v. Aberdeen Hotel Co., 118 Minn. 237, 136 N. W. 757; Hanson v. Red Wing Sewer Pipe Co., 122 Minn. 415, 142 N. W. 804; Beaton v. Great Northern Ry. Co., 123 Minn. 178, 143 N. W. 324; Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628; Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078; Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465; Davison v. Ressler, 128 Minn. 204, 150 N. W. 802; Johnson v. United Flour Mills Co., 128 Minn. 297, 150 N. W. 902; Petra v. Crookston Lumber Co., 128 Minn. 479, 151 N. W. 183; Lindstrom v. Great Northern Ry. Co., 129 Minn. 512, 152 N. W. 875; Marshall v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 208.

CONTRIBUTORY NEGLIGENCE

5999. Degree of care required of servants—The servant is not bound to exercise reasonable care to discover dangers not obvious to ordinary observation. The measure of his care is ordinary observation. See § 5981.

If a railroad servant follows customary practice approved by the master, he is not ordinarily chargeable with negligence. McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613 (brakeman attempting to enter moving train through trap door of vestibule).

(73) Titus v. Crookston Lumber Co., 130 Minn. 312, 153 N. W. 599.

6000. Effect of statutes—If the failure of a master to observe a statute and the negligence of the servant concur to cause the injury the mas-

ter is liable. Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

(75) See Digest, §§ 5895–5899.

6000a. Comparative negligence—Statutes of other states—In an action under a Wisconsin statute providing that if the master and the servant were both negligent, but the negligence of the former was greater than that of the latter and contributed in a greater degree to the injury, the latter might recover, held that the negligence of the defendant and the contributory negligence of the plaintiff, and their comparative negligence, were questions for the jury, and that the verdict for the plaintiff was justified by the evidence. Marfia v. Great Northern Ry. Co., 124 Minn. 466, 145 N. W. 385.

A statute of Iowa providing that the contributory negligence of a servant shall not defeat a recovery, but that damages shall be diminished by the jury in proportion to his negligence, held applicable to a brakeman walking over the tracks of defendant in going to a meal. Moore v. Minneapolis & St. L. R. Co., 123 Minn. 191, 142 N. W. 152, 143 N. W. 326.

6001. Sudden emergency—Distracting circumstances—(76) Nasse v. Adriatic Mining Co., 116 Minn. 192, 133 N. W. 479; Brookman v. Chicago, G. W. R. Co., 116 Minn. 409, 133 N. W. 969; McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804.

6004. Assumption as to conduct of others—Where a servant is ordered by his foreman to work in a place it is not negligent for him to act on the assumption that the foreman will not render it unsafe without warning him. Kempfert v. Gas Traction Co., 120 Minn. 90, 139 N. W. 145.

It is not ordinarily negligent for a servant to act in reliance on the giving of customary signals. Sheehy v. Minneapolis & St. L. R. Co., 126 Minn. 133, 147 N. W. 964; Johnson v. Sartell Bros., 128 Minn. 239, 150 N. W. 784.

A switchman working about cars on a spur track in switching yards has a right to assume that cars will not be shunted down the spur without warnings or attendants where it is known or ought to be known by the persons shunting the cars that he is customarily working about the spur at the time. Especially is this true in the nighttime. Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660.

(81) Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300.

(82) See Cornell v. Great Northern Ry. Co., 112 Minn. 341, 128 N. W. 22; Sheehy v. Minneapolis & St. L. R. Co., 126 Minn. 133, 147 N. W. 964.

(83) Schoen v. Chicago etc. Ry. Co., 112 Minn. 38, 127 N. W. 433; Cornell v. Great Northern Ry. Co., 112 Minn. 341, 128 N. W. 22; Sheehy v. Minneapolis & St. L. R. Co., 126 Minn. 133, 147 N. W. 964.

6007. Obeying orders of superior—(88) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590; Beneson v. Swift & Co., 127 Minn. 432, 149 N. W. 668. See Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078.

6007a. Assurance of safety by master—Where the master directs the servant to perform specific work, and assures him that he can do so in safety, if the servant, in reliance upon such assurance, proceeds to perform the work, he is usually not chargeable either with contributory negligence or with a voluntary assumption of the risk, unless the danger be so obvious and imminent and so apparent to the ordinary mind that it would be unreasonable for him to rely upon the assurances given him. Whether it would be unreasonable for him to rely on such assurances is a question for the jury unless the evidence is conclusive. Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078.

6008. Taking position of danger unnecessarily—Where there are two means of doing an act, by one of which the act may be done with comparative safety, while the other means of doing the act is dangerous, it is the duty of the servant to choose the safer way, unless he is forced to choose the other by stress of circumstances. Hoveland v. Chicago etc. Ry. Co., 110 Minn. 329, 125 N. W. 266.

(89) See Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220; Hammer v. Great Northern Ry. Co., 113 Minn. 212, 129 N. W. 219; Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798; Hagen v. Chicago etc. Ry. Co., 123 Minn. 109, 143 N. W. 121; Petra v. Crookston Lumber Co., 128 Minn. 479, 151 N. W. 183; Titus v. Crookston Lumber Co., 130 Minn. 312, 153 N. W. 599. See McCabe v. Wilson, 209 U. S. 275 (fireman held not negligent in staying by his engine in face of danger); Erdman v. Deer River Lumber Co., 182 Fed. 42.

6009. Failure to give notice of dangerous position—(90) See Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660.

6011. Disregarding warnings and instructions—If a servant adopts a dangerous method of doing his work contrary to specific instructions and warnings he cannot recover for resulting injuries. Hostager v. Northwest Paper Co., 110 Minn. 408, 125 N. W. 902.

(92) See McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613; Schlemmer v. Buffalo etc. Ry. Co., 220 U. S. 590.

6012. Disregarding instructions as to appliances and method of work—(93) Hostager v. Northwest Paper Co., 110 Minn. 408, 125 N. W. 902.

6013. Failure to use safety appliances—(95) See Nasse v. Adriatic Mining Co., 116 Minn. 192, 133 N. W. 479.

6014. Failure to observe rules or orders of master—The question whether certain rules of the defendant, in respect to the inspection of cars, specifically made applicable to employees in the freight train service, applied to and controlled switchmen in the discharge of their duties, held one of fact for the jury. Lynch v. Great Northern Ry. Co., 112 Minn. 382, 128 N. W. 457.

It is not negligence per se for a brakeman to violate a rule of the company forbidding employees to ride on the pilots of engines, when defendant's negligence creates an emergency, and renders disobedience of the rule necessary to the discharge of the brakeman's duties. Pounds v. Chicago, G. W. R. Co., 114 Minn. 312, 131 N. W. 329.

A rule of defendant providing that car inspectors and repairers must not go between or beneath cars, or do any repairs between or beneath cars, while cars are being switched in or out of trains, construed, and held to apply only where such inspectors and repairers are actually engaged in the work of inspecting or repairing cars. Gjorvad v. Minneapolis etc. Ry. Co., 116 Minn. 233, 133 N. W. 609.

An unenforced rule against going between moving cars to couple or uncouple them does not relieve a railroad company from its failure to comply with the federal Safety Appliance Act. Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300.

The violation by an employee of a rule of the employer, made for the protection of employees, is ordinarily held to constitute negligence per se. But this doctrine is not an absolute one. It yields to practical necessity. If the employer has failed to comply with some requirement of law, and such failure makes it impossible for the employee to do his work in the usual way, this may excuse him, if he follows a method of doing the work which is the only method reasonably practicable under the circumstances, or is a method which a reasonably prudent man would follow. In this case a rule of defendant forbade brakemen going in between moving cars. The rule must be construed in connection with the statute. The course to be followed by a brakeman when an automatic coupler refuses to work is not pointed out in any rule. The only way to uncouple, without going between cars, was to stop the train and walk around to the other side. The conductor on the train, called by defendant, testified that it was not necessary for the brakeman to do this, but that he might go between the cars while standing and open the coupler. This was one of the things the statute was designed to avoid. Under all the circumstances of the case, the question whether disobedience of the rule was in this case negligence was one of fact for the jury.

Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798; Slaughter v. Illinois Central R. Co., 125 Minn. 96, 145 N. W. 790.

A rule of a railroad company provided that, "Conductors must inspect the running gear and brake and draft rigging of trains as often and as closely as practicable while on the road, require their men to assist in such inspection, remedy as far as possible any defects discovered, and remove from the train cars which are unsafe to run." A train made up ready for travel, in charge of a road crew, overdue to start, and which has attempted to leave the station, but is unable to make a heavy grade without application of additional power, which, however, is right at hand, is a train "on the road" as distinguished from a train "standing in a yard." McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446. See Louisville etc. Ry. Co. v. Wilson, 188 Fed. 417.

(1) Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798; Slaughter v. Illinois Central R. Co., 125 Minn. 96, 145 N. W. 790. See Steele v. Red River Lumber Co., 110 Minn. 219, 124 N. W. 978.

(96) Steele v. Red River Lumber Co., 110 Minn. 219, 124 N. W. 978; Id., 117 Minn. 199, 135 N. W. 389 (rule requiring that when a train is being pushed by an engine a trainman be stationed in a conspicuous position on the leading car, with proper signals, to perceive the first signs of danger and immediately signal the engineer); Nasse v. Adriatic Mining Co., 116 Minn. 192, 133 N. W. 479 (rule as to signalling skip in a mine); Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922 (rule against going between moving cars to uncouple them). See McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613 (brakeman boarding a moving train by raising a trap door of a vestibule); McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446 (rule as to repairs while a train is on the road); Great Northern Ry. Co. v. Hooker, 170 Fed. 154; Chicago etc. Co. v. Ship, 174 Fed. 353; Digest, § 6015.

(98) See Steele v. Red River Lumber Co., 110 Minn. 219, 124 N. W. 978.

6014a. Effect of observing rules—The defendant's rule requiring the one throwing the switch to lock it and take position on the opposite side of the track when a train is to be switched upon a sidetrack, was properly received in evidence even if this engine did not constitute a train. The trial court committed no reversible error in permitting the jury to determine whether such rule applied in the present case, nor in referring, in the charge, to plaintiff's testimony concerning the custom to cross the track. Peck v. Chicago etc. Ry. Co., 131 Minn. ——, 154 N. W. 1075.

6015. Coupling cars—(3) Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798; Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

(7) See Griffith v. Great Northern Ry. Co., 113 Minn. 126, 129 N. W. 152.

(8–10) Pounds v. Chicago, G. W. R. Co., 114 Minn. 312, 131 N. W. 329; Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798; Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145; Slaughter v. Illinois Central R. Co., 125 Minn. 96, 145 N. W. 790; Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922; Note, 41 L. R. A. (N. S.) 32.

6016. Miscellaneous cases—(11) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987 (laborer riding on engine—foot-board gave way); Tomczek v. Johnson, 110 Minn. 320, 125 N. W. 268 (laborer killed by fall of stone from car which he was pushing over an uneven track in a stone quarry—deceased loaded the stone on the car negligently); Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180 (experienced engineer walking in path between the rails of a roundhouse track struck by engine coming behind him without signals); Schoen v. Chicago etc. Ry. Co., 112 Minn. 38, 127 N. W. 433 (workman walking on tracks in railway yards—view unobstructed—thought that engine was stationary); Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389 (workman on false work of bridge stepping into a "boat-swain" chair without seeing that the rope by which it was suspended was fast or taking other precautions); Madden v. Duluth & Iron Range R. Co., 112 Minn. 303, 127 N. W. 1052 (fireman on locomotive firing when engine was running about a curve and over an uneven track at an excessive speed—knew that plate between engine and tender jumped); Cornell v. Great Northern Ry. Co., 112 Minn. 341, 128 N. W. 22 (assistant station agent—loading box car—jumped from car and was struck by engine backing from the west to a water tank—before jumping from car plaintiff looked toward the east but not toward the west—bell of engine not rung); Lynch v. Great Northern Ry. Co., 112 Minn. 382, 128 N. W. 457 (switchman reaching down to stop train by turning on air brake struck on head by trailing adjustable brake); Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220 (fireman leaning out between engine and tender to observe semaphore); Hammer v. Great Northern Ry. Co., 113 Minn. 212, 129 N. W. 219 (workman in switching yards walking on tracks when there was opportunity to walk between tracks—not absorbed in discharge of duties—failure to look out for engines—familiar with situation—run over by engine); Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590 ("gopher holing" in an iron mine—lighting short fuse with candle fastened to end of stick without clearly seeing end of fuse on account of smoke in the hole); Tostason v. Minneapolis Threshing Machine Co., 113 Minn. 394, 129 N. W. 593 (plaintiff stepping out of freight elevator without looking or paying any attention to where he was going—elevator stopped twenty inches above level of floor—plaintiff operat-

ing elevator); Denchfield v. Minneapolis etc. Ry. Co., 114 Minn. 58, 130 N. W. 551 (helper in roundhouse steadying a swinging coal chute in coaling a locomotive); Quesnell v. Great Northern Ry. Co., 114 Minn. 276, 130 N. W. 1104 (switchman in stepping off ladder of freight car was tripped by a low switch dangerously near track); Skarpmoen v. Cloquet Box Co., 114 Minn. 278, 130 N. W. 1106 (attempting to slide belt on pulley with a stick); Orcutt v. J. Neils Lumber Co., 114 Minn. 331, 131 N. W. 464 (unloading logs from a flat car with a peavy); Kotefka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482 (switchman after watching a coupling on one of two parallel tracks walked along the other track without looking for train on that track though he knew that a train was likely to pass thereon at that time); Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643 (operator of slasher in sawmill going on table of slasher to arrange slabs); Bennett v. Great Northern Ry. Co., 115 Minn. 128, 131 N. W. 1066 (fireman on switch engine in yards at ore docks crossing railway track at night); Bark v. Dixon, 115 Minn. 172, 131 N. W. 1078 (eating tainted food); Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6 (operating a coal chute); Hider v. Minneapolis etc. Ry. Co., 115 Minn. 325, 132 N. W. 316 (taking position on front end of handcar with four other men); Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752 (wearing a loose jacket about machinery); Isackson v. Lovell, 115 Minn. 481, 132 N. W. 918 (workman on steel water tower placing plank on which to work on spider rods instead of on edge of tank); Fieck v. Chicago, G. W. R. Co., 116 Minn. 47, 133 N. W. 66 (sectionman unloading motor car under directions of freight conductor); Anderson v. Fred Johnson Co., 116 Minn. 56, 133 N. W. 85 (painter using a scaffold made by resting a plank on two stepladders); Connelly v. Barnett & Record Co., 116 Minn. 86, 133 N. W. 87 (foreman of derrick crew working about derrick with defective adjustment of becket line); Keenan v. Chicago etc. Ry. Co., 116 Minn. 107, 133 N. W. 789 (car repairer crossing tracks in yards on his way home after day's work run over by train); Sweeney v. Poppenberger, 116 Minn. 134, 133 N. W. 474 (plasterer stepped in hole in defective scaffold though he knew of its existence); Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790 (inexperienced workman standing between two tracks in yards waiting to board a switching engine); Nasse v. Adriatic Mining Co., 116 Minn. 192, 133 N. W. 479 (shift boss in iron mine—attempting to push ore car out of the way of a descending skip in mine, instead of giving the usual signals for stopping the skip); Gjorvad v. Minneapolis etc. Ry. Co., 116 Minn. 233, 133 N. W. 609 (car inspector passing between cars of train which was being switched); Security Trust Co. v. St. Paul Building Co., 116 Minn. 295, 133 N. W. 861 (plasterer getting off hoist); Brookman v. Chicago, G. W. R. Co., 116 Minn. 409, 133 N. W. 969 (brakeman on work train dropping rails

taking a position of danger near train); Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307 (foreman of crew of sectionmen working on tracks in switching yards—trains constantly passing—absorption in work); Brown v. Chicago, B. & Q. R. Co., 117 Minn. 149, 134 N. W. 315 (sectionman digging hole under tie—absorbed in work—failure to keep a lookout for trains); Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739 (quarryman splitting stone caught by side of dump car as stone was being unloaded); Bartles v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759 (shoveling coal from tender of locomotive into firebox—coal piled high about gate of bin); Koivula v. Adriatic Mining Co., 118 Minn. 262, 136 N. W. 856 (defective timbering at top of cross-cut where it joined main drift in an iron mine); Evans v. Drake & Stratton Co., 119 Minn. 55, 137 N. W. 189 (stripping an iron mine—foreman of crew standing on tracks absorbed in work of drilling bank of trench—run over by dinky engine hauling empty dump cars—failure of engineer to give customary signals); Webster v. Chicago etc. Ry. Co., 119 Minn. 72, 137 N. W. 168 (conductor of freight train run over by engine of his train—foot apparently caught in rails); Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300 (firing dinky engine while running at an excessive speed over a rough road in an iron mine); Walson v. McGregor, 120 Minn. 233, 139 N. W. 353 (brakeman riding on footboard of dinky engine in railroad construction work); Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115 (boy working about a machine in a table factory reaching over revolving knives to take hold of a saw to see what was the matter with it); Hagen v. Chicago etc. Ry. Co., 123 Minn. 109, 143 N. W. 121 (car repairer walking dangerously near tracks in a path in the snow—failure to keep a constant lookout—knew of probable switching operations that might endanger him); Moore v. Minneapolis & St. L. R. Co., 123 Minn. 191, 142 N. W. 152, 143 N. W. 326 (brakeman leaving caboose in which he had been sleeping—walking on track in going for a meal—struck by gondola car pushed by an engine in his rear); Falkenberg v. Bazille & Partridge, 124 Minn. 19, 144 N. W. 431 (painter using defective scaffold); McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613 (brakeman boarding a moving train by raising a trap door of a vestibule); Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427 (failure of rear brakeman of freight train to signal following passenger train); Hutchins v. Sleepy Eye Tel. Co., 125 Minn. 362, 147 N. W. 279 (telephone linemen handling messenger wire near electric wire of city); Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113 (using jointer in factory); Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078 (working in a dangerous position in a clay pit with knowledge of the danger); Graseth v. N. W. Knitting Co.,

128 Minn. 245, 150 N. W. 804 (operating a mangle); Cady v. Twin City Taxicab Co., 129 Minn. 70, 151 N. W. 537 (driver of taxicab entering an unlighted garage in the evening fell into a new pit in the floor); Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539 (it is not negligent as a matter of law for the operator of an uninclosed freight elevator, who has no knowledge of obstructions in the shaft, to permit his body to swerve a few inches beyond the line of the elevator floor); Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323 (burning waste matter, including rags saturated with gasolene in furnace); Titus v. Crookston Lumber Co., 130 Minn. 312, 153 N. W. 599 (stepping off the end of a rollway of logs); Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100 (using defective stairs in a store).

CASES CLASSIFIED

6017. Injuries to railroad employees—Switchman thrown from box car—car stopped suddenly by engineer without signals. Byrne v. Great Northern Ry. Co., 111 Minn. 198, 126 N. W. 627.

Experienced engineer walking in a path between the rails of a roundhouse track struck by engine coming behind him without signals. Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180.

Laborer walking on tracks in yard of brewing company run down by yard locomotive. Schoen v. Chicago etc. Ry. Co., 112 Minn. 38, 127 N. W. 433.

Boilermaker injured when walking between engine and tender after repairing the engine—overalls caught on a loose strip of moulding on tender and he was thrown to the ground. Simpson v. Great Northern Ry. Co., 112 Minn. 268, 127 N. W. 1124.

Engine running backward pulling a gravel train—running around a curve and over an uneven track at an excessive speed—fireman thrown against engine and severely injured—plate between engine and tender jumped. Madden v. Duluth & Iron Range R. Co., 112 Minn. 303, 127 N. W. 1052.

Assistant station agent loading a box car—jumped from car and was struck by engine backing to a water tank. Cornell v. Great Northern Ry. Co., 112 Minn. 341, 128 N. W. 22.

Fireman thrown from cab by explosion of boiler of locomotive. Schwartzbauer v. Great Northern Ry. Co., 112 Minn. 356, 128 N. W. 286.

Repairer directed to repair a gasolene engine and pump in a railroad pumphouse—clothes caught in an unguarded shaft and a protruding key thereon—hurled about and killed. Thomas v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297.

Switchman reaching down to stop train by turning on air brake struck in the head by trailing adjustable brake. Lynch v. Great Northern Ry. Co., 112 Minn. 382, 128 N. W. 457.

Switchman thrown from box car in switching operations—cars brought together with violence. Magers v. Minneapolis etc. Ry. Co., 112 Minn. 435, 128 N. W. 576.

Conductor of freight train mounting ladder on front end of outside of caboose thrown under wheels by sudden stopping of train—improper application of emergency brake or improper working of a defective air brake. Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011.

Bridge carpenter injured in a collision between a train on which he was being transported to his work and a freight train of his master. Headline v. Great Northern Ry. Co., 113 Minn. 74, 128 N. W. 1115.

Fireman leaning out between engine and tender to observe semaphore struck by pole sustaining a telltale. Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220.

Laborer in switching yards run over by switch engine—walking on tracks where there was an opportunity to walk between tracks—not absorbed in discharge of duties—failure to look for engines. Hammer v. Great Northern Ry. Co., 113 Minn. 212, 129 N. W. 219.

Fireman injured by derailment of tender—engine without proper safety-chain connections and brakebeam supports. Kitman v. Chicago, B. & Q. R. Co., 113 Minn. 350, 129 N. W. 844.

Member of wrecking crew attempting to ply up car with pinch bar—car slid—caught pinch bar and pinioned his foot underneath. Tendall v. Great Northern Ry. Co., 113 Minn. 473, 130 N. W. 22.

Wiper or helper in roundhouse injured by fall of swinging coal chute which he was holding and steadying in coaling an engine. Denchfield v. Minneapolis etc. Ry. Co., 114 Minn. 58, 130 N. W. 551.

Switchman in stepping from ladder of freight car tripped by low switch dangerously near track. Quesnell v. Great Northern Ry. Co., 114 Minn. 276, 150 N. W. 1104.

Brakeman on freight train mounting car struck a truck standing between two Y tracks and was thrown to ground. Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375.

Switchman after watching a coupling on one track, without looking for a train, walked along the ties of a parallel track twenty feet and was struck by an engine coming up behind him. Kotefka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482.

Laborer in roundhouse burned by explosion caused by wooden plug in flue of stationary engine coming out. Senro v. Chicago & N. W. Ry. Co., 115 Minn. 110, 131 N. W. 1011.

Fireman on switch engine in yards at ore docks, while crossing tracks near docks, struck by train of ore cars without proper signal lights. Bennett v. Great Northern Ry. Co., 115 Minn. 128, 131 N. W. 1066.

Brakeman knocked off the side of a box car by a bank of hard snow near track. Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057.

Laborer injured while throwing ties from a moving train—lost his balance and tie fell on his foot. Person v. Great Northern Ry. Co., 115 Minn. 164, 131 N. W. 1084.

Operator of coal chute—hand caught in clutch gear on inside of bull wheel and arm torn from socket. Greer v. Great Northern Ry. Co., 115 Minn. 213, 132 N. W. 6.

Car repairer struck by train running at a dangerous speed in yards as he was leaving for home after a day's work—necessary to cross tracks in going to and from work. Keenan v. Chicago etc. Ry. Co., 116 Minn. 107, 133 N. W. 789.

Inexperienced laborer, while standing between two tracks in yards waiting to board a switching engine in order to go to his work, struck by engine on other track. Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790.

Car inspector killed by being caught between two parts of a train coming together as he was passing through an opening between cars—engineer backed without signals to "bunch the slack." Gjorvad v. Minneapolis etc. Ry. Co., 116 Minn. 233, 133 N. W. 609.

Brakeman on work train engaged in unloading rails—duty to watch progress of work and signal engineer for movement of train—standing near end of car—rail thrown off one end foremost stuck in the ground—movement of train raised other end in air and struck brakeman. Brookman v. Chicago, G. W. R. Co., 116 Minn. 409, 133 N. W. 969.

Laborer in roundhouse whose duty it was to start fires in locomotives injured by fall of coal in tender—coal piled high above gate of bin for coal in tender. Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759.

Conductor of freight train run over and killed by engine of his train—foot caught between rails—his stop signals with lantern were not heeded by engineer. Webster v. Chicago etc. Ry. Co., 119 Minn. 72, 137 N. W. 168.

Tender of coal chute fell from ladder attached to chute—fall due to lantern going out—lantern not supplied with the proper kind of oil. Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142.

Brakeman riding on footboard of dinkey engine in construction work injured by derailment of engine. Walson v. McGregor, 120 Minn. 233, 139 N. W. 353.

Brakeman thrown between cars in switching operations—cars being **pushed—cus**tomary practice to have cars coupled—cars uncoupled—**brakeman** walking on top of cars—cars separated and he fell in opening. **Denoyer v.** Railway Transfer Co., 121 Minn. 269, 141 N. W. 175.

Switchman in the act of boarding a car by placing his foot on the **stirrup struck** by the handle of an unlighted switch placed dangerously **near the track**. McDonald v. Railway Transfer Co., 121 Minn. 273, 141 **N. W. 177.**

Brakeman thrown from seat in a caboose by a sudden and violent **stopping of** the train caused by a break in the air hose connecting the **brake rods** between two cars. Rose v. Minneapolis etc. Ry. Co., 121 **Minn. 363,** 141 N. W. 487.

Brakeman in attempting to board a moving car in switching yards was **injured by his** feet catching in a hard and crusted snow drift near track. **Burdick v. C**hicago etc. Ry. Co., 123 Minn. 105, 143 N. W. 115.

Car repairer walking near tracks in switching yards struck by car be**ing backed** at excessive speed, without customary lookout, and with**out the cust**omary ringing of the bell on the locomotive. Hagen v. Chi**cago etc. Ry**. Co., 123 Minn. 109, 143 N. W. 121.

Brakeman passing over flat car loaded with threshing machine sepa**rators took** hold of a part of the machinery to steady himself and it gave **way, whereb**y he was injured. Suprenant v. Great Northern Ry. Co., 123 **Minn. 170,** 143 N. W. 320.

Trucker of freight injured while sweeping out a box car—car struck **with unusual** force by another car in switching operations—no warning **—supposed t**o keep his own lookout. Beaton v. Great Northern Ry. Co., **123 Minn. 17**8, 143 N. W. 324.

Brakeman leaving caboose, in which he had been sleeping, to go for **a meal—wal**king down track—struck by gondola car pushed by an en**gine in his r**ear. Moore v. Minneapolis & St. L. R. Co., 123 Minn. 191, **142 N. W. 15**2, 143 N. W. 326.

Laborer injured while unloading logs from a flat car—contiguous cars **being unloa**ded by separate crews—cars alongside a river into which **logs were ro**lled—accident caused by fellow servant letting log roll with**out waiting** for the unloading of an adjoining car. Nylund v. Duluth & **N. E. Ry. Co**., 123 Minn. 249, 143 N. W. 739.

Semaphore repairer—injured while at work on a semaphore pole by an **explosion of** dynamite in blasting operations conducted by an independ**ent contract**or. Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 **N. W. 466.**

Machinist's helper injured while engaged in driving bolts in a locomo**tive with a** bolt-driver operated by hydraulic pressure. Novak v. Great **Northern Ry**. Co., 124 Minn. 141, 144 N. W. 751.

Engineer injured by derailment—open switch—company operating trains on track of another company under a traffic agreement. Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772.

Laborer injured while employed in taking ice from an ice house of defendant—accident due to defective ice tongs and unlighted condition of ice house. Marfia v. Great Northern Ry. Co., 124 Minn. 466, 145 N. W. 385.

Brakeman attempting to enter train in motion by lifting trap door—defective spring to door—hand caught and thumb injured. McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613.

Rear brakeman killed by collision between passenger and freight train—freight train broke in two because of a draw-bar pulling out—brakeman failed to signal passenger train following freight train. Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427.

Flagman at highway crossing killed by being struck by a box car suddenly and without customary warning driven across highway—car stood on tracks near highway without its brakes being set—other cars running at a dangerous speed driven against it without warning. Sheehy v. Minneapolis & St. L. R. Co., 126 Minn. 133, 147 N. W. 964.

Laborer in roundhouse—hand caught while lowering locomotive with hydraulic jack—negligent use of wrench instead of a lever in jack. Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106; Id., 131 Minn. —, 154 N. W. 964.

Brakeman went under car to repair brake beam—ordered to do so by conductor—train started without warning to brakeman. McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446.

Member of a bridge crew injured by fall of a part of a pile in a trestle bridge which the crew was repairing—he was separating it from the bottom part of the pile and it unexpectedly dropped from the cap to which it was supposed to be firmly attached. Marshall v. Chicago etc. Ry. Co., 127 Minn. 244, 149 N. W. 296.

Foreman of crew in switching yards killed while attempting to hook a defective car with a defective coupler to another car on a spur track in the nighttime—other cars were allowed to run down the spur without warnings and collided with the cars between which the foreman was working—no lights or attendants on moving cars. Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660.

Member of switching crew fell under cars in switching operations and was killed, probably on account of a defective brake-step. Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165.

Carpenter using hand jointer—knives dull or nicked and unguarded—board kicked back and hand came in contact with knives. Puls v. Chicago, B. & Q. R. Co., 127 Minn. 507, 150 N. W. 175.

Bridge builder fell while chipping stone at the head of a bridge chord. Hanson v. Great Northern Ry. Co., 128 Minn. 122, 150 N. W. 380.

Car repairer injured by fall of door of box car which he was repairing. Bauer v. Great Northen Ry. Co., 128 Minn. 146, 150 N. W. 394.

Truckman unloading freight car injured by fall of iron running board extending from platform to car—board slipped—no cleat to prevent slipping. Stash v. Great Northern Ry. Co., 128 Minn. 329, 151 N. W. 124.

Brakeman riding on the rear end step of a locomotive tender as train passed a station platform—leg caught and squeezed between the face of the platform and the edge of the step above the one on which he was standing—stirrup and steps were out of alignment and extended several inches beyond the face of the tender. Smith v. Great Northern Ry. Co., 131 Minn. —, 153 N. W. 513.

Yardman run over and killed while clearing snow from switch—foot probably caught between switch bar and tie. Kludzinski v. Great Northern Ry. Co., 130 Minn. 222, 153 N. W. 529.

Station agent required to run pumping house—either slipped on greasy floor or inadvertently went too near engine in pumping house—had just turned some grease cups on the rear of the pump and started toward the front of the engine to throw the clutch in gear—hand came between the crank of the shaft and top of the hood and was cut off—setscrews and crank might have been guarded but were not. Knapp v. Great Northern Ry. Co., 130 Minn. 405, 153 N. W. 848.

The conductor of a freight train threw a switch to permit the engine of his train to run upon a side track. After throwing the switch he stepped upon the track, stumbled and fell, and was run over by the engine. Peck v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1075.

(12) Hoffer v. Powers, 112 Minn. 409, 128 N. W. 299 (brakeman injured in coupling engine and car—defective coupler); Griffith v. Great Northern Ry. Co., 113 Minn. 126, 129 N. W. 152 (brakeman killed while adjusting coupler to couple engine and car—train had been separated at public road—conflict of evidence as to whether deceased gave engineer signal to back); Pounds v. Chicago, G. W. R. Co., 114 Minn. 312, 131 N. W. 329 (defective couplers—standing with right foot on "heel" of pilot and left foot between slats of pilot—right hand holding "pin lifter" —using left hand to open knuckle and hold drawbar in position—when plaintiff attempted to push drawbar into position pin-lifter rod pulled to one side causing him to lose his balance so that right foot slipped from its support and he fell under wheel); Breske v. Minneapolis & St. L. R. Co., 115 Minn. 386, 132 N. W. 337 (uncoupling box car from defective car by releasing a chain—sudden movement of cars without warning); Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300 (going between moving cars to open a knuckle of an automatic coupler on a car then used in interstate commerce); Ahrens v. Chicago etc. Ry. Co.,

121 Minn. 335, 141 N. W. 297 (going between moving cars to adjust coupling appliances—defective coupler—federal appliance act applicable); Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798 (going between moving cars to uncouple them—defective couplers); Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145 (defective coupler—going between cars to lift pin—uncertain just how accident happened—deceased probably stumbled over switch rod); Lewis v. Chicago, G. W. R. Co., 124 Minn. 487, 145 N. W. 393 (head of brakeman caught between tender of engine and the end of certain poles projecting from a car which he had just uncoupled or was uncoupling—cause of movement unproved); Slaughter v. Illinois Central R. Co., 125 Minn. 96, 145 N. W. 790 (going between moving cars to uncouple them—defective coupler—federal appliance act—lifting pin with hand—foot caught between guard rail and some other portion of switch); Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922 (pin lifter missing—going between moving cars to uncouple them—run over).

(13) Bell v. Northern Pacific Ry. Co., 112 Minn. 488, 128 N. W. 829 (ordered to remove "kinks" in rails—rail sprang from its position when spikes and angle bars were removed and struck plaintiff, breaking his leg); Hider v. Minneapolis etc. Ry. Co., 115 Minn. 325, 132 N. W. 316 (two men on handcar suddenly and without warning jumped from car while it was in motion, releasing plaintiff's support and causing him to fall from the car); Fieck v. Chicago, G. W. R. Co., 116 Minn. 47, 133 N. W. 66 (unloading motor car from freight car under direction of freight conductor); Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307 (foreman of section crew working in switching yards in constant use run over and killed as he was directing a crew); Brown v. Chicago, B. & Q. R. Co., 117 Minn. 149, 134 N. W. 315 (struck by passing train while digging hole under tie); Naneff v. Great Northern Ry. Co., 120 Minn. 18, 138 N. W. 1027 (jostled off crowded and moving handcar by fellow servant); Pylaczinski v. Great Northern Ry. Co., 120 Minn. 74, 139 N. W. 147 (plaintiff and three other sectionmen loading ties on a push car—customary practice not to drop ties on car without a signal—neglect to give signal with result that tie fell back and crushed plaintiff's right forefinger); Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843 (taking a small stone from under a rail—hand struck by tie negligently let fall by fellow servants); Longmore v. Great Northern Ry. Co., 125 Minn. 12, 145 N. W. 399 (crew replacing defective ties—putting new tie under rail—plaintiff's foot caught between tie and rail—evidence held not to show any negligence on part of foreman or fellow servants); Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385 (removing old ties from track and placing them lengthwise between tracks so as to be out of way of trains—between main track and lead track—freight train passing on

main track—at same time switch engine on lead track approached without warnings and struck and killed sectionman as he was getting a tie out of the way of the freight); Cherpeski v. Great Northern Ry. Co., 128 Minn. 360, 150 N. W. 1091 (loading rails on a flat car—plaintiff injured by negligence of fellow servants in throwing end of rail on car before the usual notice or warning was given); Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177 (hit by horse struck by engine and thrown against him); Lindstrom v. Great Northern Ry. Co., 129 Minn. 512, 152 N. W. 875 (collision between train and handcar—dense fog); Creamus v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 616 (lifting hand car from tracks to avoid collision with train—overexertion causing hernia); Castigliano v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 744 (experienced workman run over by passenger train in transfer yards—knew that passenger trains were frequently running over tracks—had just stepped off tracks to avoid another train and stepped on again without looking); Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093 (struck by steel chipped from a maul while spiking ties).

(32) See McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613.

(63) Johnson v. Oakes, 110 Minn. 94, 124 N. W. 633.

(64) Wickham v. Chicago etc. Ry. Co., 110 Minn. 74, 124 N. W. 639, 994.

(65) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987.

(66) Steele v. Red River Lumber Co., 110 Minn. 219, 124 N. W. 978; Id., 117 Minn. 199, 135 N. W. 389.

(67) Bruckman v. Chicago etc. Ry. Co., 110 Minn. 308, 125 N. W. 263.

(68) Hoveland v. Chicago etc. Ry. Co., 110 Minn. 329, 125 N. W. 266.

6019. Injuries to workmen in factories, mills and workshops—Electrician slipped while attempting to clean shaft turned by an electric motor—hand thrown upward was caught in cog-wheels attached to shaft—machinery unguarded. Snyder v. Waldorf Box Board Co., 110 Minn. 40, 124 N. W. 450.

Operator of grain elevator injured while attempting to shift a belt on a pulley with his hands. Sorseleil v. Red Lake Falls Milling Co., 111 Minn. 275, 126 N. W. 903.

Feeder of planing machine—board kicked back owing to defective adjustment of rollers. Blomquist v. Minneapolis Furniture Co., 112 Minn. 143, 127 N. W. 481.

Oiler and watchman in a flour mill killed by falling into an open conveyer. Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856.

Helper to millwright injured in attempting to slide a belt on a pulley with a stick. Skarpmoen v. Cloquet Box Co., 114 Minn. 278, 130 N. W. 1106.

Sorter of lumber in lumber yard connected with sawmill thrown from tramway while attempting to replace tram car on tramway. McCutcheon v. Virginia & Rainy Lake Co., 114 Minn. 226, 130 N. W. 1023.

Laborer in mill injured in lowering a metallic curtain. Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472.

Operator of wood-shaper in wagon stock factory—hand caught in unguarded shaper. Lundberg v. Minneapolis Iron Store Co., 115 Minn. 174, 131 N. W. 1016.

Engineer in electric light plant killed by his clothes being caught in a rapidly revolving unguarded clutch of a gas engine. Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752.

Laborer in brewery operating a freight elevator—four fingers of left hand drawn between cable and drum and cut off. Berland v. Duluth Brewing & Malting Co., 116 Minn. 418, 133 N. W. 961.

Operator of a derrick struck by crank. McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118.

Carpenter standing on ladder to saw off end of belt-shifter fell on account of defect or want of rung of ladder. Larson v. Swift & Co., 116 Minn. 509, 134 N. W. 122.

Operator of washing machine in laundry of hotel—arm caught by fall of cover—assistant engineer starting machine without warning. Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306.

Packer in flour mill fell while mounting a ladder not properly spiked at foot—ladder slipped. O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399.

Helper to millwright in a paper mill injured by starting of a coal conveyer without notice to him while he was working about it. Wiggin v. Northwest Paper Co., 119 Minn. 273, 137 N. W. 1113.

Apprentice in factory for manufacture of gasolene traction engines ordered by foreman to repair a grease cup on an engine—foreman started engine without warning while apprentice was standing near drive wheel whereby the latter's foot was crushed. Kempfert v. Gas Traction Co., 120 Minn. 90, 139 N. W. 145.

Laborer in a stone dressing factory operating a traveling crane injured by fall of stone from grab hooks of crane on account of defective stone where the holes were cut for the grab hooks. Stage v. C. H. Young Co., 120 Minn. 205, 139 N. W. 298.

Boy about sixteen years old employed in a table factory about a "sticker" or "molder"—machine unguarded—hand came in contact with knives while he was examining one of the saws. Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115.

Inexperienced operator of an unguarded bottling machine in a brewery injured by explosion of bottle which he was filling with beer. **Bertram** v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045.

Operator of jointer in factory—shoving board over knives of jointer—board jerked out of his hands—no guard about knives—hand caught in knives. **Bork** v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113.

Laborer in bottling factory injured by explosion of bottle of carbonated water which he was holding before his eyes for inspection. Jones v. **Massolt Bottling** Co., 126 Minn. 364, 148 N. W. 278.

Millwright burned to death in fire consuming factory. Rademacher v. **Pioneer Tractor** Mfg. Co., 127 Minn. 172, 149 N. W. 24.

Operator of a knitting machine injured by breaking of needle. Hedin v. **Northwestern** Knitting Co., 127 Minn. 369, 149 N. W. 541.

Carpenter using a hand jointer—knives dull or nicked and unguarded—board kicked back and hand came in contact with knives. Puls v. **Chicago, B. & Q.** R. Co., 127 Minn. 507, 150 N. W. 175.

Roustabout in a flour mill injured by fall of a sack of oats from a belt elevator. Johnson v. United Flour Mills Co., 128 Minn. 297, 150 N. W. 902.

Operator of a machine for cutting and stamping shoe patterns injured by falling hammer of machine due to defective lever. Zeuli v. Foot, Schulze & Co., 130 Minn. 184, 153 N. W. 310.

Janitor of factory burned to death—waste matter to be burned in furnace included rags saturated with gasolene—when burned these rags generated gases which became ignited and spread rapidly throughout cellar from which there were no proper exits. Conley v. Louis F. Dow Co., 130 Minn. 186, 153 N. W. 323.

Operator of a device for gluing barrels injured by hot glue escaping from a barrel which he was shaking in order to make the glue come in contact with all parts of the interior of the barrel. Clymer v. Kellogg, Spencer & Sons, 130 Minn. 327, 153 N. W. 602.

(4) **McInerny** v. St. Luke's Hospital Assn., 121 Minn. 10, 141 N. W. 837.

(49) **Rickers** v. Mission Furniture Co., 110 Minn. 156, 124 N. W. 641.

(50) **Hostager** v. Northwest Paper Co., 110 Minn. 408, 125 N. W. 902.

(01) **Peterson** v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534.

(80) **Brown** v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161 (operator of bolter reducing material to be sawed into laths struck by piece of board hurled by the saws of the bolter); Kanz v. J. Neils Lumber Co., 114 Minn. 466, 131 N. W. 643 (operator of slasher whose duty it was to arrange the slabs that were being carried on the conveyer chains up the slasher table to the saws—arranging slabs with a pick-

aroon—lost balance and fell into one of the holes of the sprocket wheels carrying the chains—left foot caught by projecting dogs on the chain and forced into the hole and mangled); Johnson v. Sartell Bros. Co., 128 Minn. 239, 150 N. W. 784 (plaintiff injured by starting of log carriage without customary signals); Petra v. Crookston Lumber Co., 128 Minn. 479, 151 N. W. 183 (unloading logs from a car on a trestle in a lake—part of logs held by a "key log"—plaintiff attempted to move this log with his peavy—crawling under a shelf of other logs—logs on top rolled down and plaintiff was struck).

6020. Injuries to workmen in mines and quarries—Inexperienced laborer in iron mine directed to operate ore car on gravity track—defective brake—thrown from car. Hill v. Republic Iron & Steel Co., 112 Minn. 244, 127 N. W. 925.

Laborer in iron mine injured by explosion of dynamite while "gopher holing." Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590.

Shift boss in iron mine in attempting to push an ore car out of a shaft to avoid a descending skip had his hand crushed by the skip. Nasse v. Adriatic Mining Co., 116 Minn. 192, 133 N. W. 479.

Laborer ordered to clean out pit in shaft under skip—skip lowered on him without warning. Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310.

Filling quarry with dirt and stone hauled in by railroad on dump cars—large stone caught against side of car as it was being dumped—plaintiff ordered to split rock—when rock was split lower half slid out from car and upper half fell on plaintiff's foot. Olsen v. Blue Limestone Co., 118 Minn. 244, 136 N. W. 739.

Laborer in iron mine injured by fall of ore from top of main drift at opening of cross-cut—defective timbering. Koivula v. Adriatic Mining Co., 118 Minn. 262, 136 N. W. 856.

Explosion of dynamite used in blasting in a mine—plaintiff injured in attempting to rescue a fellow servant. Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W. 12.

Stripping an iron mine—foreman of crew run over by dinky engine hauling cars—foreman standing on tracks absorbed in work of drilling bank of trench. Evans v. Drake & Stratton Co., 119 Minn. 55, 137 N. W. 189.

Stripping an iron mine—fireman of dinky engine thrown from engine while putting in coal—engine lurched and jumped—uneven roadbed—excessive speed. Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300.

Gopher holing—explosion near plaintiff without warning. Grbich v. Pittsburgh Iron Ore Co., 119 Minn. 365, 138 N. W. 309.

Miner going down a shaft in an iron mine in an elevator—elevator **dropped** forty or fifty feet and stopped suddenly through the negligence **of the engineer** in charge, who was incompetent. Pullaman **v.** Bangor **Mining Co.,** 121 Minn. 216, 141 N. W. 114.

Plaintiff injured by an explosion while engaged in "shaking a hole" **in a drift in** a mine—after lighting fuse plaintiff withdrew to await ex**plosion—fuse** failed to explode charge promptly and plaintiff went back, **without** waiting a proper time, to examine the fuse, when an explosion **occurred** whereby he was injured. Stanich v. Pearson Mining Co., 122 **Minn. 29,** 141 N. W. 1100.

Crew engaged in stripping a mine—train of dump cars moved sud**denly** without the customary signals—plaintiff, in attempting to get up **a sloping** bank away from the train had his foot caught and crushed by **the wheels** of the train. Petterson v. Butler Bros., 123 Minn. 516, 144 **N. W. 407.**

Plaintiff a member of a crew engaged in moving a section of track for **a steam** shovel—crew were holding the section when a straw boss told **them to let** go—plaintiff, a foreigner, did not understand order and held **on—section** fell on his foot. Morovich v. Inland Steel Co., 131 Minn. **—, 154 N.** W. 735.

(84) **Tomczek** v. Johnson, 110 Minn. 320, 125 N. W. 268.

See Note, 87 Am. St. Rep. 557.

6021. Injuries to servants in elevators—Plaintiff stepped out of freight **elevator** without looking or paying any attention to where he was going **and fell to** the floor—elevator stopped twenty inches above level of floor **—plaintiff** operating elevator. Tostason v. Minneapolis Threshing Ma**chine Co., 113** Minn. 394, 129 N. W. 593.

Operator of elevator stepped out of it for a moment to see if person **calling for it** was above—as he stepped out car moved up—in stepping **back he was** tripped by the floor of the ascending car leaving his body **partly within** and partly without the door—in that position he was **caught. Johnson** v. Finch, Van Slyck & McConville, 115 Minn. 252, 132 **N. W. 276.**

Freight elevator in brewery—workman using elevator had four fingers **cut off by** coming in contact with lifting cables and drawn between **cables and** drum—cables and drum unguarded. Berland v. Duluth **Brewing** & Malting Co., 116 Minn. 418, 133 N. W. 961.

Plaintiff put his head into shaft of elevator to examine screw eyes on **post—elevator** moved without warning. Beier v. Aberdeen Hotel Co., **118 Minn. 237,** 136 N. W. 757.

Elevator in dye house—automatic gates—one gate out of order—no **elevator operator**—to keep elevator for further use rope used to move it **was looped** and put over a picket or bar in the cage—gate left open—

failure to tie elevator—servant nineteen years old fell down shaft and was killed. Murphy v. Gross, 118 Minn. 311, 136 N. W. 868.

Elevator in factory used for moving materials operated by workman on floor above—car loaded with materials pushed into elevator and elevator operated from floor above—no one riding in elevator—door of elevator worked automatically—workman caught by descending door as elevator moved up, before he could get out after loading it. Savino v. Griffin Wheel Co., 118 Minn. 290, 136 N. W. 876.

Miner going down a shaft in a mine in an elevator—elevator dropped forty or fifty feet and stopped suddenly through the negligence of the engineer. Pullaman v. Bangor Mining Co., 121 Minn. 216, 141 N. W. 114.

Elevator in brick and tile factory—boy caught between platform of elevator and floor of building—elevator crudely constructed and inherently dangerous. Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488.

Experienced workman using elevator for his own private convenience—sick—dizzy—going to next story for medicine—elevator unenclosed on two sides—manner of accident unknown—body of workman found lying on floor of elevator with part of his body hanging over one of the unenclosed sides of the elevator—held to have assumed risk. Johnson v. Northern Pacific Ry. Co., 125 Minn. 29, 145 N. W. 628.

Boy seventeen years old killed while operating a freight elevator—head came in contact with a projection in the elevator shaft—elevator enclosed on two sides. Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539.

Workman killed by falling down elevator shaft—defective automatic gate failed to work and left shaft exposed. Diebel v. Wolpert, Davis & Co., 129 Minn. 77, 151 N. W. 541.

See Digest, §§ 1210, 5896; Note, 2 L. R. A. (N. S.) 647; 15 Id. 784; 18 Id. 911; 21 Id. 592.

6022. **Miscellaneous cases**—Plaintiff engaged in dumping materials excavated from a cellar into a wagon by means of a large steel bucket put his hand behind its supporting bail—bucket dumped—its rear end, in tipping up, passed through the clearance between it and the bail—plaintiff's hand was caught and hurt. Johnson v. MacLeod, 111 Minn. 479, 127 N. W. 497, 1120.

Structural iron crew engaged in the construction of a high building—mast of lifting derrick slipped out of position and fell, causing a workman to fall. Hamlin v. Lanquist & Illsley Co., 111 Minn. 491, 127 N. W. 490.

Plaintiff a workman on the false work of Fort Snelling bridge—suspended in a "boatswain" chair—when temporarily out of chair ordered

by foreman to get an auger in the chair—foreman had previously ordered the workman holding the rope to the chair to another part of the work leaving the rope unfastened—to get the auger as directed plaintiff stepped into the chair which fell and he was thrown to the ground eighty feet below. Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389.

Laborer assisting in making alterations in a hopper in a grain elevator in the course of construction struck by falling plank. Lindgren v. William Bros Boiler Mfg. Co., 112 Minn. 186, 127 N. W. 626.

Member of crew putting steel arches in a building ordered by his foreman to go upon a scaffold which was defective and broke under him. Johnson v. St. Paul Foundry Co., 112 Minn. 352, 128 N. W. 293.

Workman at mortar box placed directly under a derrick on a building in the course of construction killed by fall of plank from derrick. Foley v. Hoy, 113 Minn. 186, 129 N. W. 215.

Woman employed in a department store struck on the head by the door of a large metallic waste paper box—door of box moved by inexperienced and incompetent boy, a fellow servant. McVay v. Mannheimer Bros., 113 Minn. 225, 129 N. W. 371.

Electrical engineer riding to his work on a truck of his master injured through concurrent negligence of driver of truck and street car. Coleman v. Minneapolis St. Ry. Co., 113 Minn. 364, 129 N. W. 762.

Carpenter shingling the porch of a house thrown to the ground by the breaking of a plank in a scaffold. Lee v. H. N. Leighton Co., 113 Minn. 373, 129 N. W. 767.

Mason's tender while helping to move a scaffold in a building in the course of construction fell through hole in floor. Johnson v. Klarquist, 114 Minn. 165, 130 N. W. 943.

Watchman on a boat in walking on deck at night stumbled over a ladder and fell into an open hatch. Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104.

Teamster thrown from wagon load of logs—stake holding logs on wagon broke. Coultas v. Hennepin Paper Co., 114 Minn. 309, 131 N. W. 319.

Workman unloading logs from a flat car with a peavy—chains holding logs to car were fastened with fid hooks—shanks improperly up instead of down. Orcutt v. J. Neils Lumber Co., 114 Minn. 331, 131 N. W. 464.

Logger killed by fall of logs from a sled—driving out a defective fid hook in a binding chain. Olson v. Joseph Gibson Co., 115 Minn. 25, 131 N. W. 637.

Member of a steam shovel crew injured by fall of heavy stone from caving gravel bank. Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625.

Riveter injured by explosion in can used to catch rivets—powder left

in can by foreman to cause explosion for fun. Doucre v. Nickel, 115 Minn. 40, 131 N. W. 852.

Servant in hotel eating tainted food furnished by the master. Bark v. Dixson, 115 Minn. 172, 131 N. W. 1078.

Workman in lumber yard injured by fall of pile of boards. Francoeur v. Gribben Lumber Co., 115 Minn. 200, 132 N. W. 199.

Engineer of self-propeling steam hoist injured in jumping from hoist as it skidded down tracks. Murphy v. Duluth Crushed Stone Co., 115 Minn. 308, 132 N. W. 294.

Plumber injured by unguarded hoisting apparatus. Healy v. Hoy, 115 Minn. 321, 132 N. W. 208.

Laborer in trench injured by slipping of cross timbers in trench not properly blocked. Jacobsen v. Minneapolis, 115 Minn. 397, 132 N. W. 341.

Workman on steel water tower and tank thrown from a plank by the breaking of a spider rod on which the plank rested. Isackson v. Lovell, 115 Minn. 481, 132 N. W. 918.

Inexperienced workman struck in the eye by a piece of metal from a file which he was driving into a piece of wood with a hammer. Nordberg v. Hall, 116 Minn. 71, 133 N. W. 168.

Foreman of derrick crew killed by breaking of boom stick due to defective adjustment of becket line. Connelly v. Barnett & Record Co., 116 Minn. 86, 133 N. W. 87.

Carpenter injured by falling into a bulkhead while in the act of climbing on a plank which he supposed was nailed but which was not. Reid v. N. W. Fuel Co., 116 Minn. 96, 133 N. W. 161.

Plasterer injured by falling down hoist shaft by reason of negligent movement of lift. Security Trust Co. v. St. Paul Building Co., 116 Minn. 295, 133 N. W. 861.

Workman killed while pushing box car down a spur track to defendant's warehouse—other cars insufficiently blocked followed, moved by gravity—collision—workman caught between colliding cars. Hartikka v. D. G. Cutler Co., 117 Minn. 344, 135 N. W. 1005.

Workman in lumber camp struck by ax flying off handle in hands of fellow servant. Pearson v. Norling, 117 Minn. 527, 135 N. W. 1134.

Helper about ditching machine slipped and his foot was caught in the bevel gear. Falconer v. Sherwood, 118 Minn. 357, 136 N. W. 1039.

Laborer unloading timbers from car—timber dropped from car without customary warning. Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099.

Fireman on a dredge scalded while attempting to make an adjustment of one of the parts attached to the boiler of the engine. Johnson v. Forrestal, 119 Minn. 202, 137 N. W. 1095.

Chauffeur injured by overturn of automobile in which he was riding under direction of the master, who was driving it. Patterson v. Adam, 119 Minn. 283, 137 N. W. 1112.

Laborer injured by explosion of boiler in municipal water and light plant—boiler old and defective—packing blown out—boiler not inspected by state officer. Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674.

Laborer in gravel pit hit by "scale" attached to derrick for raising gravel—signalman on bank of pit failed to give customary signal. Burke v. Ash, 120 Minn. 388, 139 N. W. 705.

Swamper in lumber camp injured by falling tree—sawyers neglected to give the customary signal before fall of tree. Elenduck v. Crookston Lumber Co., 121 Minn. 53, 140 N. W. 125.

Driver of taxicab thrown out of cab into river while crossing a bridge—steering gear defective—locking of front wheels. Murphy v. Twin City Taxicab Co., 122 Minn. 363, 142 N. W. 716.

Plaintiff loading dump car with clay—fellow servants were prying off large pieces of frozen clay from a bank above him—customary practice required them to warn those working below of the impending fall of the pieces of clay pried off—failure to give warning—plaintiff was struck by large piece of clay, so pried off. Hanson v. Red Wing Sewer Pipe Co., 122 Minn. 415, 142 N. W. 804.

Plaintiff was injured while engaged in hoisting machinery into a building—steel beam projected beyond the building line over the window through which the machinery was to be hoisted—pulley and hoisting ropes were attached to this beam—while the machinery was being raised fellow servants of plaintiff let go the handles of the windlass whereby the machinery fell and injured plaintiff. Casey v. Pillsbury Flour Mill Co., 122 Minn. 474, 142 N. W. 726.

Painter injured while painting in an elevator shaft by being struck by a counterweight attached to one of the elevator cars. Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112; Id., 127 Minn. 364, 149 N. W. 459.

Laborer working about an ore dock sent by the foreman to work on ice below the dock—stick lying on edge of dock in a position dangerous to persons working on the ice beneath fell and killed the laborer. Nilsson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789.

Laborer on coal docks killed by fall of defective coal chute. Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N. W. 774.

Laborer injured by fall of timber while engaged in repair of a bridge—hydraulic jacks used under timber furnished too small a facing and in consequence the timber buckled and fell. Schultz v. St. Paul, 124 Minn. 257, 144 N. W. 955.

Laborer moving railroad box car on sidetrack by means of pinch-bars—other cars moved unexpectedly—cause of movement not shown. Koury v. Chicago, G. W. R. Co., 125 Minn. 78, 145 N. W. 786.

Member of crew of telephone linemen engaged in stringing a telephone message wire in an alley killed by the wire coming in contact with electric wire of city. Hutchins v. Sleepy Eye Tel. Co., 125 Minn. 362, 147 N. W. 279.

Laborer working in an excavation injured by fall of pile sheeting used to prevent caving in. Volpe v. Cederstrand, 126 Minn. 355, 148 N. W. 119.

Laborer in a clay pit killed by fall of earth and clay from wall of pit. Dimetre v. Red Wing Sewer Pipe Co., 127 Minn. 132, 148 N. W. 1078.

Member of crew of construction company injured while pushing a car from a string of freight cars—other cars were bumped against the string of cars by another crew of workmen without warning. Maloof v. Chicago etc. Ry. Co., 127 Minn. 272, 149 N. W. 284.

Laborer working in a ditch injured by a caving in of the earth. Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465.

Truckman on an elevated platform used for icing cars injured by being pushed off the platform by the crowding of another truck. Beneson v. Swift & Co., 127 Minn. 432, 149 N. W. 668.

Craner in a dredging outfit injured, while standing upon the pulley to fix the trip rope, by the starting of the machinery without notice. Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938.

Laborer engaged in tearing down a building—reached over a cornice to put a rope through it—brick loosened with his weight and cornice bent down, whereby he lost his balance and fell to the street below and was killed. Velin v. Lauer Bros., 128 Minn. 10, 150 N. W. 169.

Farm laborer run down by a runaway team of the master while he was husking corn in a field, the master working with the team in the rear of the servant. Schultz v. Duel, 128 Minn. 213, 150 N. W. 786.

Janitor of building killed by falling from ledge of window which he was washing. Davison v. Ressler, 128 Minn. 204, 150 N. W. 802.

Oiler on coal dock injured by starting of machinery without notice while he was oiling the rig. Arveson v. Boston Coal Dock & Wharf Co., 128 Minn. 178, 150 N. W. 810.

Driver of taxicab entering garage of the master at night, in the course of his employment, injured by falling into a new pit which was unguarded and unlighted and of which he had no knowledge. Cady v. Twin City Taxicab Co., 129 Minn. 70, 151 N. W. 537.

Laborer excavating a cellar in company with a large crew of men injured by a cave-in due to the negligence of a fellow servant in pick-

ing away a pillar of earth left to support the earth above. Olson v. Hoy **& Elzy Co., 129** Minn. 135, 151 N. W. 893.

Laborer cutting a door through a brick wall killed by the fall of a **beam set in the** wall over the doorway. Wheeler v. Tyler, 129 Minn. 206, **152 N. W. 137.**

Laborer on a boom in a river guiding logs into a sluiceway fell into **river and was** drowned. Daily v. St. Anthony Falls Water Power Co., **129 Minn. 432**, 152 N. W. 840.

Laborer helping to move a wagon loaded with crushed stone and **stalled on a** pile of such stone—as the wagon moved one of its wheels **went into a hole** in the pile and the wagon tipped over and its load fell **on him. Burmister** v. P. C. Giguere & Son, 130 Minn. 28, 153 N. W. 134.

Laborer on building in course of construction hit by fall of cable **in connection** with the moving of an engine and derrick. Kowatch v. **Pittsburgh Construction** Co., 130 Minn. 174, 153 N. W. 326.

Laborer on streets of city burned by a pail of tar placed in a wagon, **contrary to custom**, in which he and his fellow laborers were accus**tomed to ride** from one place of work to another. Jones v. St. Paul, 130 **Minn. 260, 153** N. W. 516.

Saleswoman in store injured by falling down a defective stairway in **the store. Whitney** v. Kaliske, 131 Minn. ——, 154 N. W. 1100.

Laborer unloading logs on a railroad trestle running into a lake—walk**ed off end of** rollway formed of logs. Titus v. Crookston Lumber Co., **130 Minn. 312**, 153 N. W. 599.

(01) Dougherty v. Minneapolis Steel & Machinery Co., 110 Minn. 497, **126 N. W. 136.**

FEDERAL SAFETY APPLIANCE AND EMPLOYER'S LIABILITY ACTS

6022a. Constitutionality of statutes—The act of Congress imposing **on interstate** carriers liability for the negligence of fellow servants is **constitutional.** Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. **W. 1011.**

6022b. Construction—The acts are remedial in their nature and are **to be liberally** construed in favor of employees. Peery v. Illinois Central **R. Co., 123 Minn.** 264, 143 N. W. 724; Campbell v. Canadian Northern **Ry. Co., 124** Minn. 245, 144 N. W. 772.

See Note, L. R. A. 1915C, 47 (scope and effect of the Employers' Lia**bility Act).**

6022c. Enforceable in state courts—The federal Safety Appliance Act **and the federal** Employer's Liability Act are enforceable in the state **courts. They** supersede the state law where applicable. Owens v. Chi**cago, G. W. R.** Co., 113 Minn. 49, 128 N. W. 1011; Peery v. Illinois Cen-

tral R. Co., 123 Minn. 264, 143 N. W. 724; Knapp v. Great Northern Ry. Co., 130 Minn. 405, 153 N. W. 848.

The federal statute gives the state courts concurrent jurisdiction and forbids the removal of causes. Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011.

6022d. What constitutes interstate commerce—What employees within acts—The federal Safety Appliance Act applies to a defective car or engine used in moving a box car from one switch track to another in defendant's yards, when the purpose of moving such car is to load it with merchandise for shipment into another state. Breske v. Minneapolis & St. L. R. Co., 115 Minn. 386, 132 N. W. 337.

Defendant is a common carrier by railroad engaged in interstate commerce. Plaintiff, an employee, was injured by the negligence of his fellow servants while engaged in wheeling a barrow of coal to heat the shop in which other employees were engaged in making repairs to cars that had been and were to be used in carrying interstate commerce. Held, that plaintiff, at the time of his injury, was engaged in and employed by defendant in interstate commerce, and entitled to the benefits of the federal Employers' Liability Act. Cousins v. Illinois Central R. Co., 126 Minn. 172, 148 N. W. 58.

A conductor of a freight train making daily runs between two states and engaged in interstate commerce, held entitled to the benefits of the federal Employer's Liability Act for injuries received in a collision between his train and a following freight train. At the time of the accident he was on a return trip and his train consisted only of the regular locomotive, a disabled locomotive, and the caboose in which he was riding. Peery v. Illinois Central R. Co., 123 Minn. 264, 143 N. W. 724; Id., 128 Minn. 119, 150 N. W. 382.

The plaintiff was engaged in repairing an engine in defendant's roundhouse, which engine for some time before and immediately prior to the plaintiff's injury had been used in hauling both intrastate and interstate commerce and which was likewise used immediately afterwards. Held, that the plaintiff was employed in interstate commerce and that the federal Employers' Liability Act applied. Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106.

In an action to recover for personal injuries under federal Employers' Liability Act, the defendant must be a common carrier by railroad and be at the time of the injury engaged in interstate commerce; the plaintiff must be employed by it in such commerce; and the injury must come to him from its negligence while employed by it in interstate commerce. Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165; Lewis v. Denver & R. G. R. Co., 131 Minn. —, 154 N. W. 945.

The plaintiff's intestate, a switchman, was employed by the defendant

in its yards at Oelwein, Iowa, making up a train destined for Minnesota, some of the cars to be set out at stations in Iowa and some carrying local freight to be unloaded on the way, some of the cars in the train being made up having been transported by the defendant from points in Illinois to its Oelwein yards, destined some to Iowa points and some to points in Minnesota, and some of them originating in Iowa destined some to Iowa points and some to points in Minnesota. The deceased was run over by an intrastate car and the negligence found was in respect of the brake-step of an intrastate car. Held, that the defendant was at the time engaged as a common carrier in interstate commerce and that the deceased was employed by it in such commerce, and that the federal Employers' Liability Act applied. Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165.

Recovery sustained under the federal Employer's Liability Act where a sectionman was killed while engaging in removing ties from tracks in railroad yards. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

A mason was injured while chipping away rock on the parapet of a bridge used by trains carrying interstate commerce. Facts held not to make out a case of negligence in failing to furnish a reasonably safe place in which to work within the meaning of the federal Employer's Liability Act. Hanson v. Great Northern Ry. Co., 128 Minn. 122, 150 N. W. 380.

A car in process of transportation from one state to another is in transit and is being used in interstate commerce while being switched at an intermediate yard with other interstate cars, although there may be a purpose to switch the defective car to a repair track for repair of a defective coupler before it leaves the yard. The federal Safety Appliance Act and the Employers' Liability Act apply to such a car. Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922, affirmed, 239 U. S. 349.

The depots of a railway company engaged in interstate commerce constitute a part of the equipment of the company used in such commerce. An outhouse at a depot is a mere appendage thereto; and a crew engaged in transporting a new one to a depot already in use for interstate traffic, for the purpose of installing it to take the place of an old one previously erected at such depot, is within the protection of the federal Employers' Liability Act. Nash v. Minneapolis & St. L. R. Co., 131 Minn. ——, 154 N. W. 957.

Where the plaintiff, a section foreman, was working with others in taking out rails from the main line of an interstate carrier and putting others in their place, loading those taken out onto a flatcar near by, and was injured while so loading it was at least a question for the jury whether he was employed in interstate commerce within the federal Em-

ployers' Liability Act. Cherpeski v. Great Northern Ry. Co., 128 Minn. 360, 150 N. W. 1091.

See Note, 20 L. R. A. (N. S.) 473; 41 Id. 49; 47 Id. 38; L. R. A. 1915C, 47.

6022e. Defective couplers—The duty to provide railroad cars and engines with automatic couplers is absolute. A failure to comply with the statute constitutes negligence per se. The couplers must be in such a condition at all times that if used reasonably, cars will couple automatically on impact, and trainmen can uncouple cars without going between them. Breske v. Minneapolis & St. L. R. Co., 115 Minn. 386, 132 N. W. 337; Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300; Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297; Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798, 237 U. S. 369; Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145; Willett v. Illinois Central R. Co., 122 Minn. 513, 142 N. W. 883; Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

Under the federal Safety Appliance Act a trainman may recover where, on account of a defective coupler, it is reasonably necessary for him to go between cars to couple or uncouple them by hand, though there is a rule of the company, known to him, against doing so. Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798, 237 U. S. 369; Slaughter v. Illinois Central R. Co., 125 Minn. 96, 145 N. W. 790. See Note, 20 L. R. A. (N. S.) 473; 41 Id. 49.

Whether couplers are such as the statute requires or are in a defective condition are questions for the jury, unless the evidence is conclusive. Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300; Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798; Willett v. Illinois Central R. Co., 122 Minn. 513, 142 N. W. 883.

In an action against a railroad engaged in interstate commerce to recover for injuries to plaintiff, its employee, while attempting to open a knuckle of an automatic coupler on a car then used in interstate commerce, held, that under the evidence it was for the jury, and not the court, to determine whether or not the coupler was such as is required by the federal Safety Appliance Act. A coupler which fails to work when an honest and reasonable effort is made to operate it under circumstances and in the manner it is designed to be operated does not comply with the requirements of the act referred to. The trial court held that the sole ground of recovery rested upon the alleged failure of defendant to comply with the act mentioned. It therefore follows that the defendant was not entitled to avail itself of plaintiff's contributory negligence for any purpose, under the proviso of section 3 of the federal Employer's Liability Act. Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300.

The federal Safety Appliance Act imposes an absolute duty upon a railroad, on a highway of interstate commerce, to have couplers in such condition at all times that, when operated in an ordinary and reasonable manner, the cars can be uncoupled without requiring the operator to go between the cars. In this case the operator, in attempting to lift the pin to open a coupler, "jerked on it and pulled up at it" three or four times, but it would not uncouple. Another brakeman testified that he soon thereafter tried to lift the pin, but could not. Defendant's witnesses admitted that it worked stiff. This was sufficient evidence to sustain a finding of the jury that the coupler was not such as was required by law. Popplar v. Minneapolis etc. Ry. Co., 121 Minn. 413, 141 N. W. 798, 237 U. S. 369.

6022f. Defective air hose and brakes—Evidence held to justify a recovery for an injury due to a defective air hose connecting the air brake rods between cars. Rule of res ipsa loquitur applied. Rose v. Minneapolis etc. Ry. Co., 121 Minn. 363, 141 N. W. 487.

The federal Safety Appliance Act, requiring air brakes in operation on all trains, applies to an engine and fifteen cars loaded and switched in the yards of the defendant transfer railway company, and placed upon a track set apart for the use of a particular road, and thereafter moved by the engine and crew some six or seven blocks, a distance of something like a half mile, across a number of switches, and across and along the two parallel main tracks of an independent railroad, and into the yards of the company to which the cars belonged. The failure of a railroad company to have the air brakes in operation in an interstate movement makes it liable to an employee proximately injured because of such failure, regardless of its actual negligence. La Mere v. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068.

6022g. Defective switches—Evidence held to justify a recovery for an injury from a switch stand, unlighted and in a dangerous position. McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177.

A recovery has been sustained under the statute for an injury due to an open and unlocked switch, though the defendant was operating its train over tracks owned by another company. Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772.

6022h. Defective brake-step—Evidence held to justify a recovery for injuries due to a defective brake-step. Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165.

6022i. Defective draw-bar—Evidence held to justify a recovery for injuries due to the pulling out of a draw-bar of a freight car. Rule of res ipsa loquitur applied. Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427.

6022j. Negligence of fellow servants—Evidence in an action by a freight brakeman to recover damages sustained while jointly engaged with a fellow brakeman in switching movements, by being caught between the engine tender and cars left on another track, considered, and held to warrant findings that, under the circumstances disclosed, plaintiff had the right to rely on the other brakeman's statement that the cars were clear for the engine to pass, and that the making thereof constituted negligence attributable to defendant under the federal Employers' Liability Act. Skaggs v. Illinois Central R. Co., 124 Minn. 503, 145 N. W. 381, affirmed, 240 U. S. 66.

In an action for personal injuries by a switchman against a railroad engaged in an interstate operation, held, that the evidence was sufficient to go to the jury on the question whether the engineer, a fellow servant, was negligent in making an emergency stop when there was no emergency, and that, if he was negligent, the defendant was chargeable with his negligence within the provisions of the federal Employers' Liability Act. La Mere v. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068.

6022k. Contributory negligence—Comparative negligence—Contributory negligence is not a bar to an action under the federal Safety Appliance Act or under the Employer's Liability Act, but it may be proved in reduction of damages. McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145; La Mere v. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068; Burke v. Chicago & N. W. Ry. Co., 131 Minn. —, 154 N. W. 960.

If the negligence of plaintiff concurs with that of the defendant to cause the injury the doctrine of comparative negligence applies in an action under the federal Employer's Liability Act. Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427.

It is provided by the federal Employer's Liability Act, "That in all actions hereafter brought against any common carrier by railroad under this act to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The direction that the diminution of damages shall be "in proportion to the amount of negligence attributable to such employee," means, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. Skaggs v. Illinois Central R. Co., 124 Minn. 503, 145 N. W. 318; Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499. See Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175.

6022*l*. Assumption of risk—Assumption of risk is no defence under the federal Safety Appliance Act. La Mere v. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068.

Assumption of risk is a defence to an action under the federal Employer's Liability Act except as therein specified. Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492; Marshall v. Chicago etc. Ry. Co., 131 Minn. —, 155 N. W. 208. See 28 Harv. L. Rev. 163.

6022m. Pleading—The federal acts may be invoked without being specially pleaded. McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297; Tuder v. Oregon Short Line R. Co., 131 Minn. —, 155 N. W. 200; Seaboard Air Line Ry. Co. v. Duvall, 225 U. S. 477, 482; Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42.

A plaintiff held not required to elect on the trial whether he would proceed under the federal Employers' Liability Act or under the state law. Tuder v. Oregon Short Line R. Co., 131 Minn. —, 155 N. W. 200.

A complaint should allege ultimate and issuable facts, and not conclusions of law or evidentiary facts; and in a complaint under the federal Employers' Liability Act it is sufficient to allege that the defendant is a railroad company engaged as a common carrier in interstate commerce; that the plaintiff was employed by the defendant in such commerce; and that he received his injury in connection therewith through the negligence of the defendant. Such allegations are not conclusions of law; and it was error to refuse proffered proof in support of them. Lewis v. Denver & R. G. R. Co., 131 Minn. —, 154 N. W. 945. See Tuder v. Oregon Short Line R. Co., 131 Minn. —, 155 N. W. 200.

A complaint construed and held to state a cause of action under the federal Safety Appliance Act, and that the issues were properly submitted to the jury on that theory. Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297.

The facts and not the pleadings determine whether the wrong done in any given case confers a right to recover under the federal or the state statute. Tuder v. Oregon Short Line R. Co., 131 Minn. —, 155 N. W. 200; Corbett v. Boston & Maine Railroad, 219 Mass. 351, 107 N. E. 60.

6022n. Contracts contrary to acts void—A contract relieving an employer from liability contrary to the provisions of the federal Employer's Liability Act, held properly excluded. Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309. See Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84.

ACTIONS

6023. Parties defendant—A charge of negligence against a manager of a master in connection with unguarded machinery may be joined with a charge of negligence against the master for failing to guard the machinery. Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518.

(83) See Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488.

6024. Pleading—To take advantage of the federal Employer's Liability Act or Safety Appliance Act it is unnecessary to mention the act; it is sufficient to allege facts sufficient to bring the case within the terms of the act. Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297. See § 6022m.

An act of the master done through a servant may be pleaded directly as the act of the master without mentioning the servant. Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

The defence of assumption of risk is an affirmative defence, and to be available must be pleaded as such. The defendant may avail himself of the defence by demurrer, or by a denial in the answer when the issue is tendered by the complaint, or on the trial when it conclusively appears in plaintiff's case, or when it is litigated without objection. Skow v. Dahl Punctureless Tire Co., 129 Minn. 324, 152 N. W. 755.

(84) Morey v. Shenango Furnace Co., 112 Minn. 528, 128 N. W. 1134 (complaint against master and general superintendent sustained though it failed to allege any act on the part of the superintendent which was the proximate cause of the accident—proximate cause is a question of fact which cannot well be considered on demurrer); Kitman v. Chicago, B. & Q. R. Co., 113 Minn. 350, 129 N. W. 844 (admission in answer that plaintiff was in the employ of defendant controlling—issue as to release not made by pleadings); Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472 (complaint held to be unnecessarily specific in pointing out the precise defect in an instrumentality); Breske v. Minneapolis & St. L. R. Co., 115 Minn. 386, 132 N. W. 337 (complaint held insufficient to sustain a recovery for negligence in using defective cars independent of the federal statute); O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399 (complaint construed to allege a failure to furnish a safe place in which to work though it alleged the furnishing of an unsafe instrumentality—election between the two grounds—variance immaterial); Webster v. Chicago etc. Ry. Co., 119 Minn. 72, 137 N. W. 168 (complaint against master and servant held not to restrict evi-

dence of negligence to defendant servant); Grbich v. Pittsburgh Iron Ore Co., 119 Minn. 365, 138 N. W. 309 (servant working in iron mine—gopher holes—failure to warn of impending explosions—alternative allegations held not to vitiate complaint); Anderson v. Brooks-Scanlon Lumber Co., 119 Minn. 542, 138 N. W. 1033 (failure to furnish servant a safe place to work—indefinite complaint sustained on demurrer); Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142 (servant injured while unloading coal from a coal shed—alleging two concurrent causes of injury—failure to prove one not a failure of proof requiring a dismissal); Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716 (laborer in municipal gas plant—drain pipes of plant became clogged whereby gas accumulated and exploded, burning plaintiff—complaint sustained); Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713 (failure of railroad company to fence—horse getting on right of way thrown by engine against sectionman—complaint alleged negligence in failure to fence and also in management of train—held to show assumption of risk as to first ground but sustained as to the latter); Crotty v. Great Northern Ry. Co., 120 Minn. 535, 139 N. W. 948 (servant furnished with a defective monkey wrench—complaint sustained—held not to show assumption of risk); Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297 (a complaint held to state a cause of action under the federal Safety Appliance Act); Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518 (belt off pulley—servant injured while attempting to catch belt and keep it out of machinery—failure to guard machinery—action against company and general manager—complaint sustained); Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045 (complaint for negligence in failing to guard a bottling machine sustained); Laine v. Consolidated V. & E. Co., 123 Minn. 254, 143 N. W. 783 (complaint for injury caused by explosion of a waste fuse thrown away by a fellow servant—failure to allege or show negligence of defendant as proximate cause of injury—complaint held demurrable); Sheehy v. Minneapolis & St. L. R. Co., 126 Minn. 133, 147 N. W. 964 (complaint for wrongful death of highway-crossing flagman held sufficient to show negligence on defendant's part whereby a car, left standing near the crossing without brakes being set, was propelled over the crossing without customary notice or warning to the flagman, causing his death); Burmister v. P. C. Giguere & Son, 130 Minn. 28, 153 N. W. 134 (complaint held to charge negligence of defendant in ordering plaintiff without warning into a dangerous place). See § 6022m.

See Dunnell, Minn. Pl. 2 ed. §§ 740–766.

6025. Evidence—Admissibility—(86) Magers v. Minneapolis etc. Ry. Co., 112 Minn. 435, 128 N. W. 576 (fact that plaintiff had previously made similar claims against others); Cornell v. Great Northern Ry. Co.,

112 Minn. 341, 128 N. W. 22 (negative evidence as to ringing of bell of engine); Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161 (where the issue is as to whether one has absolved himself from liability by turning over control of a mill or factory to an independent contractor, evidence of a prior taking out of employer's liability insurance is inadmissible); Murphy v. Gross, 118 Minn. 311, 136 N. W. 868 (practice of instructing all servants when employed as to the method of operating an elevator); Peck v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1075 (rule requiring one throwing a switch to lock it and take a position on the opposite side of the track when a train is to be switched upon a sidetrack, held admissible); Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093 (servant struck by a missile while spiking ties with a maul—evidence of occasional shooting in the vicinity held inadmissible as too remote).

6025a. Evidence—Sufficiency—See Digest, § 7047.

6026. Issues and variance—(88) Creteau v. Chicago & N. W. Ry. Co., 113 Minn. 418, 129 N. W. 855 (complaint predicated action on statute of Wisconsin abolishing the fellow-servant rule—held error for court to submit case under federal act); Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472 (defect in instrumentality—variance held immaterial); O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399 (variance between unsafe place in which to work and unsafe instrumentality held immaterial); Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385 (variance between allegations and proof held not fatal).

See Digest, § 7061.

6027. Burden of proof—(89) Spino v. Butler Bros., 113 Minn. 326, 129 N. W. 590 (assumption of risk); Bark v. Dixson, 115 Minn. 172, 131 N. W. 1078 (giving servant tainted food to eat); Johnson v. Finch, Van Slyck & McConville, 115 Minn. 252, 132 N. W. 276 (defective elevator—res ipsa loquitur); Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752 (injury from unguarded machinery); Hartikka v. D. G. Cutler Co., 117 Minn. 344, 135 N. W. 1005 (box car on spur track insufficiently blocked moved down grade by gravity—res ipsa loquitur); Rose v. Minneapolis etc. Ry. Co., 121 Minn. 363, 141 N. W. 487 (accident due to breaking of air hose connecting the brake rods between two railroad cars—doctrine of res ipsa loquitur applicable); Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112 (burden on plaintiff to prove that master did not warn him); Koury v. Chicago, G. W. R. Co., 125 Minn. 78, 145 N. W. 786 (degree of proof required—res ipsa loquitur held inapplicable to movement of railroad cars on a side track—verdict cannot rest on speculation or conjecture); Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427 (freight train broke in two—pulling out of

draw-bar—rule of res ipsa loquitur applicable); Skow v. Dahl Punctureless Tire Co., 129 Minn. 324, 152 N. W. 755 (assumption of risk).

See Digest, §§ 5997, 7042–7047.

6027a. Verdict—Naming fellow servant—Action against master and servant—In an action against the master and one of his employees for damages due to their alleged negligence, a verdict against the master alone must be treated as a finding in favor of the employee, although the verdict is silent as to him; but such finding does not vitiate the verdict as to the master, unless the sole negligence alleged in the complaint against the master is the negligent act or omission of his employee. Webster v. Chicago etc. Ry. Co., 119 Minn. 72, 137 N. W. 168. See Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488 (verdict in favor of superintendent held not inconsistent with verdict against master); Doran v. Chicago etc. Ry. Co., 128 Minn. 193, 150 N. W. 800; Note, 9 L. R. A. (N. S.) 880; 30 L. R. A. (N. S.) 404.

(90) Wickham v. Chicago etc. Ry. Co., 110 Minn 74, 124 N. W. 639, 994 (statute held inapplicable); Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310 (answer "defendant company" held sufficient).

MAXIMS AND GENERAL PRINCIPLES

6028a. Test of a sound rule of law—Neither logic, nor legal symmetry, furnish conclusive reasons for adopting a rule of law. The decisive consideration is that furnished by experience—the practical working of a rule. Jeremiah Smith, 25 Harv. L. Rev. 320.

Legal rules and principles should be adjusted to the human conditions they are to govern rather than to assumed first principles. The human factor should have the central place while logic should be relegated to its true position as an instrument. Roscoe Pound, 8 Col. L. Rev. 609. See also 25 Harv. L. Rev. 512–516.

As the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result serve the purposes of justice. Allen, J., in Spade v. Lynn & Boston R. Co., 168 Mass. 285, 47 N. E. 88; Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 237, 148 N. W. 67.

6028b. Practical considerations controlling—The law is practical. State v. Lundgren, 124 Minn. 162, 165, 144 N. W. 752; Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

The administration of the law is a practical matter and much must be left to the wisdom and judgment of the trial court. State v. Lundgren, 124 Minn. 162, 165, 144 N. W. 752.

Questions involving government must not be determined along tech-

nical lines. Practical and broad considerations should control. Woodbridge v. Duluth, 121 Minn. 99, 103, 140 N. W. 182.

The rule of conduct of a whole people, long prevailing and acted upon in their business dealings, should not be subordinated to mere consistency of legal principles, but an exception should be made to the operation of the principle, especially when the exception is more just than the legal rule. Glennan v. Rochester Trust & Safe Deposit Co., 209 N. Y. 12, 102 N. E. 537.

6028c. Taking the law into one's own hands—The law does not permit parties to take the settlement of conflicting claims into their own hands. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Souther v. N. W. Telephone Exchange Co., 118 Minn. 102, 109, 136 N. W. 571.

6028d. Duty to act reasonably as a member of society—The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946.

6029. Various maxims in English—A party cannot be heard to set up his own fraud as a ground for relief. Devlin v. Quigg, 44 Minn. 534, 47 N. W. 258.

A wrong cannot be made right by any formalities of procedure. Shearer v. Barnes, 118 Minn. 179, 196, 136 N. W. 861.

It is a strong presumption that that which never has been done cannot by law be done at all. Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878.

(92) Ammon v. Gamble-Robinson Commission Co., 111 Minn. 452, 456, 127 N. W. 448; McFadden v. Follrath, 114 Minn. 85, 90, 130 N. W. 542; Cedar Rapids Nat. Bank v. Mottle, 115 Minn. 414, 417, 132 N. W. 911; Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 127, 134 N. W. 510; Fitzpatrick Building Co. v. Healy, 120 Minn. 237, 139 N. W. 495; Bjorgo v. First Nat. Bank, 127 Minn. 105, 149 N. W. 3; National Safe Deposit etc. Co. v. Hibbs, 229 U. S. 391 (unauthorized and fraudulent sale of corporate stock to bona fide purchaser by officer of corporation).

(95) Souther v. N. W. Telephone Exchange Co., 118 Minn. 102, 109, 136 N. W. 571.

(97) Newman v. Springfield Fire & Marine Ins. Co., 17 Minn. 111 (98); Devlin v. Quigg, 44 Minn. 534, 47 N. W. 258.

6030. Various maxims in Latin—Corruptio optimi pessima. Sound general principles should not be turned to support a conclusion manifestly improper. Jacobs v. Beecham, 221 U. S. 263.

(2) See Pollock, Genius of the Common Law, 118 (comments on origin of rule).

(6) Stenberg v. Blue Earth County, 112 Minn. 117, 127 N. W. 496.

(10) Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142.

(12) O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677 (maxim cannot be invoked to avoid the operation of the statute of frauds upon a contract which by its terms is not to be performed within one year); Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105 (the basis of the maxim is that mere trifles and technicalities must yield to practical common sense and substantial justice).

(19) Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620.

(34) Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 211, 127 N. W. 926; Young Men's Christian Assn. v. Horn, 120 Minn. 404, 418, 139 N. W. 805.

(41) Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 117 Minn. 59, 134 N. W. 309.

(43) Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110; Way v. Barney, 116 Minn. 285, 133 N. W. 801. See Dunnell, Minn. Pl. 2 ed. § 31.

MECHANICS' LIENS

IN GENERAL

6031. Nature—(48) Lamoreaux v. Andersch, 128 Minn. 261, 150 N. W. 908.

6033. Construction of statutes—The statutes are given a liberal construction, not only as to the proceedings for the perfection and enforcement of the lien, but also as to the parties who are entitled to liens. Krengel v. Haslam, 118 Minn. 506, 137 N. W. 11; Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Atlas Lumber Co. v. Dupuis, 125 Minn. 45, 145 N. W. 620; Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359; Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6; Thompson-McDonald Lumber Co. v. Morawetz, 127 Minn. 277, 149 N. W. 300; Lamoreaux v. Andersch, 128 Minn. 261, 150 N. W. 908 (extraordinarily liberal construction).

It is sufficient for us to say that, whatever may be the conflicting decisions of other tribunals, we are of the opinion that no narrow or limited construction of our mechanic's lien law should be indulged in by the courts, and that the labor and industry of the country should not be hampered by technicalities or harsh interpretations of what was evidently intended to be a just law for the benefit of our industrial pursuits, which tends so materially to the building of cities and towns, and is the embodiment of so much natural justice. He whose property is enhanced in value by the labor, and toil of others should be made to respond in some way by payment and full satisfaction for what he has secured. To accomplish this result is the intent of the lien law. The stat-

utes must be adapted to changing conditions brought about by improved methods and the progress of the inventive arts. Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6.

(59) Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6.

6034. Constitutionality of statutes—(60) See 25 Harv. L. Rev. 274.

6035. Basis of lien is consent of owner—(65) Wallinder v. Weiss, 119 Minn. 412, 138 N. W. 417; Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37.

6037. Improvements by persons not owners—Consent of owners—Notice—Statute—A lessor may, by posting or giving notice, as required by section 3509, R. L. 1905 (G. S. 1913, § 7024), prevent mechanics' liens from attaching to his interest, although in the lease he has given the tenant permission to make the alterations for which the lien is claimed; the tenant having agreed to pay for the alterations and to restore the building to its former condition at the end of the term. No change in the statute was designed by the revision of 1905. Wallinder v. Weiss, 119 Minn. 412, 138 N. W. 417.

A florist's refrigerator, caused to be erected by a tenant in a storeroom in a hotel building, such room having been leased by a hotel company, the lessee of the whole building, to the tenant for a flower, candy, and soft drink store, held to be a "trade fixture," and not an "improvement" or "fixture," within the mechanic's lien statute; and hence the hotel property was not lienable for the value thereof. White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. W. 114.

Painting a building inside and out, papering, painting, and kalsomining inside, and putting on a section of new roof, to fit premises for occupancy by a tenant, are not "repairs," within a statute which provides that, against a lessor, no lien is given for repairs made by or at the instance of his lessee. Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

(68) Northwestern Lumber & Wrecking Co. v. Parker, 118 Minn. 211, 136 N. W. 855.

(72–75) Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37.

PROPERTY SUBJECT TO LIEN

6039. Interests subject to the lien—Who are owners—A ground lease held subject to a lien. Madler v. Twin City Box Factory, 125 Minn. 207, 145 N. W. 1072.

(84) Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339 (evidence held to justify a finding that a married woman's property was subject to a lien and that she was personally liable as upon an implied contract).

6040. Lands and buildings—Appurtenances—Fixtures—Fixtures irremovably attached to the land or buildings are lienable. White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. W. 114; Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

6043. Follows proceeds of sale of building—(96) See Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

6043a. Insurance money—In the absence of contract or special circumstances, the holder of a mechanic's lien has no claim on insurance money paid to the owner for the loss of property to which the lien attached prior to the loss. Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

RIGHT TO LIEN

6045a. Improvement on land not essential—An improvement on the land is not essential. An architect has been allowed a lien where the owner abandoned the project of building and there was no improvement on the land. Lamoreaux v. Andersch, 128 Minn. 261, 150 N. W. 908. See 28 Harv. L. Rev. 714.

6046. When materials are furnished—An actual delivery upon the premises of material sold and furnished a contractor for use in the construction of a building thereon is not necessary, as against the owner, to vest in the materialman a right of lien under our mechanic's lien statutes. In the absence of fraud and collusion between the materialman and the contractor, a good-faith delivery of such material to the contractor for use in the building is all that is necessary to protect the rights of the materialman. The owner may protect himself from fraudulent conduct on the part of the contractor by requiring a bond or other security for the payment of material purchased by him on the credit of the building and premises. Thompson-McDonald Lumber Co. v. Morawetz, 127 Minn. 277, 149 N. W. 300.

6048. Materials furnished for but not used in a building—Materials furnished in good faith for the improvement of realty may be lienable, though not actually used in the work. Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6.

A contractor was building two houses, numbered 4540 and 4544, on adjoining lots. He purchased millwork of plaintiff. He ordered two drain boards to be delivered by plaintiff at 4544, and they were so delivered. In fact one was intended for 4540. In a few days plaintiff was so advised, assented thereto, and made charges on its books accordingly. The drain board was never, however, taken to No. 4540 and was never used anywhere. Plaintiff is entitled to a lien for the amount of this item upon the property at No. 4540, and his lien is prior to that of a mort-

gage taken during the construction of the building. Minneapolis Sash & Door Co. v. Hedden, 131 Minn. —, 154 N. W. 511.

(5) See Lamoreaux v. Andersch, 128 Minn. 261, 150 N. W. 908.

6048a. Abandonment of contract by contractor—Where a contractor has completely abandoned his contract for the construction of a building, he has no implied authority thereafter to purchase material therefor, and his act in doing so is not binding upon the owner; it not appearing that the same was accepted and used in the building. Lampert Lumber Co. v. Campfield, 111 Minn. 359, 127 N. W. 6.

6052. Limitations on amount of lien—(11) American Bridge Co. v. Honstain, 120 Minn. 329, 139 N. W. 619.

6053. Subcontractors—A subcontractor can sustain a lien as against the owner only for the reasonable value of the work or materials, but his contract with the principal contractor is prima facie evidence of the reasonable value as against the owner. Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

6056. Claim assignable—Enforcement—(22) Note, 49 Am. St. Rep. 530.

6058. Fraud and misconduct of contractor—Evidence held to justify a finding that a delay in the delivery of certain items of material, delivered some time after the substantial completion of the contract, was not for the wrongful purpose of extending the time within which to perfect the lien. Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472.

6060. Held entitled to a lien—Where the owner of premises, upon which improvement is to be erected for which the statute gives a right to a mechanic's lien, contracts with the mechanic for personal supervision and temporary store or tool houses in connection with the work he undertakes, the mechanic is entitled to claim a lien for the whole contract price. Lindquist v. Young, 119 Minn. 219, 138 N. W. 28.

One furnishing material and labor for installing a combination steam heating and power plant at the instance of a tenant of a building. Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

One furnishing coal and wood consumed in generating power used in ditching work. Fay v. Bakers Surety Co., 125 Minn. 211, 146 N. W. 359.

One performing services as a cook to a gang of workmen. Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

One furnishing excavating contractors with coal and gasolene for generation of power, dynamite for blasting, lubricants, lighting materials

and supplies, and materials for the erection of a tool house. Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6.

(29) Lamoreaux v. Andersch, 128 Minn. 261, 150 N. W. 908. See 28 Harv. L. Rev. 714.

(32) See White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. W. 114.

6061. Held not entitled to a lien—One furnishing a trade fixture in the form of a florist's refrigerator. White Enamel Refrigerator Co. v. Kruse, 121 Minn. 479, 140 N. W. 114.

One furnishing axes, hack saw blades, horse feed and provisions to contractors. Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

One furnishing supplies for and repairs and parts of excavating machinery, being merely contributions to the personal property of the contractors. Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6.

One furnishing electric light fixtures. Lyons v. Westerdahl, 128 Minn. 288, 150 N. W. 1083.

A building contract provided for the construction at a fixed price, and further provided that, if the owner wanted a surety bond, the principal contractor would procure it and the owner would pay for it. The owner afterwards required such bond, and the principal contractor procured and paid for it. Held, that the cost of the bond is not a lienable claim. Baxter Sash & Door Co. v. Ornes, 130 Minn. 214, 153 N. W. 594.

PRIORITIES

6065. Priority between mechanics' liens and mortgages—Evidence held to sustain a finding that the principal contractor in a building contract agreed that a mortgage in contemplation of execution upon the property should be prior in lien to the mechanics' liens, and that such liens would be discharged by such contractor. Baxter Sash & Door Co. v. Ornes, 130 Minn. 214, 153 N. W. 594.

(44) Minneapolis Sash & Door Co. v. Hedden, 131 Minn. —, 154 N. W. 511.

LOSS, WAIVER AND SATISFACTION

6069. Arrest or abandonment of work by owner—An architect held entitled to a lien for plans and specifications though the owner abandoned the project of building and there was no improvement on the land. Lamoreaux v. Andersch, 128 Minn. 261, 150 N. W. 908.

6072. Waiver—A trust agreement for the benefit of creditors and a conveyance to trustees in pursuance thereof held to constitute a waiver. Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

A temporary withdrawal from the office of the register of deeds of a

lien statement to correct the description of realty, held not a waiver or abandonment of a lien. American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014.

(53) Note, 41 Am. St. Rep. 761.

6073. Transfer of title—Estoppel—Forfeiture of ground lease—The defendant owned a ground lease. The building was burned. By agreement between the defendant and the fee owner the insurance money was deposited as security for rebuilding. The ground lease was afterwards assigned to the plaintiff upon condition that he rebuild the building. Liens accrued against the ground lease. The fee owner gave notice forfeiting the leasehold. The defendant purchased the fee and claimed a forfeiture. Held, that by purchasing the fee, after the forfeiture by the fee owner, the defendant could not defeat the liens against the ground lease. Madler v. Twin City Box Factory, 125 Minn. 207, 145 N. W. 1072.

6074. Including non-lienable items—Claiming more than due—If one knowingly demands in his lien statement more than is justly due he is not entitled to a lien in any amount. Lyons v. Westerdahl, 128 Minn. 288, 150 N. W. 1083.

LIEN STATEMENT

6077. In general—All the items of labor or material furnished for a single job may be joined in one statement. American Bridge Co. v. Honstain, 120 Minn. 329, 139 N. W. 619; Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964. See Northwestern Lumber & Wrecking Co. v. Parker, 118 Minn. 211, 136 N. W. 855.

A failure to state for what improvement the materials were supplied held not fatal. Atlas Lumber Co. v. Dupuis, 125 Minn. 45, 145 N. W. 620.

(72) Atlas Lumber Co. v. Dupuis, 125 Minn. 45, 145 N. W. 620 (failure to state for what improvement the materials were supplied held an inaccuracy within the statute).

(74) Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37 (slight excess in the lien account filed, due to clerical error in adding the items, held harmless).

6079. Description of premises—A description of the premises as lot 1, block 1 of a certain addition, whereas the improvement was on lot 2 block 1, both lots being owned by the person to whom the materials were furnished and together constituting the enclosure appurtenant to the dwelling house constructed, held sufficient. Atlas Lumber Co. v. Dupuis, 125 Minn. 45, 145 N. W. 620.

(80) American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014.

6084a. Nature of contract need not be disclosed—The statute does not require that the lien statement show whether the lien is claimed under an express contract or under an implied contract to pay the reasonable value. A variance in this regard is immaterial. Lindquist v. Young, 119 Minn. 219, 138 N. W. 28.

6086. Verification—A verification held sufficient though made by an agent upon information given to him by the lien claimant. Krengel v. Haslam, 118 Minn. 506, 137 N. W. 11; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

6087. Time of filing—The fact that trivial finishing touches are added to a building after the filing of the lien statement does not invalidate the lien. Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975.

Where the owner abandons or suspends the work a lien statement may be filed at any time within ninety days thereafter. Lamoreaux v. Andersch, 128 Minn. 261, 150 N. W. 908.

(2) Samels Lumber Co. v. Kropf, 113 Minn. 200, 129 N. W. 370.

(3) American Bridge Co. v. Honstain, 120 Minn. 329, 139 N. W. 619; Northwestern Lumber & Wrecking Co. v. Parker, 118 Minn. 211, 136 N. W. 855; Id., 125 Minn. 107, 145 N. W. 964.

(4) Northwestern Lumber & Wrecking Co. v. Parker, 118 Minn. 211, 136 N. W. 855.

6090. Amendment—(19) See American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014.

INDEMNITY BONDS AGAINST LIENS

6093. Indemnifying bond of contractors—A subcontractor held not entitled to sue on a bond given by the principal contractor and a surety company. Moore v. Mann, 130 Minn. 318, 153 N. W. 607.

The cost of a bond, furnished by a contractor under an agreement whereby the owner agreed to pay the cost, held not a lienable claim. Baxter Sash & Door Co. v. Ornes, 130 Minn. 214, 153 N. W. 594.

(22) Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426 (bond furnished by surety company—query whether excess payments released the surety—complaint sustained—in action on bond lien claimants not necessary parties); Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067 (limitation of actions); Fitger Brewing Co. v. American Bonding Co., 127 Minn. 330, 149 N. W. 539 (limitation of actions—surety not released by an excess payment made by the owner to the contractor, or by a failure of the owner to give the surety immediate notice of the failure of the contractor to complete the building by the time specified in the contract). See § 9104a.

6095. Indemnifying bonds of mortgagors—(25) Wood v. Pacific Surety Co., 116 Minn. 474, 134 N. W. 127 (foreclosure of mortgage held not to affect liability on bond—complaint sustained). See § 9104a.

6096a. Contracts to protect against—A building loan contract between an owner of land and a trust company held not to obligate the company to protect the land from liens. Jefferson v. Lone, 115 Minn. 314, 132 N. W. 299.

ACTION TO FORECLOSE

6101. Parties—Intervention—Personal representatives—No prejudice resulted to the owner from the order compelling another lien claimant to intervene after plaintiff's cause was tried and before entry of judgment, for it was open to the owner to suggest to the court at the trial of plaintiff's action that such lien claimant ought to be made a party as contemplated by section 3517, R. L. 1905 (G. S. 1913, § 7032). Lindquist v. Young, 119 Minn. 219, 138 N. W. 28.

In an action by a lien claimant to foreclose his lien, perfected for material supplied the contractor, the personal representative of the contractor, who died before the commencement of the action, is a proper, if not necessary, party to the action, and the determination in that action of the amount due the lien claimant, an incidental issue, is conclusive upon the estate of the deceased contractor. Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472.

(47) See P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

(48) See Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472.

6106. Bill of particulars—The trial court's denial of the defendant's motion, in an action to foreclose a mechanic's lien and for personal judgment, to strike out the complaint and to disallow the lien, on the ground that there was no original bill of items attached thereto as required by R. L. 1905, § 3516 (G. S. 1913, § 7031), and that the plaintiff's additional and supplemental bill of items did not comply with this statute, sustained. Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

Where a party verifies his complaint by an affidavit that the averments therein are true of his own knowledge, and the complaint alleges positively that the attached bill of items is true and correct, this is a sufficient verification of the bill of items. Lyons v. Westerdahl, 128 Minn. 288, 150 N. W. 1083.

6107. Answer—Counterclaim—The statute provides that the answer, in addition to all other matters proper to be pleaded, shall set up any lien claimed by the defendant, and demand the enforcement thereof. This does not make the pleading of counterclaims compulsory. Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

6109. Variance—The fact that the last item stated in a lien statement is not proved is not fatal to the whole claim, provided the statement was filed within the specified time after the last item stated in it and proved. Lundell v. Ahlman, 53 Minn. 57, 54 N. W. 936.

A statement in a lien filed as to a matter not required to be stated does not prevent the lien claimant from pleading and proving the facts, where no one has been misled by such statement. Lindquist v. Young, 119 Minn. 219, 138 N. W. 28.

6111. Evidence—Admissibility—(88) Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964 (contract of sub-contractor with principal contractor prima facie evidence of the reasonable value of the materials or services as against the owner)

6112. Evidence—Sufficiency—(89) Kuethe v. Buck, 111 Minn. 269, 126 N. W. 826; Lampert Lumber Co. v. Campfield, 111 Minn. 359, 127 N. W. 6; American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014; Samels Lumber Co. v. Kropf, 113 Minn. 200, 129 N. W. 370; Jefferson v. Lone, 115 Minn. 314, 132 N. W. 299 (findings that a trust company in advancing money for the improvement of property did not agree to protect the property from liens, and that a payment by the company protected it, sustained); Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339; Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472; Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339; Shevlin-Carpenter Lumber Co. v. Taylor, 124 Minn. 132, 144 N. W. 472; Minneapolis Plumbing Co. v. Arcade Investment Co., 124 Minn. 317, 145 N. W. 37 (sufficiency of evidence to show filing of lien statement in the office of the register of deeds).

6113. Judgment—In the foreclosure of a mechanic's lien, there can be no personal judgment with execution until after the foreclosure sale; and the judgment involved in this appeal is construed to intend a personal judgment and execution only after foreclosure sale. A defendant, holding a lien claim, after trial but before findings and adjudication released his lien and elected to take personal judgment against the principal contractor with immediate execution, and judgment was entered accordingly. It affirmatively appearing that no legal prejudice can result to the debtor, such judgment is sustained. A mortgage, in addition to the land on which the building was constructed, included a quarter section which the owner had homesteaded. The court refused to so find; but in the judgment it was adjudged that in certain contingencies, and the only ones which could arise, the principal contractor, the appellant, should be subrogated to the mortgage. Held, that the judgment sufficiently adjudges the appellant's right of subrogation to all the land

in the mortgage, including the quarter section. Baxter Sash & Door Co. v. Ornes, 130 Minn. 214, 153 N. W. 594.

6114. Costs—Attorney's fees—The allowance of fifty dollars for attorney's fees as costs is reasonable and the statute authorizing the same is constitutional. Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339.

(2) Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975 (allowance of attorney's fees sustained); Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339 (attorney's fees allowable to a prevailing lienholder—statute constitutional); Foltmer v. First Methodist Episcopal Church, 127 Minn. 129, 148 N. W. 1077 (attorney's fees).

MEDICAL BOOKS—See Evidence, 3358.

MEDICAL SOCIETIES—See Physicians and Surgeons, 7483a.

MINES AND MINERALS

6122. Leases of public mineral lands—Assignment—R. L. 1905, § 2493, (G. S. 1913, § 5317), providing for the manner of execution of an assignment of a state mining lease, is not a statute of frauds; and contracts relative thereto, observing in their execution the requirements of contracts for the sale of lands, are valid between the parties to them. Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

6123. Private mining leases and contracts—Construction—(17) Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129 (certain so-called mining leases, executed by a non-resident testatrix in her lifetime upon lands in this state, and in which her husband joined, held to be leases and not conditional sales of the ore in place, thus entitled her husband, claiming as statutory heir under R. L. 1905, § 3648, to one-third of the royalties accruing and to accrue thereunder subsequently to her death); Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791 (contract for sale of part interest in a mining lease—option to take back part of interest conveyed); Howell v. Cuyuna Northern Ry. Co., 127 Minn. 480, 149 N. W. 942 (a lease of real property construed and held to confer upon the lessee the right to explore for, remove and transport to market, all iron ore found therein, and such additional rights of possession and control of the premises as are necessary to the proper conduct of the mining operations—except in so far as necessary to such mining operations the lessor, the fee owner of the land, retains the right of possession of the surface of the land and may maintain an action against any third person entering into the possession thereof without right or authority—the lessee, though the lease grants him the right to construct

upon the premises all facilities necessary to market the ore taken from the land, including railroads, has no right to authorize the construction of a railroad upon the premises, except for the purpose of aiding in the mining operations and transportation of ore to market); Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538 (partnership agreement for exploiting mineral land); Kent v. Costin, 130 Minn. 450, 153 N. W. 874 (joint adventure to develop a mine and to form a corporation to carry on the enterprise—agreement as to number of shares to which the parties should be entitled). See Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785 (an instrument likened to a mining lease).

6123a. Reservation in deeds of mining rights—A conveyance of land may reserve to the grantor minerals in the land and the use of the land for mining operations. Carlson v. Minnesota Land & Colonization Co., 113 Minn. 361, 129 N. W. 768; Buck v. Walker, 115 Minn. 239, 132 N. W. 205; Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706; Tyndall v. Dubois, 125 Minn. 536, 147 N. W. 708. See § 2673; Note, 135 Am. St. Rep. 131.

6123b. Wrongful mining—Damages—There is much conflict of authority as to the measure of damages where ore is improperly mined by one person on the land of another. Stratton's Independence v. Howbert, 231 U. S. 399.

MISTAKE

6124. Equitable relief—Mistake of law or fact—Ignorance of one put upon inquiry, due to his failure to inquire, is not a mistake. Grant v. Bibb, 129 Minn. 312, 152 N. W. 728.

(19) Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455; American Fruit Product Co. v. Barrett & Barrett, 113 Minn. 22, 128 N. W. 1009; C. H. Young Co. v. Springer, 113 Minn. 382, 129 N. W. 773; Diebel v. Diebel, 116 Minn. 168, 133 N. W. 463; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156. See Orr v. Sutton, 127 Minn. 37, 50, 148 N. W. 1066; Note, 28 L. R. A. (N. S.) 785; 117 Am. St. Rep. 227.

(20) See Orr v. Sutton, 127 Minn. 37, 50, 148 N. W. 1066; Note, 55 Am. St. Rep. 494.

MONEY HAD AND RECEIVED

6126. Nature of action—(26, 27) See Dunnell, Minn. Pl. 2 ed. § 756.

6127. Fiction of a contract—(28–31) See Dunnell, Minn. Pl. 2 ed. § 757.

6128. When action lies—In general—It is immaterial in what capacity the money was received. Ripa v. Hogan, 127 Minn. 502, 150 N. W. 167. See Dunnell, Minn. Pl. 2 ed. § 755.

6129. When action lies—Miscellaneous cases—An action for money had and received will not lie to recover money in the form of partial payments not pleaded or proved in a former action on the debt. Harbek v. Carpenter-Robinson Co., 123 Minn. 389, 143 N. W. 916.

(38) Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759; Bernard v. Doctor Nelson Co., 123 Minn. 468, 143 N. W. 1133. See Downey v. Red Wing, 121 Minn. 348, 141 N. W. 495 (money paid for liquor license not issued); Dunnell, Minn. Pl. 2 ed. § 761.

(42) McBrady v. Monarch Elevator Co., 113 Minn. 104, 109, 129 N. W. 163 (money paid on a fraudulent misrepresentation of an indebtedness); Benson v. United States Instalment Realty Co., 113 Minn. 346, 129 N. W. 594 (money paid on a policy through fraud); Marotta v. Duluth News Tribune Co., 116 Minn. 51, 133 N. W. 89 (money received by A from B with knowledge that it belonged to C and was wrongfully taken from C by B); Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754 (money obtained by fraudulent misrepresentations as to the formation of a corporation); Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67 (money paid by purchaser of land upon fraudulent misrepresentations of the vendor as to its quality and character); Gormley v. Dangel, 214 Mass. 5, 100 N. E. 1084. See Dunnell, Minn. Pl. 2 ed. § 762.

(43) Gedney v. Ayers, 111 Minn. 66, 126 N. W. 398; Larson v. First Nat. Bank, 125 Minn. 275, 146 N. W. 1097; Ripa v. Hogan, 127 Minn. 502, 150 N. W. 167; Sandoval v. Randolph, 222 U. S. 161. See Dunnell, Minn. Pl. 2 ed. § 765.

(47) Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Karbach v. Grant, 131 Minn. —, 154 N. W. 1071. See § 1808; Dunnell, Minn. Pl. 2 ed. § 761; Woodward, Quasi Contracts, §§ 162–178.

(50) Tunny v. Hastings, 121 Minn. 212, 141 N. W. 168. See Dunnell, Minn. Pl. 2 ed. § 761.

(52) State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286. See Dunnell, Minn. Pl. 2 ed. § 761; Woodward, Quasi Contracts, §§ 232–236.

6133. Parties defendant—Municipalities—(58) Tunny v. Hastings, 121 Minn. 212, 141 N. W. 168. See § 6703; Dunnell, Minn. Pl. 2 ed. § 789.

6135. Pleading—Two causes of action for money had and received held properly joined. Benson v. United States Instalment Realty Co., 113 Minn. 346, 129 N. W. 594.

A complaint alleging that the defendant, at a certain time, had and received a sum of money from plaintiff, which he then agreed to repay to plaintiff upon demand, states a cause of action for money loaned, and not for money had and received. Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815.

A complaint held not to state a cause of action for money had and received. Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67.

In an action against an agent it is not necessary to plead the agency. Ripa v. Hogan, 127 Minn. 502, 150 N. W. 107.

(64) Vetter v. Sandbo, 114 Minn. 144, 130 N. W. 450; Major v. Lunn, 115 Minn. 404, 132 N. W. 321; Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Comstock v. Baldwin, 125 Minn. 357, 147 N. W. 278.

See Dunnell, Minn. Pl. 2 ed. § 752

6136. Defences—Evidence held not to show laches. Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

R. L. 1905, § 4660(4) (G. S. 1913, § 8375[4]), rendering communications between physician and patient privileged, merely prescribes a rule of evidence, and does not prevent an action for money had and received to recover money paid by the patient to the physician in consideration of the latter's guaranty to cure him of a certain disease, where such consideration fails. Bernard v. Doctor Nelson Co., 123 Minn. 468, 143 N. W. 1133.

6136a. Burden of proof—The burden of proving payment to or on account of plaintiff of moneys received for plaintiff's use is generally on the defendant. Farmers Warehouse Assn. v. Montgomery, 92 Minn. 194, 99 N. W. 776.

Burden of proving how much, if any, of certain moneys coming into their hands, did not come from plaintiff's one-third share of a crop, held on the defendants. Ripa v. Hogan, 127 Minn. 502, 150 N. W. 167.

See Dunnell, Minn. Pl. 2 ed. § 753.

6137. Interest—(73) Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759. See Dunnell, Minn. Pl. 2 ed. § 785.

6137a. Evidence—Sufficiency—Evidence held to warrant the action of the trial court in submitting to the jury the question as to whether medi-

cines purchased by plaintiff from defendant were worthless, so as to entitle the former to recover back the amount paid therefor. Bernard v. Doctor Nelson Co., 123 Minn. 468, 143 N. W. 1133.

MONEY LENT

6138. When action lies—(75) See Dunnell, Minn. Pl. 2 ed. § 793.

6139. Pleading—A complaint in the form of the common indebitatus assumpsit count for money lent, or substantially in that form, is common in our practice and unquestionably sufficient. See Chamberlain v. Tiner, 31 Minn. 371, 18 N. W. 97; Fravel v. Nett, 46 Minn. 31, 48 N. W. 446; Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487; Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084.

A complaint alleging that the defendant, at a certain time, had and received a sum of money from plaintiff, which he then agreed to repay to plaintiff upon demand, states a cause of action for money loaned, and not for money had and received. Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815.

See Dunnell, Minn. Pl. 2 ed. § 790.

MONEY PAID

6142. When action lies—(82) See Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. 257; Dunnell, Minn. Pl. 2 ed. §§ 797–802.

6143. Pleading—A complaint in the form of the common indebitatus assumpsit count for money paid, or substantially in that form, is common in our practice and unquestionably sufficient. See Rosemond v. N. W. Autographic Register Co., 62 Minn. 374, 64 N. W. 925; Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. 257; Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056; Dunnell, Minn. Pl. 2 ed. § 796.

MORTGAGES

IN GENERAL

6146. Once a mortgage always a mortgage—(3) Holien v. Slee, 120 Minn. 261, 139 N. W. 493. See Note, 131 Am. St. Rep. 914.

6148. An incident of the debt—(6, 8) First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

EQUITABLE MORTGAGES

6150. In general—One having no interest in land, legal or equitable, at the time a deed was executed by the owner to a third party, cannot assert the rights of a mortgagee therein against the grantee, solely by virtue of an oral agreement made by the grantee to convey the land to him upon payment of a certain sum. Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309.

The plaintiff, having an option to purchase a lot, entered into an arrangement with the defendants whereby title was to be taken in the name of one of them, and held as security for advances to the plaintiff, and this was done. Held, that by this arrangement an equitable mortgage was created. Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396.

A deed to secure future advances may be an equitable mortgage. Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396.

(12) Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309; Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396.

6152. Held to constitute an equitable mortgage or lien—An agreement whereby title was to be taken in defendant as security for future advances to plaintiff who had an option to purchase the land. Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396.

6153. Held not to constitute an equitable mortgage—A contract and deed and certificate of redemption held not to constitute a mortgage. Smith v. Funk, 114 Minn. 367, 131 N. W. 377.

An oral agreement to convey held not a mortgage. Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309.

(36) See 14 Col. L. Rev. 672.

ABSOLUTE DEED AS MORTGAGE

6154. In general—Absolute deeds can no longer be treated as a mortgage. It is now provided by statute that "no instrument relating to real estate shall be valid as security for any debt, unless the fact that

it is so intended and the amount of such debt are expressed therein." G. S. 1913, § 2301. See Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455; Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

It is not important that the relation of debtor and creditor did not exist at the time of the conveyance. It is sufficient if it appears that the purpose was to secure the payment of future advances. It is not conclusive against plaintiff that he may have intended by the transaction to defeat the efforts of other creditors to enforce their claims against him. Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

(37) Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494; Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309.

(45, 46) Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494.

6155. Intention how proved—Parol evidence—In an action by the widow and heirs of a grantor against the grantee to have certain deeds declared to be mortgages, an instrument executed by the defendant after the death of the grantor, whereby he agreed to sell a portion of the property involved to one of the heirs, and to accept, as a credit upon the stipulated consideration, the widow's quitclaim deed to another portion of such property, was admissible as evidence tending to show conduct on the part of the defendant inconsistent with his claim of absolute ownership. Holien v. Slee, 120 Minn. 261, 139 N. W. 493.

The fact that an absolute deed was intended as a mortgage may be proved by circumstantial evidence. When one of the parties is dead such evidence is generally the only means of proof. Holien v. Slee, 120 Minn. 261, 139 N. W. 493.

(51) Murphy v. Kuntze, 122 Minn. 530, 142 N. W. 1134 (seller gave purchaser a promissory note in the amount mentioned as the consideration for the deed).

(53, 56) Holien v. Slee, 120 Minn. 261, 139 N. W. 493.

6156. Deed and bond to reconvey—Conditional sales—(59) See Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827.

6157. Degree of proof required—Sufficiency—(65) Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486 (evidence held sufficient); Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638 (id.); Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186 (id.); Holien v. Slee, 120 Minn. 261, 139 N. W. 493 (id.); Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827 (question on appeal—deference of appellate court to finding of trial court); Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396 (evidence held sufficient); Young v. Baker, 128 Minn. 398, 151 N. W. 132 (evidence held insufficient).

6160. Recording act—Notice—Estoppel—Section 3361, R. L. 1905 (G. S. 1913, § 6851), requiring a written defeasance to be recorded, is a recording statute, and serves merely to protect persons dealing in land on the faith of the record title. Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494.

Where the plaintiff conveyed land to one of the defendants by absolute deed, which was recorded, and on the same day took back an executory contract of sale from the grantee, which contained provisions for the construction of a house on the premises by such defendant, and also authorized her to mortgage the property for a certain amount, which contract, however, was not recorded, a mortgage so executed upon the premises in favor of the other defendant, and which was in entire accord with the terms of the authorization contained in the contract of sale, and which was virtually ratified by the plaintiff, before the money secured thereby was paid over to the mortgagor, by his withdrawal of objections theretofore made to the mortgagee, was not subject to equities asserted by the plaintiff against the grantee in the deed. Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

As against an innocent purchaser for value a deed absolute on its face cannot be shown by evidence de hors the record to be a mortgage. Locke v. Hayter, 123 Minn. 367, 143 N. W. 917.

(74) See Locke v. Hayter, 123 Minn. 367, 143 N. W. 917.

(75) Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

6163. Other remedies than foreclosure—Where the grantee mortgaged the land, and the mortgage was foreclosed, and the grantee's refusal to reconvey according to the agreement prevented the grantor from redeeming from the foreclosure, it was held that the grantor's remedy was not specific performance, but an action on the contract for damages. Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638.

In an action to compel a reconveyance, a finding that the debt secured had not been paid in full held justified by the evidence. Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

The grantor may assert his rights in an action to determine adverse claims. Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

6164. Conveyance by mortgagee—Fraud—(79) See Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638.

6166. Judgment—Amount required to redeem—A money judgment was docketed against the husband of the defendant in whose name title was taken, and the court directed that the amount due upon this judgment be taken from the amount necessary to be paid in redemption by the plaintiff, and deposited in court to await the determination of the claim of the judgment creditor to the land if such claim should be

asserted. Held error. Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396.

6167. Pleading—(82) Howard v. Erbes, 112 Minn. 479, 128 N. W. 674 (ejectment—prayer that if an absolute conveyance be found a mortgage it be foreclosed). See Dunnell, Minn. Pl. 2 ed. § 805.

FORM, EXECUTION AND DELIVERY

6173. Description of the premises—See Note, 137 Am. St. Rep. 252.

RECORDING

6180. Effect as notice—In general—Section 3361 R. L. 1905 (G. S. 1913, § 6851), requiring a written defeasance to be recorded, is a recording statute, and serves merely to protect persons dealing in land on the faith of the record title. Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494.

A mortgage upon real property, upon which the registry tax imposed by chapter 328, Laws 1907, has not been paid, though erroneously recorded by the register of deeds, furnishes no sufficient legal basis in the mortgagee for the redemption from the foreclosure of a prior mortgage upon the same property, as against the holder of the title under that foreclosure. The record of such a mortgage, being prohibited by the statute and thereby declared invalid for any purpose, is not evidence of the fact that it was duly recorded, or of the validity of the instrument. A certificate upon the back of such a mortgage, made by the county treasurer, before the same was recorded, that the mortgage was not subject to the tax, held not to conclude the holder of the title to the property under the prior foreclosure. Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

SUBJECT-MATTER

6180a. In general—Any interest in realty which may be sold or assigned may be mortgaged. Bennett v. Harrison, 115 Minn. 342, 350, 132 N. W. 309.

6186. Fixtures—(35) See Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964.

DEBT OR OBLIGATION SECURED

6193. Future advances—(44) Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721; Tenvoorde v. Tenvoorde, 128 Minn. 126, 150 N. W. 396. See G. S. 1913, § 2301; Note, 116 Am. St. Rep. 690.

PERSONAL LIABILITY TO PAY MORTGAGE DEBT

6205a. Release—Parol agreement—The mortgagor in a mortgage of real property, the mortgage being a mere incident to the debt or obligation secured, may be released and discharged from his personal liability for the payment of the debt by a subsequent parol agreement with the mortgagee, founded upon a valuable consideration; and such an agreement is not in violation of the statute of frauds. An agreement in parol to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside the written contract. First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681. See Digest, § 6246.

LIEN

6207. In general—(98) See 25 Harv. L. Rev. 567.

CONFLICT AND PRIORITY OF LIENS

6208. Purchase-money mortgages — Definition — (2) See Marin v. Knox, 117 Minn. 428, 136 N. W. 15.

6209. Priority of purchase-money mortgages—Where a mutual agreement is made, between a vendor in a contract to convey land, the vendee therein, and a third party, that the vendee is to obtain money to pay part of the balance of the purchase price from such third party, securing the same by a first mortgage upon the land, and the vendor is to take a second mortgage for the remainder of the purchase price, and pursuant to such agreement the deed and mortgages are executed and delivered, such mortgages are superior to the lien of a judgment obtained against the vendee prior to the delivery of the mortgages. If such deed and mortgages are executed and delivered pursuant to such mutual agreement, it constitutes but one transaction, although the documents may not have been delivered on the same day. Marin v. Knox, 117 Minn. 428, 136 N. W. 15.

(3, 4) Marin v. Knox, 117 Minn. 428, 136 N. W. 15. See Note, 40 L. R. A. (N. S.) 272.

(7) See Note, 52 L. R. A. (N. S.) 540.

6211. Priority among mortgages irrespective of recording act—Absolute deed from A to B intended as a mortgage. Subsequent mortgage from B to C. A remained in possession. Possession of A notice to C. Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

MORTGAGEE IN POSSESSION

6238. **Who is a mortgagee in possession**—(91) Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899. See Note, 40 L. R. A. (N. S.) 839.

6239a. **Loss of rights—Temporary absence**—One who has acquired the rights of a mortgagee in possession does not lose the same by being temporarily or involuntarily dispossessed. Finley v. Erickson, 122 Minn. 235, 142 N. W. 198.

PAYMENT AND PERFORMANCE

6243. **In general**—(20) Hendricks v. Hess, 112 Minn. 252, 127 N. W. 995.

(32) Harris v. Hanson, 119 Minn. 20, 137 N. W. 166.

6246. **By release—In general**—The mortgagor in a mortgage of real property, the mortgage being a mere incident to the debt or obligation secured, may be released and discharged from his personal liability for the payment of the debt by a subsequent parol agreement with the mortgagee founded upon a valuable consideration; and such an agreement is not in violation of the statute of frauds. An agreement in parol to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside the written contract. First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

6253. **By tender**—The lien of a mortgage may be discharged by a tender of the amount of the debt secured. Orr v. Sutton, 127 Minn. 37, 148 N. W. 37. See 10 Col. L. Rev. 252.

6262. **Payment to agent**—(71) State v. Lawrence, 130 Minn. 10, 153 N. W. 123.

(82) Harris v. Hanson, 119 Minn. 20, 137 N. W. 166.

(83) State v. Lawrence, 130 Minn. 10, 153 N. W. 123.

6265. **Satisfaction of record**—The rights of third persons can only be affected by a discharge of the mortgage of record in the manner pointed out by law. But a formal written discharge is not necessary to the validity of an agreement made for that purpose between the mortgagor and mortgagee, where the rights of third persons are not involved. First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

6266. **Extension of time of payment—Release of surety**—(1) Sime v. Lewis, 112 Minn. 403, 128 N. W. 468. See 13 Col. L. Rev. 238.

ESTOPPEL

6267. **Mortgagor held estopped**—Plaintiff executed two mortgages on real property; the latter one being for commissions in securing the for-

mer, and containing no power of sale. There was default in both mortgages, and the commission mortgage was attempted to be foreclosed by advertisement. The mortgagee purchased at the sale, and at the end of a year went into possession. He and his grantees remained in peaceable possession for more than five years, paid taxes, made improvements, and paid off and procured to be satisfied the prior mortgage. Defendant purchased the land for a valuable consideration, without actual notice of the invalidity of the foreclosure. Plaintiff at all times knew of the attempted foreclosure, of the facts before stated, and of the defect which rendered the foreclosure invalid; but he remained silent, not asserting any title to or right in the land until he commenced this action to redeem. The property in the meantime had greatly increased in value. Held, that plaintiff is estopped by his conduct from asserting title to the land or the right to redeem. Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899.

6268. Mortgagor held not estopped—(26) Burns v. Burns, 124 Minn. 176, 144 N. W. 761.

FRAUD

6274. In general—(51) Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812 (evidence held not to justify a finding that an assignment of a mortgage was obtained by fraud or undue influence); Wagner v. Magee, 130 Minn. 162, 153 N. W. 313 (ratification after knowledge of fraud).

INSURANCE

6275. In general—(52) See Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372.

(55) See In re Holmes Lumber Co., 189 Fed. 178, 182.

(56) Effect of owner's neglect to furnish proof of loss. 27 Harv. L. Rev. 763.

See Note, 118 Am. St. Rep. 968; 135 Id. 743.

ASSIGNMENT OF DEBT

6276. What passes—(64) Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051.

ASSIGNMENT OF MORTGAGE

6280. Essentials of a legal assignment—Assignment from husband to wife. Evidence held to show a sufficient delivery. Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051.

An unacknowledged assignment is good as between the parties. Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812.

(75) Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

6284. Assignee takes subject to equities—(82) Hendricks v. Hess, 112 Minn. 252, 127 N. W. 995.

(83) See 12 Col. L. Rev. 152.

(85) Hendricks v. Hess, 112 Minn. 252, 127 N. W. 995.

6285. Recording assignment—Notice—An assignment of a mortgage, though not recorded, is valid as against a purchaser of the premises who has notice of the assignment, or notice that the mortgage is an existing lien. German-American Bank v. Anderberg, 114 Minn. 431, 131 N. W. 468.

An assignment of a real estate mortgage is a "conveyance," within the recording acts, and, if not recorded, is void as to a purchaser of the property, who, relying upon the record, in good faith secures a satisfaction of the mortgage from the mortgagee. Letters from the owner of the land to the prospective purchaser with reference to the amount of the incumbrance on the land were competent evidence upon the question of good faith of the purchaser in securing a satisfaction of a recorded mortgage, which had been assigned, but not recorded. Foss v. Dullam, 111 Minn. 220, 126 N. W. 820.

An assignment of a mortgage upon real property, though not recorded until after the death of the assignor, is valid and superior to the rights of the heirs of the assignor, who are not within the recording act, in the position of subsequent bona fide purchasers. An unacknowledged assignment of a mortgage is valid between the parties; the acknowledgment thereof being essential only to entitle it to record. Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812.

(87) Foss v. Dullam, 111 Minn. 220, 126 N. W. 820.

(90) Hendricks v. Hess, 112 Minn. 252, 127 N. W. 995.

6286. Effect of assigning notes and mortgage to different persons—(93, 94) Note, 42 L. R. A. (N. S.) 183.

ASSUMPTION OF MORTGAGE

6293. Grantor must be personally liable—It is the law of this state that a provision in a deed, whereby the grantee agrees with the grantor to assume and pay an outstanding mortgage on the property conveyed, creates no enforceable obligation, unless the grantor is personally liable to pay the debt; but, if the grantor is personally liable, the mortgagee or his assignee may enforce the obligation by action against the assuming grantee. Whether the grantor in such a deed is personally liable for the mortgage debt is to be determined according to the laws of the state where his contract was made. If such laws make the grantor personally liable, his grantee, who assumes and agrees to pay the mortgage, is liable, though such assumption agreement be made in this state. Wood v. Johnson, 117 Minn. 267, 135 N. W. 746.

6295. Land becomes primary fund—Grantor a surety—Release— When real estate is conveyed subject to a mortgage, and the grantee assumes payment of the mortgage debt, the relation of principal and surety is established between the parties, the grantee becoming the principal and the mortgagor the surety; and the satisfaction of the mortgage by the mortgagee, with knowledge of such conveyance, releases the mortgagor from the mortgage debt. Heidahl v. Geiser Mfg. Co., 112 Minn. 319, 127 N. W. 1050.

(26) Heidahl v. Geiser Mfg. Co., 122 Minn. 319, 127 N. W. 1050; Sime v. Lewis, 112 Minn. 403, 128 N. W. 468; Kuby v. Ryder, 114 Minn. 217, 223, 130 N. W. 1100. See Note, 16 L. R. A. 85.

(29) Sime v. Lewis, 112 Minn. 403, 128 N. W. 468; Kuby v. Ryder, 114 Minn. 217, 223, 130 N. W. 1100.

6301. Unauthorized insertion of assumption clause—(48) Demaris v. Rodgers, 110 Minn. 49, 124 N. W. 457.

FORECLOSURE BY ADVERTISEMENT

6307. The power—(78) Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899.

6308. Strict compliance with statute necessary—(80) Moore v. Carlson, 112 Minn. 433, 128 N. W. 578; Sander v. Stenger, 117 Minn. 424, 136 N. W. 4.

6314. Effect of sale in exhausting lien—(7, 8) Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

WHO MAY EXERCISE POWER

6321. Sufficiency of the record—Action to set aside the foreclosure of a mortgage by advertisement. Held, when land is registered under the Torrens law, subject to the lien of a mortgage, it is not necessary to the foreclosure of such mortgage by advertisement that assignments of the same made before the decree of registration should be registered, or a memorial thereof be entered upon the certificate of title. Section 55, c. 305, Laws 1905, applies only to mortgages and assignments made after the decree. Sander v. Stenger, 117 Minn. 424, 136 N. W. 4.

NOTICE OF SALE

6326. By whom signed—Names of the parties—Requisites of notice when title to land is registered. Sander v. Stenger, 117 Minn. 424, 136 N. W. 4.

(66) Moore v. Carlson, 112 Minn. 433, 128 N. W. 578.

6329. Amount claimed to be due—In the absence of specific statutory requirement a general statement of the default is sufficient. Hage v. Benner, 111 Minn. 365, 127 N. W. 3.

6337. Service of notice—If the character of the occupancy is such as to require the service of a notice it is immaterial that the occupant is in possession without right or license. Fitger v. Alger, Smith & Co., 131 Minn. —, 153 N. W. 996.

Whether the occupancy is open and visible so as to require the service of a notice is a question for the jury, unless the evidence is conclusive. Fitger v. Alger, Smith & Co., 131 Minn. —, 153 N. W. 997.

(20) Fitger v. Alger, Smith & Co., 131 Minn. —, 153 N. W. 997. See McCauley v. McCauleyville, 111 Minn. 423, 127 N. W. 190.

See Laws 1911, c. 210 (curative act).

SALE

6347. For inadequate price—See Note, 103 Am. St. Rep. 51.

6356. Attacking validity of sale—Limitation—A statutory mortgage foreclosure sale, of record and fair on its face, is not open to attack upon any ground after the limitation prescribed by section 4478, R. L. 905 (G. S. 1913, § 8144), has run. Finley v. Erickson, 122 Minn. 235, 142 N. W. 198.

6357. Curative acts—(17) See Finley v. Erickson, 122 Minn. 235, 142 N. W. 198; G. S. 1913, §§ 8109, 8110, 8113, 8114, 8115, 8117, 8118, 8120–8126, 8134, 8135, Laws 1915, cc. 109, 123.

RIGHTS AND LIABILITIES OF PURCHASER

6368. Succeeds to rights of mortgagee—(82) Allis v. Foley, 126 Minn. 14, 147 N. W. 670.

6369. Effect of mortgagee bidding in—A bond given by a mortgagor to a mortgagee to protect the latter from mechanics' liens on the mortgaged premises held not discharged by a foreclosure and sale to the mortgagee. Wood v. Pacific Surety Co., 116 Minn. 474, 134 N. W. 127.

(85) Allis v. Foley, 126 Minn. 14, 147 N. W. 670.

6373. As a mortgagee in possession—(99) Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899.

6374. Right to sue on covenants in mortgage—Although the legal title does not vest in the purchaser at a mortgage foreclosure sale until the expiration of the period for redemption, yet, when it so vests, it relates back and takes effect as of the date of the mortgage, and, after it so vests, the rights of the purchaser against prior covenantors are the same as if the premises had been conveyed to him, at the date of the mortgage, by

deed containing the same covenants contained in the mortgage. Where the grantee in a deed of warranty executed a first mortgage with full covenants to one party and a second mortgage to another, and thereafter conveyed the premises to a third subject to both mortgages, and the first mortgage was subsequently foreclosed, a cause of action against the original covenantor for breach of his covenant of warranty, accruing after the execution of the first mortgage, passed to the purchaser at the foreclosure sale, and, at the expiration of the period for redemption, became vested and absolute in him, or in his assignee, and subsequent grantees of the mortgagor no longer had any interest therein. Where both such subsequent grantees of the mortgagor and the assignee of the purchaser at the foreclosure sale were plaintiffs in an action against the original covenantor for breach of his covenant of warranty, it was not error to dismiss the action as to all the plaintiffs except such assignee. Allis v. Foley, 126 Minn. 14, 147 N. W. 670.

REDEMPTION—IN GENERAL

6385. An incident of every mortgage—(22) Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 133 N. W. 91.

6392. Extension of time to redeem—(40) Oertel v. Pierce, 116 Minn. 268, 133 N. W. 797.

6392a. Extension of time of payment of debt beyond redemption period—A mortgagee was the purchaser at the foreclosure of his mortgage, and subsequently, and before the expiration of the period of redemption, entered into an agreement with the mortgagor extending the time for the payment of the mortgage debt beyond the period for redemption. Held, that the legal effect of the agreement and the part performance thereof was a waiver of rights acquired under the foreclosure, and an annulment thereof, leaving the parties in the relation of mortgagor and mortgagee, with the right of redemption still subsisting. Oertel v. Pierce, 116 Minn. 266, 133 N. W. 797.

6396. Release or sale to mortgagee—(46) Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186; Holien v. Slee, 120 Minn. 261, 139 N. W. 493. See Schnitter v. Lau, 189 Fed. 893; Note, 55 Am. St. Rep. 100.

REDEMPTION BY MORTGAGOR OR ASSIGNS

6398. By mortgagor or his wife—Part owner—An absolute deed from A to B intended as a mortgage. B mortgaged the land for the benefit of A. A entitled to redeem. Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638.

A wife of a mortgagor may redeem, and this applies to the foreclosure of a purchase-money mortgage. Northwestern Trust Co. v. Ryan, 115 Minn. 143, 132 N. W. 202. See Digest, § 4279(75).

Where an entire tract of land has been sold at a foreclosure or execution sale, a party who has no lien on any part thereof but owns a separate part, or has some interest therein, may redeem the whole tract as owner. Such redemption annuls the sale, but he is entitled to a lien in the nature of an equitable mortgage on the part not owned by him for the amount necessarily paid to redeem, if the whole of the original lien was, as to him, equitably chargeable to that part of the tract; otherwise, for an equitable pro rata share of the amount he was compelled to pay to protect his own estate. Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

(51) Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

6403. Effect of redemption—(70) Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16. See Powers v. Sherry, 115 Minn. 290, 132 N. W. 210 (effect of redemption of whole tract by owner of part).

REDEMPTION BY CREDITORS

6405. Nature of right—(77) Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

6407. When right accrues—(81) Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

6410. Who may redeem as creditors—Where an entire tract of land has been sold at a foreclosure or execution sale, a creditor having a lien on a part only of the tract may redeem the whole thereof, and be subrogated thereby to the rights of the purchaser at such sale, which is not annulled by the redemption. Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

The right of a judgment creditor to redeem may be defeated by a tender by the judgment debtor of the full amount of the judgment. Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066.

(86) Orr v. Sutton, 119 Minn. 193, 137 N. W. 973. See Burns v. Burns, 124 Minn. 176, 144 N. W. 761 (mortgage held without consideration and mortgagee not entitled to redeem).

(91) Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066.

(95) Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

6411. Attacking creditor's lien—Action to enjoin redemption—One who has redeemed from a foreclosure may contest the validity of a lien under which a subsequent redemptioner claims the right to redeem. Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

Appellant and her husband made a deed to the latter's brother of land to which she held the legal unrecorded title; the husband took the deed to the brother and delivered it, upon receiving a surrender of the equities of the brother to land, the legal title whereof was in appellant's

husband, and the balance of the agreed consideration in money; and thereupon a mortgage without any consideration was executed to appellant to protect the mortgagors against their own improvidence. Held, that it was not error to exclude evidence concerning appellant's purchase of the land so conveyed, nor as to her secret instructions to her husband respecting the delivery of the deed. The mortgage to appellant caused no legal fraud, and plaintiff is not estopped from asking its cancelation. Plaintiff and intervener are entitled to maintain this action by virtue of their interest in the land to which the mortgage relates. Plaintiff's cause of action did not accrue until appellant refused to release the mortgage or until she asserted its validity. Burns v. Burns, 124 Minn. 176, 144 N. W. 761.

No one in the line of redemptioners, nor an intermeddler, may, by tender of payment of a judgment, impair or destroy a judgment creditor's right to use the judgment to effect redemption. To destroy a judgment creditor's right to use the judgment as a means for obtaining certain land through redemption, it is not indispensable that the judgment debtor, in addition to tender of payment, bring suit to compel satisfaction of the judgment and deposit the money tendered in court. A tender by the judgment debtor of the full amount due on a judgment, under which the judgment creditor has filed an intention to redeem land, before the arrival of the time when the judgment could be used for such purpose, and under circumstances clearly disclosing that both parties appreciated the purpose of such tender, destroys the right of the judgment creditor to thereafter use the judgment as a basis for redeeming such land. But if a redemption is made by a judgment creditor whose right to make it, though good on the face of the record, has, in fact, been destroyed by the tender of the payment of the judgment, the title of the purchaser at the sale nevertheless passes to him if the holder thereof accepts the redemption money with full knowledge of the tender. Assuming a valid tender proved it is held: (a) That the defendant Torinus, the holder of the title acquired through the mortgage foreclosure sale, by accepting the redemption money paid by plaintiffs, judgment creditors, with full knowledge of the facts showing that they had no right to redeem, thereby suffered plaintiffs to succeed to his title and cannot now question the validity of their redemption. (b) That the evidence does not show any rights or equities which required the court to relieve the defendant William Sutton, junior to plaintiffs in the line of redemptioners, who attempted to redeem under a mortgage, recorded without the prepayment of the registry tax. Nor has Sutton alone, or in conjunction with any other defendant, any equities through which to attack plaintiffs' title. (c) That the defendant Sauntry, the owner, after the expiration of the year of redemption had no interest in the land so as to question plaintiffs' redemption, and his right to have the land

applied to the payment of such of his debts as were liens thereon depended entirely upon the lienholders making redemption in strict conformity with the statute. Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066.

A judgment creditor, whose judgment is irregular, has no right to redeem from a mortgage foreclosure sale, but if he undertakes to do so, and the purchaser at the sale receives the redemption money and appropriates it to himself, he waives any defect in the title of the holder of the judgment to redeem, and the redemption thereon operates as an assignment to the redeeming creditor of the rights acquired by the purchaser at the sale. The certificate holder may rescind his acceptance of the redemption money and still assail the right of the redemptioner to redeem if induced by fraud to accept it and, perhaps, if so induced by mistake. In this case there was no showing that plaintiffs' purchasers at foreclosure sale were induced by fraud or mistake to accept redemption money. The fact that the litigation out of which the judgment arose was still pending was patent. Plaintiffs were put upon inquiry by the fact of redemption. They could not themselves have determined the validity of the judgment, but they could have ascertained that it was still in litigation, and in that situation they were bound to determine whether they would recognize it as valid or disregard it as invalid. The fact that they could not themselves litigate the validity of the judgment presents no reason why they were obliged to recognize it as valid. Grant v. Bibb, 129 Minn. 312, 152 N. W. 728.

(6, 8) See Grant v. Bibb, 129 Minn. 312, 152 N. W. 728.

6413. Notice of intention—(16) See Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066.

6417. Proof of right to redeem—The statute contemplates that a lien in the form of a subsequent mortgage shall be of record, and that the redemptioner shall produce to the officer to whom the redemption money is paid a certified copy of the record, and either the original mortgage or a certified copy thereof. A mortgage upon real property, upon which the registry tax imposed by chapter 328, Laws 1907, has not been paid, though erroneously recorded by the register of deeds, furnishes no sufficient legal basis in the mortgagee for the redemption from the foreclosure of a prior mortgage upon the same property, as against the holder of the title under that foreclosure. The record of such a mortgage, being prohibited by the statute and thereby declared invalid for any purpose, is not evidence of the fact that it was duly recorded, or of the validity of the instrument. Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

6423. Effect of redemption—Where an entire tract of land has been sold at a foreclosure or execution sale, a creditor having a lien on part only of the tract may redeem the whole thereof, and be subrogated

thereby to the rights of the purchaser at such sale, which is not annulled by the redemption. Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

If a redemption is made by a judgment creditor whose right to make it, though good on the face of the record, has, in fact, been destroyed by the tender of the payment of the judgment, the title of the purchaser at the sale nevertheless passes to him, if the holder thereof accepts the redemption money with full knowledge of the tender. Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066.

(67) Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

(68) Grant v. Bibb, 129 Minn. 312, 152 N. W. 728.

(69) Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

FORECLOSURE BY ACTION

6434. Parties—Unless a wife of a mortgagor is made a party her equity of redemption is not cut off. Northwestern Trust Co. v. Ryan, 115 Minn. 143, 132 N. W. 202.

Junior incumbrancers as parties. Note, 36 L. R. A. (N. S.) 426.

6437. Defences—Action to foreclose a purchase money mortgage. Defence that the vendor, the plaintiff, misrepresented the location of the lands conveyed, and that the vendee, the defendant, rescinded the contract because of such misrepresentation. Evidence held to justify a finding for defendant. Mager v. Knudsen, 126 Minn. 85, 147 N. W. 819.

6455. Strict foreclosure—Public service corporations—Where a public service corporation, such as a telephone company, mortgages its franchises, easements, and its entire property, both real and personal, and it appears, by reason of the character and condition of the mortgaged property, that the plant is an integer, and that the real estate cannot be sold separately from the personal property, without greatly impairing the value of the whole, to the detriment of all concerned, the mortgaged property should, on foreclosure, be sold as an entirety, without right of redemption as to the real estate, notwithstanding the statute, giving a right of redemption from foreclosure sales of real estate. Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 133 N. W. 91.

MARSHALING SECURITIES

6466. In general—Marshaling assets for benefit of mortgagor. Note, 47 L. R. A. (N. S.) 302.

(32) Powers v. Sherry, 115 Minn. 290, 132 N. W. 210.

(36) See Miller v. McCarty, 47 Minn. 321, 50 N. W. 235.

ACCOUNTING

6468. In general—The controversy being whether the summons in an action to recover the amount of deficiency claimed to be due on a fore-

closure mortgage sale was personally served, and whether the plaintiff was entitled to an accounting for moneys alleged to have been received by defendant after the service of such summons, held, the evidence to the effect that the summons had been served, and that the defendant was not indebted to the plaintiff, was not so manifestly and palpably in favor of the findings as to require a reversal of an order of the trial court granting a new trial. Oertel v. Pierce, 112 Minn. 397, 128 N. W. 671.

Action for an accounting to determine the amount of the debt secured, to foreclose the mortgage given as security, to have prior liens determined, and for leave to redeem from a prior mortgage. Findings as to allowance of items sustained. National Citizens Bank v. Babcock, 113 Minn. 493, 129 N. W. 1045.

INJUNCTION

6470. Injunction granted to restrain sale—A substantial overstatement of the mortgage debt in a notice of sale given in a foreclosure by advertisement is sufficient ground for temporarily enjoining the sale. Ekeberg v. Mackay, 114 Minn. 501, 131 N. W. 787. See 25 Harv. L. Rev. 192.

ACTIONS

6475. Action to recover excess at foreclosure sale—(76) Note, 44 L. R. A. (N. S.) 1041; Dunnell, Minn. Pl. 2 ed. § 768.

6482. Action to reform and foreclose—Reformation of absolute deed intended as a mortgage where both parties were ignorant of statute invalidating such mortgage. Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455; Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

6486. Action to redeem from mortgage—In an action by a mortgagor to redeem mortgaged premises, where the mortgagee has been in possession, the latter should be charged with the fair rental value of the premises while he had possession. Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186.

(16) Schnitter v. Lau, 189 Fed. 893.

(20) Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

6487. Action to set aside foreclosure sale—Limitation—A statutory mortgage foreclosure sale of record, and fair on its face, is not open to attack upon any ground, after the limitation prescribed by section 4478, R. L. 1905 (G. S. 1913, § 8144) has run. Finley v. Erickson, 122 Minn. 235, 142 N. W. 198.

The statute of limitations is not unconstitutional as against one in possession prior to the enactment of the statute, upon the ground that

one in possession cannot constitutionally be required by an after-enacted statute to bring an action or interpose a defense against an adverse claimant, unless such one in possession is in possession claiming under the chain of title affected by the foreclosure. Fitger v. Alger, Smith & Co., 131 Minn. —, 153 N. W. 997.

MOTHERS' PENSIONS—See Infants, 4466b.

MOTIONS AND ORDERS

MOTIONS

6492. Definition—An action may sometimes be treated as in effect a motion. Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

6493. Scope of remedy—Relegating parties to an action—When a motion is an improper means of trying the issues the court may relegate the parties to an action. Woodford v. Reynolds, 36 Minn. 155, 30 N. W. 757: Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

(83) Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915.

6494. Refusal to entertain motion or exercise discretion—(84) National Council v. Ruder, 126 Minn. 154, 147 N. W. 959 (order denying relief "on the records and files in said case" held to show affirmatively that it was on the merits).

6497. Notice of motion—Where the motion is based on "the pleadings and all the files and proceedings in the action" the court is required to consider only the files in the pending action. Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

Where a party is served with a short notice of an interlocutory motion, his remedy is by timely application to the trial court to vacate the service or to be relieved from default. No remedy having been sought there, the point is not available on appeal. The time of notice of settlement of a case prescribed by statute may be shortened by an order to show cause. Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

6498. Where and by whom heard—A motion for judgment upon the return to an alternative writ of mandamus may be made at the place where the writ is made returnable. State v. Common Council of Waseca, 116 Minn. 40, 133 N. W. 67.

6499. Practice at hearing—Order of argument—Affidavits—Oral evidence—It is discretionary with the court to permit additional affidavits to be read and filed at the hearing of a motion or order to show cause. Schlesinger v. Modern Samaritans, 121 Minn. 145, 140 N. W. 1027.

(13) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022; Ziegler v. Suggit, 118 Minn. 74, 136 N. W. 411; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

6500. Relief which may be awarded—Where there is an appearance and contest on the merits of a motion which prays for both specific and general relief, the court may grant the moving party any relief the facts may justify, if the adverse party is not thereby taken by surprise. Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737.

6502. Renewal of motion—(31, 33) McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

ORDERS

6510. Res judicata—An ex parte decision is not res judicata. Merz v. Wright County, 114 Minn. 448, 452, 131 N. W. 635.

(54) See Morton v. Sperry, 113 Minn. 447, 129 N. W. 843.

(56) Major v. Owen, 126 Minn. 1, 147 N. W. 662 (order in condemnation proceedings disposing of funds—conflicting claimants to funds).

6512. Vacation and amendment—Whatever may be done upon motion to the court may, by the court, upon further motion seasonably made by either party, be wholly undone. McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

(60) Dorffi v. Duluth, Winnipeg & Pac. R. Co., 117 Minn. 276, 135 N. W. 529 (amendment of order granting a new trial); McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134 (vacating order for judgment on the pleadings); Dasich v. La Rue Mining Co., 126 Minn. 194, 148 N. W. 45 (order approving settlement of a claim vacated).

ORDERS TO SHOW CAUSE

6513. As a short notice—(61) Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

MOTOR VEHICLES—See Highways, 4167; Street Railways, 9023a.

MUNICIPAL CORPORATIONS

IN GENERAL

6517. Nature—(77) Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325.

6520a. Organization and territorial extent legislative questions—The creation of municipal corporations and their territorial extent are legislative rather than judicial questions. State v. Gilbert, 127 Minn. 452, 149 N. W. 951.

6520b. De facto corporations—A public corporation de facto exists where there is (1) some law under which a corporation with the powers assumed might lawfully have been formed, (2) a colorable and bona fide attempt to perfect an organization under such a law, (3) user of the rights claimed to have been conferred by the law for an appreciable length of time. Where a municipal body has assumed under color of authority to exercise the power of a public corporation of a kind recognized by the organic law, the validity of its organization can be challenged only by the state, and neither the corporation nor any private party can in private litigation question the legality of its existence. The fact that the organization was so defective as to be void in its inception does not change the rule. Time of exercise of the functions of a corporation is not of controlling importance. These rules preclude direct as well as collateral attack by private litigants. 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. Evans v. Anderson, 131 Minn. ——, 155 N. W. 1040. See §§ 6528, 6531.

6521. Boundaries—Annexation of territory—Detachment of agricultural lands—The power to create a municipality and to prescribe its territorial limits is a legislative one, which cannot be exercised by the courts; but they have jurisdiction to locate on the ground the boundary line of a municipal corporation. Snow v. Excelsior, 115 Minn. 102, 132 N. W. 8.

Under a home rule charter a city cannot extend its power and jurisdiction to territory and residents outside the boundaries of the city. Duluth v. Orr, 115 Minn. 267, 132 N. W. 265.

Chapter 113, Laws 1909 (G. S. 1913, §§ 1800–1804), providing for annexation of territory to villages and cities, applies both to existing and to future municipal corporations of that kind. The clear intent expressed in the first part of the first section to include future as well as existing villages, aided by the presumption that the Legislature intended to pass a constitutional act, leads to the conclusion that the

word "present," in the latter part of said section, refers
limits as "present" or existing at the time of the institut
nexation proceedings, and not to the time of the passage
It is no valid objection to village annexations that terr
conditioned to be annexed was not included. The fraud
lawful colonization of the annexed territory by residents
prior to the election, and their taking part therein, assum
be raised in this proceeding, did not change the result;
illegal votes are rejected, and that number deducted f
cast in favor of annexation, the proposition still receiv
Territory annexed to a village, like territory originally
must be so conditioned as properly to be subjected to
ment. State v. Gilbert, 127 Minn. 452, 149 N. W. 951.

(86) Jones v. Red Lake Falls, 116 Minn. 454, 134 N.
State v. Gilbert, 127 Minn. 452, 149 N. W. 951.

INCORPORATION OF VILLAGES

6526. General laws—Application—Chapter 145, Laws 1
the incorporation of villages, and providing that all villa
incorporated under the general statutes of the state shou
by the provisions thereof, though repealed by section 55
nevertheless, by force of section 698, R. L., remains in fo
ing villages, which were not reincorporated as provided
699, R. L. 1905. Chicago etc. Ry. Co. v. Le Roy, 124 Mi
W. 464.

(94) Chicago etc. Ry. Co. v. Le Roy, 124 Minn. 107,

6526a. Requisite population—Gen. St. 1894, § 1200, a
chapter 208, Laws 1903, providing for the incorporation
lages, contemplates and requires that the necessary po
thorize incorporation should be composed of actual r
territory, those having a fixed abode therein, and to excl
porarily sojourning therein. In determining such popu
temporarily employed at lumber camps cannot be incl
Island Lake, 130 Minn. 100, 153 N. W. 257.

6527. Territory—The final test whether territory adj
lands may be incorporated with it as a village, pursuan
Supp. 1909, § 700, is whether they have such a natural
the people residing thereon have such a community of i
whole may be properly subjected to village government.
allegations of the answer are not so clearly insufficient
judgment of ouster upon a demurrer thereto. State v.
330, 127 N. W. 1118; Id., 114 Minn. 195, 130 N. W. 948

The original incorporation of a village is not open to attack because there was left out other adjoining territory which might properly have been included. State v. Dover, 113 Minn. 452, 130 N. W. 74, 539; State v. Gilbert, 127 Minn. 452, 149 N. W. 951.

Whether unplatted territory, included within the limits of a village corporation, is so conditioned as properly to be subject to village government, is a question of fact, to be determined by the voters entitled to vote upon the question; and their decision cannot be disregarded, unless it clearly appears to have been the result of arbitrary action. State v. Dover, 113 Minn. 452, 130 N. W. 74, 539; Schweigert v. Abbott, 122 Minn. 383, 387, 142 N. W. 723; State v. Gilbert, 127 Minn. 452, 149 N. W. 951.

(97) State v. Gilbert, 127 Minn. 452, 149 N. W. 951.

6528. De facto villages—Collateral attack—(98) See Snow v. Excelsior, 115 Minn. 102, 132 N. W. 8 (de facto boundaries not open to collateral attack by individuals); State v. Island Lake, 130 Minn. 100, 153 N. W. 257 (facts held not to estop state from attacking the incorporation of the village).

6529. Village as part of town—Under chapter 35, Sp. Laws 1889, the citizens of the village of Preston remain citizens of the townships in which they reside for all township purposes, and have in addition the powers and privileges of village citizens, and as such the right to vote at town meetings of their respective towns. Held, the legislature created a dual municipality. The village is subject to the duty of constructing and maintaining its own roads and bridges. Its voters remain voters of the respective townships, entitled to vote at town meetings and to representation on the town board. The township had the power to levy, estimate, and collect taxes on the lands within the village for the construction and maintenance of roads and bridges within the township. Love v. Preston, 112 Minn. 459, 128 N. W. 673.

6529a. Dissolution of villages—Disposition of property—The township within which a dissolved incorporated village was located is not, in the absence of a statute so providing, the legal successor of the village or the owner of any of its property, or the surplus funds remaining in the village treasury after dissolution, and cannot maintain an action therefor. Section 743, R. L. 1905 (section 1305, G. S. 1913), provides that, where a municipal corporation is dissolved, the common council thereof shall direct how any surplus fund shall be used, and an improper direction or disposition of such funds cannot be complained of by the township in which municipality was located. Highland Grove v. Winnipeg Junction, 125 Minn. 280, 146 N. W. 974.

INCORPORATION OF CITIES

6531. Collateral attack—(3) Snow v. Excelsior, 115 M
W. 8; Evans v. Anderson, 131 Minn. —, 155 N. W. 1

HOME RULE CHARTERS

6535. Constitutional provision—(8) State v. St. Paul
150 N. W. 389.

6537a. Construction—Provisions of home rule charte
construed so as to abrogate well established equitable d
Norton Yards v. Rochester, 117 Minn. 114, 134 N. W. 64

The rule requiring statutes to be so construed as not
stitutional inhibitions, if reasonably susceptible of suc
applies to so-called home-rule city charters, and the pro
charters are not to be held void if they can reasonably
as not to transgress such inhibitions. State v. Ely, 12
N. W. 545.

6538. Scope and contents—In the home rule charter of
ed in 1900 the dual form of government of prior charte
The president of the common council held entitled to ac
appointive board. Appointment of county assessor. Sta
Minn. 111, 124 N. W. 983.

Under a home rule charter a city cannot extend its p
diction to territory and residents outside its boundaries.
115 Minn. 267, 132 N. W. 265.

Whether provisions of a home rule charter are self-e
determined by no arbitrary test. Whether a provision i
must be determined from a consideration both of the
and of the intrinsic nature of the provision itself. In ge
that prohibitory provisions in a constitution or charter a
executing to the extent that any thing done in violation
so is any provision that indicates that it was intended a
actment, complete in itself as definitive legislation not con
sequent legislation to carry it into effect. It is not imp
er legislation may be contemplated to supplement it.
is to be operative at all events, and the nature and exte
conferred and the liabilities imposed are fixed by it, so t
determined by examination and construction of its terms
sion itself furnishes a complete working rule of conduct
self-executing, and the legislative authority will not be
through the perfunctory process of passing it in order to
State v. McColl, 127 Minn. 155, 149 N. W. 11.

Home rule charters may provide for the government of city schools and libraries. State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

The constitutional and legislative provisions relating to home rule charters do not authorize a provision in a charter granting a city council authority to punish a witness called before it for contempt. State v. Fitzgerald, 131 Minn. ——, 154 N. W. 750.

6539. Harmony with state constitution and laws—A home rule charter cannot legislate out of office a municipal judge elected under the general statutes. State v. Fleming, 112 Minn. 136, 127 N. W. 473.

Home rule charters must be in harmony with and subject to the constitution and laws of the state. Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

(23) State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

(24) Thune v. Hetland, 114 Minn. 395, 131 N. W. 372; State v. St. Paul, 128 Minn. 82, 150 N. W. 389. See Hjelm v. St. Cloud, 129 Minn. 240, 152 N. W. 408 (provision as to venue of actions against municipality held not to supersede general statute).

6539a. Commission form of government—The requirement of art. 4, § 36 of the constitution, that home rule charters must provide for a "mayor or chief magistrate, and a legislative body," does not of itself import such a severance of the several departments of municipal government as to preclude the legislature from authorizing cities and villages to adopt the commission form of government, wherein the mayor is vested with legislative functions and the council is given other than legislative powers. Article 3, of the constitution providing that the powers of government shall be divided into executive, legislative, and judicial, etc., does not apply to municipal governments; and neither its expressed intent nor its spirit can be read into art. 4, § 36, of the constitution, so as to extend the limitation imposed by the latter on the form of municipal government, and thereby make it co-extensive with the limitation imposed by the former upon the form of state government. Laws 1909, c. 170, authorizing cities and villages to adopt the commission form of government, held constitutional and valid. The Mankato city charter, which provides and establishes the commission form of government for that city, is authorized by Laws 1909, c. 170, and does not transcend the constitutional limitations imposed upon the form of municipal government. State v. Mankato, 117 Minn. 458, 136 N. W. 264. See Note, 35 L. R. A. (N. S.) 802.

The Commission Charter of St. Paul, adopted in 1912, sustained as against the contention that, by reason of its educational features, its adoption, solely by the male voters or otherwise, was not authorized by Const. art. 4, § 36, relating to home rule charters, and that such provisions contravene Const. art. 8, §§ 1, 3, relating to establishment and main-

tenance of public schools, and, both in themselves and in the manner of their adoption, violate article 7, § 8, enfranchising women in educational matters. State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

Under the provision of the commission charter of the city of Duluth, adopted December 3, 1912, and going into effect thirty days thereafter, that the officers of the city, holding office at the time such charter takes effect, shall continue in office until the commission thereby provided for shall be elected and take office, the city council chosen under the former charter, and holding over under the new by virtue of such provision, had the power to order the issue of city bonds authorized under the former charter, and likewise to order the extension of a sewer, and to provide for the purchase of an automobile for the fire department; there being involved in such matters only the ordinary responsibilities incident to the administration of municipal affairs. Woodbridge v. Duluth, 121 Minn. 99, 140 N. W. 182.

6542. Debt limit—An amendment to the charter of Moorhead construed, and held to empower and authorize the city to construct a pavement on and retaining wall along a certain street, notwithstanding that the cost of such improvement would make the indebtedness of the city exceed the limit prescribed by the original charter. A. A. White Townsite Co. v. Moorhead, 120 Minn. 1, 138 N. W. 939.

6543. Submission—Calling an election—Submission to mayor—In determining the date from which to compute the six months within which a proposed home rule charter shall be submitted to the mayor, under Const. art. 4, § 36, a date earlier than the date of the appointment of the last member of the charter commission will not be taken. When a common council refuses to call an election for the submission of a charter duly returned by the charter commission upon the ground that it should have been submitted at a state election occurring after its return to the mayor, at which election the council did not submit it, it will be compelled by mandamus, there being no laches, to call an election within the time fixed by G. S. 1913, § 1348, regardless of whether the intervening election was one at which the charter might properly be submitted. State v. Barlow, 129 Minn. 181, 151 N. W. 970.

(31) State v. Barlow, 129 Minn. 181, 151 N. W. 970.

6544. When take effect—The constitution provides that a charter, ratified by the electors of a municipality, becomes effective at the end of thirty days thereafter. Woodbridge v. Duluth, 121 Minn. 99, 140 N. W. 182.

6546. Amendment—The law requires amendments adopted by the voters to be certified and a copy deposited in the office of the Secretary of State, as in the case of the original charter. An amendment so adopted

and certified becomes a part of the charter, and courts will take judicial notice thereof. A. A. White Townsite Co. v. Moorhead, 120 Minn. 1, 138 N. W. 939.

LEGISLATIVE CONTROL

6548. In general—The state has the power to require of its municipal subdivisions the performance of duties of state concern and to demand that they raise money and disburse the same for such purposes. Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325.

A municipal corporation has no such interest in contracts, or funds, held by it for governmental purposes that it can invoke against a legislative act affecting such contracts or funds the constitutional objection of impairment of contract or interference with vested rights. State v. George, 123 Minn. 59, 142 N. W. 945.

The legislature may change the classification of cities and thereby change the laws governing them. A municipality has no vested right to be governed by a particular set of laws. State v. St. Louis County, 124 Minn. 126, 144 N. W. 756.

The legislature cannot authorize one municipality to determine for another matters which properly belong to the local affairs of the latter. State v. Carver, 126 Minn. 5, 147 N. W. 660.

A municipality has no vested right to public funds in its hands as against legislative control. It is a general rule that public funds cannot be diverted from the uses for which they were raised, but this rule applies only to the local public officers having in charge the disbursement of the funds, and not to the legislature. State v. Wright County, 126 Minn. 209, 148 N. W. 52.

The legislature may impose a liability regardless of fault. It may impose a liability for the destruction of property by a mob. Chicago v. Sturges, 222 U. S. 313.

Legislative control of municipal property. Note, 35 Am. St. Rep. 529.

(38) State v. George, 123 Minn. 59, 142 N. W. 945.

See Digest, § 2242.

6550. Payment of imperfect obligations—(41) See State v. George, 123 Minn. 59, 142 N. W. 945.

6551. Private use of public funds—(42) See State v. George, 123 Minn. 59, 142 N. W. 945; Digest, § 2242.

6555. Change—Apportionment of debts, etc.—The court below was guided in disposing of the case, by the general rule that public funds cannot be diverted from the uses for which they were raised, and since this fund was raised for a specific purpose, namely, the construction of a new school building in district No. 44, it was beyond the power of the county board to award a portion thereof to district No. 139. While the

general rule stated is well settled, we think it has no application to a situation like that here presented. The rule only applies to the local officers having in charge the disbursement of the money, and does not affect legislative control of the fund. The case is controlled by the further rule that the legislature, having plenary control of the local municipality, of its creation and of all its affairs, has the right to authorize or direct the expenditure of money in its treasury, though raised for a particular purpose, for any legitimate municipal purpose, or to order and direct a distribution thereof upon a division of the territory into separate municipalities. State v. Wright County, 126 Minn. 209, 148 N. W. 53.

OFFICERS

6556a. De facto officers—A person appointed an assistant city clerk after the regular clerk had absconded held a de facto officer. State v. McIlraith, 113 Minn. 237, 129 N. W. 377.

6561. Term—Under the provision of the commission charter of the city of Duluth adopted December 3, 1912, and going into effect thirty days thereafter, that the officers of the city, holding office at the time such charter takes effect, shall continue in office until the commission thereby provided for shall be elected and take office, the city council chosen under the former charter, and holding over under the new by virtue of such provision, had the power to order the issue of city bonds authorized under the former charter, and likewise to order the extension of a sewer, and to provide for the purchase of an automobile for the fire department; there being involved in such matters only the ordinary responsibilities incident to the administration of municipal affairs. Woodbridge v. Duluth, 121 Minn. 99, 140 N. W. 182.

6564. Removal—Section 12 of the city charter of Brainerd imposes no duty upon the city council to entertain and hear a petition filed by citizens and taxpayers, whether specially interested or not, preferring charges against city officers and demanding their removal; and hence an alternative writ of mandamus to compel the council to fix a time and place for a hearing upon charges so preferred was demurrable. State v. Brainerd, 121 Minn. 182, 141 N. W. 97.

Elective municipal officers cannot be removed except for malfeasance or nonfeasance in office. Sykes v. Minneapolis, 124 Minn. 73, 144 N. W. 453.

The proceedings before a council are not to be tested by the strict rules that prevail in courts of law. State v. Duluth, 53 Minn. 238, 243, 55 N. W. 118; State v. Duluth, 125 Minn. 425, 430, 147 N. W. 820.

(66) Sykes v. Minneapolis, 124 Minn. 73, 144 N. W. 453 (city council may remove the supervisor of the city waterworks at will—charter's provision as to removal constitutional).

(67) State v. McColl, 127 Minn. 155, 149 N. W. 11 (right to remove limited by civil service provision—provision as to removal in classified civil service self-executing—officer not entitled to a formal trial but removing officer acts judicially and his action is reviewable by certiorari—age limit for officers—rights of officers irregularly appointed confirmed by amended charter).

See § 8010; 3 Mich. L. Rev. 290, 341.

6566. Failure to enforce liquor laws—(72) See State v. Osakis, 112 Minn. 365, 128 N. W. 295.

6567. Notice to officers notice to municipality—(73) State v. District Court, 131 Minn. ——, 155 N. W. 103.

6568. Mayor—Veto power—Where the power to issue licenses to sell intoxicating liquors is vested in the city council, the function of the mayor under an ordinance requiring his signature to such licenses is purely ministerial, and he has no power in such connection to impose any conditions or limitations upon the use of the license. Downey v. Red Wing, 121 Minn. 348, 141 N. W. 495.

COUNCIL

6573. President—The office of president of the council of the city of St. Paul was abolished, by Sp. Laws 1891, c. 6, but was revived by the home rule charter of 1900. State v. Haas, 110 Minn. 111, 124 N. W. 983.

It is no part of the official duty of the president of a village council to detect and apprehend persons suspected of committing crimes outside of his village. Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

6575. Powers—A council has no authority to punish a witness called before it for contempt. State v. Fitzgerald, 131 Minn. ——, 154 N. W. 750.

6576. Delegation of powers—(88) Edison v. Blomquist, 110 Minn. 163, 124 N. W. 969, 125 N. W. 895.

FISCAL AFFAIRS

6579. Limit of indebtedness—What is an indebtedness within limitation. Note, 44 Am. St. Rep. 229.

What constitutes the creation of a debt. Note, 37 L. R. A. (N. S.) 1058.

(96) See Digest, § 6542.

6581a. Contingent fund—Incidental expenses—The term "current and incidental expenses," as used in St. Paul Charter 1905, p. 37, subsec. 22, means the usual and reasonably necessary expenses, not otherwise provided for, of carrying into effect the powers and discharging the duties

given and imposed by the charter. Advertising the city is not a current and incidental expense, but one which is payable only out of the contingent fund of $10,000 for promoting the welfare of the city. Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66.

6584. Liability for debts of predecessor—(8) Ingersoll v. Deer River, 125 Minn. 452, 147 N. W. 439. See Love v. Preston, 112 Minn. 459, 128 N. W. 673.

LEGAL DEPARTMENT

6586. City attorney—Special counsel—The water, light, power, and building commission of the city of East Grand Forks being a governmental department of the city, the city attorney is its legal advisor, and it has no express or implied power to employ its own attorney, thereby creating a liability against the city. Conceding, without deciding, that an emergency may give power where none otherwise exists, it is held that, when the commission employed the attorney for whose services the city is sought to be made liable, no emergency existed, the commission had performed its duty, and was under no legal obligation to assist a private person to enforce a claim audited and ordered paid by it against the city. State v. Gorman, 117 Minn. 323, 136 N. W. 402.

POLICE DEPARTMENT

6590. Eligibility—(16) State v. McColl, 127 Minn. 155, 149 N. W. 11 (age limit).

6594. Powers of police officers—Police officers have the powers and duties of constables at common law. This includes the duty to arrest violators of statutes and ordinances. One of their chief duties in crowded streets is to direct travel for convenience and safety. State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

FIRE DEPARTMENT

6603. Negligence of firemen—The firemen of a fire department in a city are not the servants or agents of the person whose property they attempt to save from fire, so that their negligence in failing to take the proper course in the extinguishment of the fire avails one who by a negligent act cut off the water supply by which the fire was being successfully subdued, and thereby proximately caused the destruction of the property. Erickson v. Great Northern Ry. Co., 117 Minn. 348, 135 N. W. 1129. See Bodkin v. Great Northern Ry. Co., 124 Minn. 219, 144 N. W. 937; Mullen v. Otter Tail Power Co., 130 Minn. 386, 153 N. W. 746. (35) Hubert v. Granzow, 131 Minn. ——, 155 N. W. 204.

6605a. Pensions—Plaintiff, a regular and permanent member of the fire department of Minneapolis, was dropped from the rolls on account

of disabilities received while in the employ of the department. He was precluded from membership in the relief department by the fact that he was more than thirty-six years of age. He brought this action to require defendant to place him upon its pension rolls and to pay plaintiff such money as he may be entitled to. Held, that under chapter 24, Laws 1907, he was entitled to the relief sought. Buckendorf v. Minneapolis Fire Dept. Relief Assn., 112 Minn. 298, 127 N. W. 1053, 1133.

Where a member of the Minneapolis Fire Department Relief Association, an organization formed under the general laws of the state for the relief of disabled members of the Minneapolis Fire Department, is determined by the association to be disabled within the meaning of its constitution and by-laws and is granted a pension as therein provided, his right to the pension is a vested legal right of which he cannot be deprived except by due process of law, namely, by notice and opportunity to be heard in any proceedings had by the association for the purpose of terminating his rights. A determination by the association that a member thereof previously entered upon the pension rolls has fully recovered from his disability is not final and conclusive where the member had no notice and was not afforded an opportunity to be heard upon the question. The rights of the parties are analogous to and controlled by the principles of law applicable to mutual benefit societies. Stevens v. Minneapolis Fire Dept. Relief Assn., 124 Minn. 381, 145 N. W. 35.

A finding, evidentiary in character, in the absence of a specific assignment, is held a sufficient finding that the plaintiff was not depending upon her husband for support within Laws 1913, c. 318. The fact that the widow of a deceased fireman had separated from him, and was obtaining a living from an immoral occupation, does not prevent her from receiving a pension under Laws 1907, c. 24, and the defendant's articles and by-laws. Laws 1913, c. 318, defining the term "widow" as used in Laws 1907, c. 24, relative to pensions for firemen, was intended to apply as of that date to widows then receiving pensions as well as widows who might thereafter claim them. As between the state and members of the fire department the pension is a gratuity; and the state may take it away, except so far as it has accrued, without affecting a vested right or violating the constitution. Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075.

Chapter 318, Laws 1913 (G. S. 1913, §§ 3349, 3355), is not unconstitutional as class legislation because based upon an arbitrary distinction between widows of common-law marriages and widows of ceremonial marriages. Under Laws 1907, c. 24 (G. S. 1913, §§ 3348–3358), as amended by Laws 1913, c. 318 (G. S. 1913, §§ 3349, 3355), the widow of a fireman, otherwise entitled to a pension, who was his common-law wife, is not entitled thereto. Where prior to the passage of Laws 1913,

c. 318 (G. S. 1913, §§ 3349, 3355), the defendant denied liability to the plaintiff, but upon action brought such liability was found by the court, and judgment directed accordingly, prior to the passage of Laws 1913, c. 318, and was entered afterwards, such judgment will not be enforced in proceedings by contempt where the widow was the pensioner's common-law wife. Minegar v. Minneapolis Fire Dept. Relief Assn., 126 Minn. 332, 148 N. W. 279.

PARKS

6613. Minneapolis park board—(46) State v. Brown, 111 Minn. 80, 126 N. W. 408.

STREETS—IN GENERAL

6618. Municipal control—In general—When a village is incorporated and includes within its limits part of a county road, that part of the road becomes, as a general rule, a village street, and subject to the control of the village. But the legislature may give to counties control of highways within villages. Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738.

(54) International Falls v. Minn. D. & W. Ry. Co., 117 Minn. 14, 134 N. W. 302.

6619. Privileges and immunities—(55) See Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571.

See Note, 125 Am. St. Rep. 343.

6621. Laying out—Paying property owner—A village may properly, under some circumstances pay a property owner for the opening of a street across his property. The court will not enjoin such expenditure, unless its illegality is made to appear. Vague allegations that the expenditure is an extravagant waste of funds, without stating any facts on which the court can form a judgment, are not sufficient to warrant an injunction. Tiedt v. Argyle, 129 Minn. 259, 152 N. W. 412.

(57, 59, 60) Minneapolis etc. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423; Chicago etc. Ry. Co. v. Le Roy, 124 Minn. 107, 144 N. W. 464 (the authority of a court in reviewing a finding as to a necessity for the new street is limited to the inquiry whether the evidence upon the question is practically conclusive that no public necessity exists for the improvement—evidence held to support a finding as to the necessity for a new street across a railroad right of way).

6623. Vacation—Action to recover possession of a tract of land, which, as the defendant claimed, was a part of a public steamboat landing or levee in the city of Red Wing. Findings of fact for the defendant. Held, that the tract was dedicated to the use of the public primarily as a steamboat landing or levee. An ordinance of the city pur-

porting to vacate the levee is void, because the city council had no authority to enact it. Legislative authority to such council to alter or abolish streets, avenues, lanes, and alleys does not include the power to extinguish the public easement in a levee. Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096.

Evidence in proceedings for the registration of the title to certain land held to show a valid vacation of a part of La Salle street in the city of St. Paul. White v. Coburn, 114 Minn. 213, 130 N. W. 1028.

A proceeding under the statute is not an ordinary action in personam, but a special proceeding in the nature of an action in rem. The fact that the county is not named as a party is immaterial. It is not necessary to name adverse parties in the petition or notice. The right to appear and be heard on the question of vacating a street is not limited to those who own or occupy land which would be affected thereby. The provision of the statute as to owners is intended to enable them to appear, be heard and claim damages, but not to prevent the official representatives of the public from appearing and opposing the vacation. Jamieson v. Ramsey County, 114 Minn. 230, 130 N. W. 1000.

Appellants secured a judgment, no one opposing, vacating a public street, under the provisions of Laws 1909, c. 503. The trial court, on motion of the respondent county, ordered the judgment vacated, and permitted the county to answer. Record considered, and held, that the county had a right to be heard on the question of the vacation of the street, that the order was a matter within the discretion of the trial court, and that it was correctly exercised. Jamieson v. Ramsey County, 114 Minn. 230, 130 N. W. 1000.

A resolution of a village council unconditionally vacating a public street, not shown to have been the result of proceedings duly had as required by law, held void and of no effect. Certain resolutions of a village council vacating upon condition a certain street as it extended over the right of way of defendant, not shown to have been requested or solicited by it, held improperly received in evidence as a recognition of the existence of the street by the defendant. State v. Great Northern Ry. Co., 114 Minn. 293, 131 N. W. 330.

The question whether a petition for the vacation of a street is signed by the requisite number of petitioners, as provided by section 150, c. 8, Laws 1895, is one of fact to be determined by the city council, and its decision thereon, in the absence of fraud, cannot be reviewed and set aside, except in a direct proceeding. The trial court did not err in sustaining an objection to the offer of the city to show that the petition for the vacation of the streets was not signed by the requisite number of petitioners, or in sustaining an objection to its offer to show that the value of the premises vacated, as determined by the city council, paid

by the abutting owners to the city, and retained by it, was less than one-tenth part of their value. Minneapolis Brewing Co. v. East Grand Forks, 118 Minn. 467, 136 N. W. 1103.

Under G. S. 1913, § 1281, a petition signed by a majority of the owners of property abutting on the part of the street to be vacated is sufficient. A naked allegation that one of the signers signed conditionally, with nothing to indicate the nature of the condition, does not show that the signature was invalid. Tiedt v. Argyle, 129 Minn. 259, 152 N. W. 412.

Section 3369, R. L. 1905, as amended by chapter 503, Laws of 1909 (G. S. 1913, § 6863), deprives the district court of the authority to vacate or alter the public streets or alleys in the city of St. Paul, since the charter of said city provides a method for vacation of streets dedicated to the public by the city authorities under the first proviso of said section as amended. Balch v. St. Anthony Park West, 129 Minn. 305, 152 N. W. 643.

(64) Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110 (vacation of a certain street in the village of Excelsior held authorized and valid). See Note, 46 Am. St. Rep. 493.

6624. Lighting—(68) Brantman v. Canby, 119 Minn. 396, 138 N. W. 671. See Note, L. R. A. 1915A, 325.

STREETS—GRADING

6628. Rights and liabilities—In general—A municipality may object to the raising or lowering of streets so as to interfere with established or prospective grades. See Worden v. Bielenberg, 119 Minn. 330, 138 N. W. 314.

6629. Authority to grade—The city council of Minneapolis has, under the charter of that city, the authority to establish street grades, but in making the improvement cannot take, destroy, or damage private property without compensation. The grading of a street by the street commissioner under the direction of the engineering department, pursuant to a resolution of the city council ordering the construction of sidewalks upon a grade to be "given by the city engineer" and paid for with municipal funds, is the act of the municipality. Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856.

6631. Duty to grade—Extent—Covered culverts—A municipality is not required to exercise the same care in grading and constructing a rural way as when improving a street in the populous portions of the city. In improving and maintaining such roadways the city is not required to grade or improve to the entire width of the highway. A covered culvert, extending across a rural driveway and ending abruptly seven and one-half feet beyond the line of the way improved for travel,

ordinarily would not be held negligent construction. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

6637. Lateral support—Liability for damages—The fact that an abutting owner petitions for the establishment of a grade does not estop him from claiming damages for the impairment of his lateral support by the grading. Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856.

6646. Damages from establishment of grade—Liability—Complaint construed to state a cause of action for consequential damages resulting to abutting property from the first establishing of a street grade, and does not necessarily involve defect in plan or negligence in execution thereof, nor is the cause of action based on a defect in a public work, or upon the negligence of any officer or agent of the city, so that service of notice of claim upon the city is a prerequisite to maintenance of an action. The city charter of the city of St. Paul does not provide for assessment of damages resulting to abutting lots from the establishment of a street grade in the proceeding for assessing the cost of grading the street against benefited property; hence such proceeding held not a bar to an action to recover damages by the owner of abutting lots resulting from the grade established. It not appearing from the answer that the grade was established before plaintiff petitioned the defendant to grade the street, he cannot be held to have waived damages to his property resulting from the grade established, and it is unnecessary to determine whether, by petitioning after the grade is established, the property owner waives damages. Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 269. See Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856.

6650. Damages from change of grade—Liability—The cause of action for damages accrues when the change of grade is physically made, and not when it is authorized or established by ordinance or resolution. Sather v. Duluth, 123 Minn. 300, 143 N. W. 906.

The abutting owner may recover damages arising from excavations which take away the lateral support of his premises abutting on the street, from lowering the grade of the street, or for injury to driveways to and from his premises. Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532.

(16) Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856; Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 269; Sather v. Duluth, 123 Minn. 300, 143 N. W. 906; Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532; Austin v. Tonka Bay, 130 Minn. 359, 153 N. W. 738. See Note, 36 L. R. A. (N. S.) 1194.

SIDEWALKS

6652. Petition for construction—(19) See State v. Dis Minn. 312, 129 N. W. 585; Digest, § 6857.

SEWERS AND DRAINS

6666. Duty to repair and keep clean—(39) Note, 29 A

WATERWORKS AND WATER SUPPLY—LIGHTING

6674. Water and light boards or commissions—The w building commission created by chapter 412, Laws 1907 villages containing a population of less than ten thousa has exclusive control of the village or city light or wa authority to employ all help necessary to properly opera audit and allow all accounts for expenses incurred in t and to issue in the manner therein prescribed warrants therefor. The approval or allowance of such accounts by lage council, or the signature of the mayor thereof to t sued by the water commission, is not necessary to the same. In the absence of a showing of apportionment by cil of the current expense fund created by section 88, c. among the several departments of the city, it is held tha of the city water department are payable from the curren State v. McIlraith, 113 Minn. 237, 129 N. W. 377.

The water, light, power and building commission of Ea held to have no authority to employ special counsel. St 117 Minn. 323, 136 N. W. 402.

6679a. Liability of municipality for negligence—Wher takes to serve both public and private convenience by ma nicipal lighting plant to light its streets and also furnish consumers, it is not exercising a governmental function, responsibility for negligence in the management of such an injury has been caused to the person or property of Brantman v. Canby, 119 Minn. 396, 138 N. W. 671 (plain juries from a gas explosion in his cellar—the evidence pr tion of fact for the jury as to whether or not such gas ha a leak in the pipe supplying a street lamp).

A complaint charging a municipality with negligence waterworks to become polluted whereby plaintiff's intes typhoid fever and died, held to state a cause of action. kato, 113 Minn. 55, 129 N. W. 158, 775.

Liability of municipality for tort in connection with system. Note, 52 L. R. A. (N. S.) 465.

6679b. Liability of private companies for negligence—Where a private company contracts with a municipality to furnish water to it and its citizens, the company may be liable to an individual citizen for a negligent failure to perform the contract. See Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428.

6680. Cutting off water supply—Injunction—Cutting off water supply for non-payment of rates. 24 Harv. L. Rev. 67.

Duty to serve all without discrimination. Note, 47 L. R. A. (N. S.) 654.

6681. Water rates—See § 2182.

6683. Power to purchase and maintain water and light plants—Contracts—Action by taxpayer—A taxpayer has no such direct interest in an agreement between a municipality and a corporation for supplying water as will allow him to sue either ex contractu for breach, or ex delicto for violation, of the public duty thereby assumed. Gorman Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220.

(64) Backus v. Virginia, 123 Minn. 48, 142 N. W. 1042 (city of Virginia held authorized to purchase a water and light plant—terms of purchase may be fixed by agreement without reference to statutes regulating the power of eminent domain—contracts and bonds held valid).

POWERS—IN GENERAL

6684. Statutory—(65) Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609 (no power in the absence of legislative authority to appropriate money in aid of railroads—no power to aid a railroad in the performance of the duties and obligations which the construction and maintenance of its road imposes). See State v. Brown, 111 Minn. 80, 126 N. W. 408 (implied power to build a dwelling house for a park superintendent); Digest, § 6763.

6689. Miscellaneous powers—A city and town may unite to build and own a municipal building in common. White v. Chatfield, 116 Minn. 371, 133 N. W. 962.

PROPERTY

6693. Power to hold and convey—In controversies between a municipality and an individual respecting its property the general rules of law apply. Gould v. St. Paul, 120 Minn. 172, 180, 139 N. W. 293.

CONTRACTS

6696. Distinction between governmental and proprietary powers—When a municipality engages in enterprises not governmental it becomes generally amenable to the rules of law applicable to the dealings

of individuals and private corporations under like circum
Norton Yards v. Rochester, 117 Minn. 114, 134 N. W.

6703. Implied or quasi contracts—Money or property an illegal contract—A municipality may be liable for serv on implied or quasi contract. State v. Clark, 116 Minn. 129; Laird Norton Yards v. Rochester, 117 Minn. 114, First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 5 §§ 2288, 6133, 8672, 9654; Note, 27 L. R. A. (N. S.) 111

The fact that a municipality has enjoyed the benefits ized contract will not render it liable on implied contr opportunity to reject the benefits. Minneapolis etc. Co. 124 Minn. 351, 145 N. W. 609.

Where a municipal corporation receives money or pro under and pursuant to a contract upon a subject with powers, which contract was entered into in good faith a pose to violate or evade the law, but for the failure to requirements of statutes made essential to a valid cont and void, and the money or property so received is reta quently devoted to legitimate municipal purposes, the liable therefor, and recovery may be had against it as contract. Where a bank in good faith loans money to poration for a legitimate corporate purpose, and the mo paid into the municipal treasury and subsequently ex purpose stated, recovery may be had against the munic turn of the money, though the contract was void becau of the municipal council was also a managing officer o participated in the council proceedings by which the lo ized. First Nat. Bank v. Goodhue, 120 Minn. 362, 139

6704. Formal requisites—Effect of irregularities—Wh ity has authority to make a contract, informalities or entering into it are generally not fatal, in so far as i formed by either party. Laird Norton Yards v. Roche 114, 134 N. W. 644.

6707. Advertising for bids—Necessity of awarding c est bidder—Cash deposit—Where a statute or ordinance bid shall be accompanied by a cash deposit or certified tain amount, the bidder cannot object to the acceptanc the ground that too small a deposit was required of Hastings, 121 Minn. 212, 141 N. W. 168.

A charter provision requiring advertisement for prop mandatory and a contract in violation thereof is inva enjoined at the instance of a taxpayer. Arpin v. Thief Minn. 34, 141 N. W. 833.

A provision requiring advertisement for bids held not to forbid the making of changes or alterations in the plans of a valid contract for the construction of a public work, when the right to make the changes or alterations is reserved in the contract itself. Carson v. Dawson, 129 Minn. 453, 152 N. W. 842.

(94) See Kelling v. Edwards, 116 Minn. 484, 134 N. W. 221 (necessity of awarding contract to lowest responsible bidder—right to consider fitness and ability of bidder to perform contract); Note, 30 L. R. A. (N. S.) 126; 38 Id. 653, 672.

(97) Tunny v. Hastings, 121 Minn. 212, 141 N. W. 168 (deposit by bidder—abandonment of contract by mutual consent—negotiation on a different basis—recovery of deposit).

(98) Penner v. Ulvestad, 110 Minn. 59, 124 N. W. 371 (conditional acceptance of bid by village council—acceptance of condition by bidder).

See § 2835.

6707a. Extra work or materials—written orders—Where a valid written contract provided that no claim for extra labor or material should be allowed, unless ordered in writing by the city, and also provided that the city should have the right to make alterations in extent, dimensions, form of plans, or location of the work, these provisions are independent, so that where changes or alterations are made, necessitating an increase in expense, the contractors are entitled to recover the value of the necessary labor and material, even though no written order therefor has been given. Carson v. Dawson, 129 Minn. 453, 152 N. W. 842.

6710. Ratification—(4, 5) See Note, L. R. A. 1915 A, 1023.

6710a. Abandonment—Recovery of deposit—When a contract is abandoned by mutual agreement of the parties a deposit by a bidder may be recovered. Tunny v. Hastings, 121 Minn. 212, 141 N. W. 168.

6712. Municipal officers cannot be interested in contracts—Where a bank in good faith loans money to a municipal corporation for a legitimate corporation purpose, and the money so loaned is paid into the municipal treasury and subsequently expended for the purpose stated, recovery may be had against the municipality for a return of the money, though the contract was void because the president of the municipal council was also a managing officer of the bank, and participated in the council proceedings by which the loan was authorized. First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599.

Public, including municipal, office or agency entails a natural disability on the part of the officer, reinforced by gravest considerations of public policy, to contract or deal personally, either directly or indirectly, with his principal concerning matters within his province as such officer or agent, without regard either to the fairness or unfairness of

the transaction, or to whether the principal is or is not be
This rule exists independently of statute, and its force
nor its scope restricted by statutory or ordinance decla
The proscribed transaction cannot be ratified, except by
qualified acceptance by the duly constituted authorities, v
edge, and then only to the extent of rendering the prin
upon implied contract, for the reasonable value of the se
erty received by it, which does not include profits made
Where a city officer, while acting in an advisory capacit
tee of the council charged with the selection of a site fo
be used in connection with his department, purchased ce
the view of selling it to the city for such purpose, and c
third person, who, pursuant to the plan, sold it to the
vanced price, the officer became a trustee for and liable
the extent of the difference between the price paid by hi
by the city. Minneapolis v. Canterbury, 122 Minn. 301,

(9) Martinsburg v. Butler, 112 Minn. 1, 127 N. W. 4
Mankato, 112 Minn. 24, 127 N. W. 397; Buyck v. Buyck
127 N. W. 452. See Sorenson v. School District, 122 M
W. 1105.

6717. Unauthorized or ultra vires contracts—Where a
poration receives money or property of another under a
a contract upon a subject within its corporate powers,
was entered into in good faith and without purpose to v
the law, but for the failure to comply with the requirem
made essential to a valid contract was illegal and void,
or property so received is retained and subsequently de
mate municipal purposes, the municipality is liable th
covery may be had against it as upon an implied contra
Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599. See N
(N. S.) 1117; 41 Id. 473.

The fact that a municipality has enjoyed the benefit of
ed contract will not render it liable if it has had no opp
ject it. Minneapolis etc. Co. v. Minneapolis, 124 Minn.
609. See Digest, §§ 2288, 4480.

(15) Minneapolis etc. Co. v. Minneapolis, 124 Minn.
609.

(16) Farmer v. St. Paul, 65 Minn. 176, 67 N. W. 990; J
of Education, 112 Minn. 167, 127 N. W. 569; First Nat.
hue, 120 Minn. 362, 139 N. W. 599. See Digest, § 2288.

(17) State v. Clark, 116 Minn. 500, 134 N. W. 129;
Yards v. Rochester, 117 Minn. 114, 134 N. W. 644; M
Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609. S
Moines v. Welsbach, 188 Fed. 906; Woodward, Quasi C

6718. Notice of powers—(18) First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599.

6719. Estoppel—(19) Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569; First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599; Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609. See Note, L. R. A. 1915A, 990.

BONDS OF PUBLIC CONTRACTORS

6720. Under general statutes—Municipal corporations of this state are authorized by statute to take from contractors for public improvements bonds to secure those who furnish labor or materials towards the completion of the contract. A bond so executed and properly conditioned, but in which the penalty is less than the amount required by the statute, is valid, and one who is unpaid for work or material furnished by him pursuant to the contract may maintain an action upon the bond. The execution of such a bond, where it does not appear that the plaintiff has been damaged because the amount named in the bond is less than the statutory requirement, is a sufficient defence in an action under the statute against the municipality. Waterous Engine Works Co. v. Clinton, 110 Minn. 267, 125 N. W. 269.

A builder's bond to a municipality, which is not conditioned for the payment of labor and material furnished pursuant to the contract which the bond is given to secure, is not a compliance with section 4535, R. L. 1905 (G. S. 1913, § 8245); and if the materialman is unable to collect from the contractor, he may have against the municipality the action given by section 4536. It does not appear from the complaint that plaintiff has been guilty of laches in pressing its claim against the original debtor. Scott-Graff Lumber Co. v. Independent School District, 112 Minn. 474, 128 N. W. 672.

Chapter 413, Laws 1909, changing the requirement as to notice of claims upon bonds of public contractors, affects the remedy provided for the enforcement of such bonds and not the obligation thereof, and is applicable to claims arising subsequent to its enactment upon bonds given prior to its enactment. Architectural Decorating Co. v. National Surety Co., 115 Minn. 382, 132 N. W. 289, affirmed, 226 U. S. 276.

Conceding that a contract made with a town is invalid for the failure to give the bond provided by R. L. 1905, § 4535 (G. S. 1913, § 8245), after the contract has been fully performed, and the work has been approved and accepted by the town board, the contractor has a valid claim against the town for the reasonable value of the services rendered, and the board may audit and allow such claim, and draw orders in payment thereof. Such orders are valid, and the treasurer is not justified in re-

fusing to pay the same on the ground that no bond was given. State v. Clark, 116 Minn. 500, 134 N. W. 129.

Notice of claim under R. L. 1905, § 768, held unnecessary before suit for failure to take a bond from a public contractor. McMullin Lumber Co. v. Pine Island, 119 Minn. 60, 137 N. W. 192.

The purpose of this statute was the protection of laborers and materialmen performing labor or furnishing material for the execution of a public work to which the mechanic's lien statute does not apply. The bond stands as security for the payment of all obligations incurred by the contractor in the prosecution of the work, and the general rules and principles of the law of suretyship apply to and govern the rights of the parties. While the rule of strict construction in favor of the surety does not apply to a surety company, the surety is bound in the manner and to the extent of his obligation and no further; but the bond, being given by virtue of statute, cannot be severed therefrom, and the parties are deemed to have contracted with reference thereto. Such an instrument must be construed in the light of the statute, and extended, as well as limited in its scope, to those cases contemplated by the statute, unless violence would be done to the language of the bond by such construction. Although the bonds are not conditioned in terms in accordance with our present statute, but follow chapter 321, Laws 1901, with these principles as guides, we are led to the conclusion that the bonds are valid as statutory obligations to the extent of the fair import of the language used in the conditions. Their effect cannot, however, be extended further. Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899; Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359. See § 9104a.

A surety on a bond of a public contractor is entitled to subrogation as in the case of sureties on private bonds. National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55.

Alterations not changing the general nature of the work do not release the surety though he did not consent to them. Equitable Surety Co. v. United States, 234 U. S. 448.

6721. Under charter provisions—Bond executed under the charter of Fergus Falls. Provision in charter that in case of default of contractor the city shall furnish the labor and materials necessary to complete the contract is complied with by letting one or more contracts for such completion. Extra work. Excess payments to contractor. Unlawful sharing of profits with engineer. Irregular estimates not exceeding agreed percentage. Surety not released. Fergus Falls v. Illinois Surety Co., 112 Minn. 462, 128 N. W. 820. See § 9104a.

BONDS

6723. Authority to issue—Validity—Laws 1907, c. 93, Laws 1909, c. 206, and Laws 1911, c. 155, each authorizing cities of the first class to issue and sell bonds for park purposes, are valid. They are cumulative, and none of them supersedes or repeals the others; and, further, bonds may be issued and sold by such cities under each of the acts, subject to the conditions and limitations therein named. Molyneaux v. Minneapolis, 115 Minn. 188, 131 N. W. 1015.

Bonds issued by the city of Chatfield for the purpose of joining with the town of Chatfield in the construction of a city and town hall to be used in common. Injunction to prevent payment of bonds denied. White v. Chatfield, 116 Minn. 371, 133 N. W. 962.

Bonds issued by a county under the drainage act of 1905 are the direct and general obligations of the county. Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226.

Water and light bonds of the city of Virginia held authorized by its home rule charter and valid. Backus v. Virginia, 123 Minn. 48, 142 N. W. 1042.

Section 10 of chapter 312, Sp. Laws 1891, authorizing the board of education of the city of Duluth to issue the bonds of the district to mature within a period of not exceeding thirty years, held not repealed by section 781, R. L. 1905, which provides that bonds of municipal corporations, other than certain cities, shall not issue for a longer period than twenty years. Fider v. Board of Education, 123 Minn. 514, 144 N. W. 161.

6723a. Proceedings to authorize—Construction—De minimis—While statutory provisions regulating the issue of municipal bonds are mandatory and to be followed strictly, yet the maxim de minimis applies. Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105.

6724. Petition for issuance—Under Laws 1907, c. 122, § 4, providing that a petition instituting proceedings for the issuance of municipal bonds to the state shall be signed by ten or more freeholders and residents, a petition for the issuance of such bonds by a school district, which contained ten duly qualified signatures, was not rendered invalid by reason of the fact that in addition thereto it contained the signatures of two members of the board of directors of the district, who were not personally or financially interested in the result. Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105.

6726. Election to determine issue—A special election in the city of Virginia to authorize the purchase of a water and light plant and to issue bonds therefor, sustained against an objection to the sufficiency of

the notice for the election. Backus v. Virginia, 123 M
W. 1042.

6728. Form—Date of maturity—Payable in gold—Bon
payable in gold coin. Interest may be made payable an
annually. White v. Chatfield, 116 Minn. 371, 133 N. W

The statute provides that the bonds of certain municip
shall mature not later than twenty years from the date
1913, § 1852. See Fider v. Board of Education, 123 Mi
W. 161.

Where the resolution for the issuance of school distri
state violated section 6, art. 8, of the constitution, in that
the first of the series should mature in less than five yea
date of all the bonds was changed by subsequent reso
conform to the constitutional requirement, and the result
were inconsequential, the irregularity in the original reso
ground for injunction against the issuance of the bon
Sorenson v. School District, 122 Minn. 59, 141 N. W. 110

6730. Recitals—Compliance with conditions—(56) Wh
116 Minn. 371, 133 N. W. 962. See Digest, § 6736; 13 C
Note, L. R. A. 1915A, 916.

6736. Bona fide purchasers—(67) White v. Chatfield,
133 N. W. 962. See Note, 51 Am. St. Rep. 822.

6737. Estoppel—(71) White v. Chatfield, 116 Minn.
962. See Note, L. R. A. 1915A, 916.

CLAIMS

6739. Notice of claim under general statute—In 1913
broadened so as to apply to claims of servants of a
claims for death by wrongful act, and to municipalities
charters. G. S. 1913, §§ 1786–1789. Schultz v. St. Paul,
144 N. W. 955.

Since the revision of 1905 the statute applies to actions
of municipal officers, agents or servants. Mitchell v.
Minn. 323, 133 N. W. 804.

Technical nicety is not required in a notice. The stat
so strictly construed as to make it difficult for an average
a good notice. Larkin v. Minneapolis, 112 Minn. 311, 12

The plaintiff was injured by alleged defects in a sidew
Her attorney, shortly after the accident, caused the
which occasioned her injury, to be taken from the wa
until it was offered in evidence on the trial, and a new
into the walk, in place of the defective one, and securely

after the statutory notice was given to the defendant. Held, that if such acts were wilful, and thereby the purpose of the statute requiring notice was defeated, and the defendant deprived of the benefit and protection thereof, the service of such notice was not a good-faith compliance with the statute, and the plaintiff cannot recover. Whether the defendant was thus deprived of the benefit of the statute was made by the evidence a question of fact, and the trial court correctly denied a motion for judgment and granted a new trial. Wornecka v. St. Paul, 118 Minn. 207, 136 N. W. 561.

The statute held inapplicable to an action under R. L. 1905, § 4536 (G. S. 1913, § 8246), for failure of a municipality to take a statutory bond from a contractor. McMullin Lumber Co. v. Pine Island, 119 Minn. 60, 137 N. W. 192.

An answer held to admit that plaintiff had caused due service of a notice upon the proper officers. Vills v. Cloquet, 119 Minn. 277, 138 N. W. 33.

The statute now applies to an action for injury to private property caused by the negligence of the municipality. The statute was amended and broadened in 1913, but the amendment was not retroactive. Diamond Iron Works v. Minneapolis, 129 Minn. 267, 152 N. W. 647.

If a notice conveys the information required by the statute it is sufficient, though it is informal or technically inaccurate. A notice given by a parent of a claim for injuries sustained by his minor child which contains the essential information required by the statute is sufficient, although it fails to state specifically that the parent claims damages on his own account and also as the statutory representative of his child, and fails to make an apportionment between the two of the amount claimed. Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976.

Service of the written notice prescribed by section 1786, G. S. 1913, is a condition precedent to the maintenance of a suit to recover damages from a city on account of an illness contracted from the use of contaminated water supplied from the waterworks owned and operated by the city. The statute is not an arbitrary discrimination in favor of municipalities owning and maintaining public utilities as against private parties carrying on similar enterprises, and is not violative of any constitutional provision. Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 121.

A mistake of one day in giving the date of the accident held not fatal on demurrer. Murphy v. St. Paul, 130 Minn. 410, 153 N. W. 619.

(73) G. S. 1913, § 1786.

(78) Senecal v. West St. Paul, 111 Minn. 253, 126 N. W. 826. See G. S. 1913, § 1788.

(79) See Diamond Iron Works v. Minneapolis, 129 Minn. 267, 152 N. W. 647; Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 121. Note change in statute.

(80) Mitchell v. Chisholm, 116 Minn. 323, 133 N. W. 804; St. Paul, 119 Minn. 63, 137 N. W. 199; Quackenbush v. Minn. 373, 139 N. W. 716; Schultz v. St. Paul, 124 Minn. 25 955; Diamond Iron Works v. Minneapolis, 129 Minn. 267, 1 Note change in statute.

(81) Kandelin v. Minneapolis, 110 Minn. 55, 124 N. W. 44 Minneapolis, 112 Minn. 311, 127 N. W. 1129; Wornecka v. Minn. 207, 136 N. W. 561.

(87) Note, 46 L. R. A. (N. S.) 167.

(96) Kandelin v. Ely, 110 Minn. 55, 124 N. W. 449; Lark apolis, 112 Minn. 311, 127 N. W. 1129; Smith v. Cloquet, 139 N. W. 141. See Kennedy v. Montgomery, 111 Minn. 54 1134; Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80.

(98) See Kandelin v. Ely, 110 Minn. 55, 124 N. W. 449; Montgomery, 111 Minn. 544, 127 N. W. 1134; Larkin v. 112 Minn. 311, 127 N. W. 1129.

(99) Defect in title cured by revision of 1905. Mitchell 116 Minn. 323, 133 N. W. 804; Gaughan v. St. Paul, 119 N. N. W. 199.

6740. Notice of claims under charter provisions—Provisio in home rule charters are now superseded by the general st 1913, § 1789. See, as to notices under the St. Paul charter amendment of the statute, O'Brien v. St. Paul, 116 Minn. W. 981; Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 26 v. St. Paul, 119 Minn. 63, 137 N. W. 199.

6741. Presentation of claims—A claim against a village take a statutory bond from a contractor held properly pres council of the village under R. L. 1905, § 738. McMullin L Pine Island, 119 Minn. 60, 137 N. W. 192.

ORDINANCES

6750. Must be certain—(24) See State v. O'Connor, 115 M N. W. 303.

6752. Must be consistent with constitution and general nances are presumed constitutional and courts will not decl constitutional unless they are so beyond a reasonable doub v. Martin, 124 Minn. 498, 145 N. W. 383.

(26) State v. Eck, 121 Minn. 202, 141 N. W. 106.

6754. In restraint of trade—(29) State v. O'Connor, 11 132 N. W. 303.

6755. Must be reasonable—(33) Twin City Separator Co etc. Ry. Co., 118 Minn. 491, 137 N. W. 193.

(35) State v. Sugarman, 126 Minn. 477, 148 N. W. 466 (an ordinance may be valid as to congested portions of a city but not as to sparsely settled portions).

6756. Held reasonable—An ordinance prohibiting the emission of dense smoke by railroad switch engines. State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

An ordinance against the raising of dust by street cars and requiring the sprinkling of tracks. St. Paul v. St. Paul City Ry. Co., 114 Minn. 250, 130 N. W. 1108.

An ordinance regulating cemeteries. State v. District Court, 114 Minn. 287, 131 N. W. 327.

An ordinance requiring fruits and berries exposed for sale to be protected from flies and dust. State v. O'Connor, 115 Minn. 339, 132 N. W. 303.

An ordinance requiring a railroad company to lower its tracks. Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193.

An ordinance fixing an annual license fee for moving picture shows. Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417.

An ordinance requiring coal to be weighed on municipal scales, with certain exceptions. State v. Eck, 121 Minn. 202, 141 N. W. 106.

An ordinance fixing a license fee of twenty-five dollars for auctioneers. Minneota v. Martin, 125 Minn. 498, 145 N. W. 383.

An ordinance providing that when three or more persons standing together on a street or sidewalk so as to obstruct free passage a police officer may arrest them if, after requesting the persons to move on, they neglect or refuse to do so. State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

6757. Held unreasonable—An ordinance forbidding the storing, piling or placing of unused boxes, barrels, etc. upon or in any place within a city without a permit. State v. Wittles, 118 Minn. 364, 136 N. W. 883.

A fire ordinance forbidding the leasing of the third or attic floor of two-story frame buildings. State v. McCormick, 120 Minn. 97, 138 N. W. 1032.

6757a. Fire protection—What is a reasonable regulation—To justify legislative interference with the property rights of the citizen in the interest of fire protection, and to prohibit him, without the special license or permit of the public authorities, from keeping upon the premises a certain kind or class of property, it should appear either that the property itself, by reason of its character, or the manner in which it is kept or used, is a source of danger and a fire menace. State v. Wittles, 118 Minn. 364, 136 N. W. 883.

6758. Effect of different conditions—An ordinance may be valid when applied to the congested parts of a city, and invalid as to suburban or

semi-suburban districts. St. Paul v. St. Paul City Ry. C
250, 130 N. W. 1108; State v. Sugarman, 126 Minn. 477, 1

6759. Concurrent with general statutes—(63) Note, 110
149.

6760. Void in part—(64) State v. Chicago etc. Ry. Co., 1
130 N. W. 545; State v. Eck, 121 Minn. 202, 141 N. W. 1

6763. Authority to enact—In general—The validity of a
a city ordinance expressly authorized by the legislature do
upon the expediency or public policy of its enactment, but
within the legislative power of the state. State v. Chicago
114 Minn. 122, 130 N. W. 545.

Municipalities are invested with general police powers to
public health and comfort. St. Paul v. St. Paul City Ry. C
250, 254, 130 N. W. 1108.

A municipality invested with control over its streets
power to enact a reasonable ordinance for the regulation o
streets and sidewalks. State v. Sugarman, 126 Minn. 477, 1

(68) Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124
St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

(74) See State v. Sugarman, 126 Minn. 477, 148 N. W. 46

6765. Presumption of authority—(76) State v. Taubert,
148 N. W. 281.

6766. Held authorized by general statutes—(77) See St
man, 126 Minn. 477, 148 N. W. 466.

(78) Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 4

6768. Held authorized by charters—An ordinance again
of dust by street cars and requiring the sprinkling of track
St. Paul City Ry. Co., 114 Minn. 250, 130 N. W. 1108.

An ordinance regulating cemeteries. State v. Distric
Minn. 287, 131 N. W. 327.

An ordinance requiring a street railway company to
track. State v. St. Paul City Ry. Co., 117 Minn. 316, 135 N

An ordinance requiring coal to be weighed on municipal
v. Eck, 121 Minn. 202, 141 N. W. 106.

An ordinance amending prior ordinances by providing f
tive punishment of fine or imprisonment, instead of a puni
might be both fine and imprisonment. State v. McDona
207, 141 N. W. 110.

An ordinance providing that when three or more person
gether on a street or sidewalk so as to obstruct free passag
ficer may arrest them if, after requesting the persons to r

neglect or refuse to do so. State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

An ordinance regulating the issuance and use of street-railway transfers. St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

6769. Held not authorized by charters—An ordinance vacating a levee. Betcher v. Chicago etc. Ry. Co., 110 Minn. 228, 124 N. W. 1096.

6773. Class legislation—An ordinance prohibiting the emission of dense smoke by railroad switch engines held not class legislation. State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

A fire ordinance forbidding the lease of the third or attic floor of two-story frame buildings held void as class legislation. State v. McCormick, 120 Minn. 97, 138 N. W. 1032.

An ordinance permitting tanneries already in existence to continue in operation, but providing that no tannery should be established thereafter without first obtaining permission therefor from the city council, sustained against the objection that it denied a party the equal protection of the laws. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

See Note, 123 Am. St. Rep. 36.

6774. Construction—The rule of ejusdem generis applies. State v. Kern, 130 Minn. 191, 153 N. W. 311.

6775. Motives of council—(22) Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417.

6776. Particular ordinances construed—An ordinance relating to the moving of buildings. Edison Electric Light & Power Co. v. Blomquist, 110 Minn. 163, 124 N. W. 969, 125 N. W. 895.

An ordinance against the raising of dust by street cars and requiring the sprinkling of street car tracks. St. Paul v. St. Paul City Ry. Co., 114 Minn. 250, 130 N. W. 1108.

An ordinance regulating cemeteries. State v. District Court, 114 Minn. 287, 131 N. W. 327.

An ordinance regulating tanneries. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

An ordinance to regulate and restrain porters, runners, agents and solicitors for boats, vessels, stages, cars, public houses or other establishments. State v. Kern, 130 Minn. 191, 153 N. W. 311.

6778. No extraterritorial effect—The power and jurisdiction of a municipality is confined to its own limits and to its own internal affairs. Duluth v. Orr, 115 Minn. 267, 132 N. W. 265.

(48) See State v. Carver, 126 Minn. 5, 147 N. W. 660 (effect of statute forbidding sale of intoxicating liquors within one-half mile of a town or municipality which has voted no license).

6779. Private action on—(49) Note, 5 L. R. A. (N. S.) 186; 27 Harv. L. Rev. 317. See § 6976.

6786a. Amendment—The ordinance of the city of Minneapolis of April 9, 1888 (13 C. P. 971), entitled "An ordinance relative to the costs, fines and penalties in the municipal court," and the ordinance of February 1, 1890 (16 C. P. 63), amending it, are valid, though the effect thereof is to amend by a single ordinance a large number of the criminal ordinances of the city, by providing an alternative punishment of fine or imprisonment, instead of a punishment which may be both fine and imprisonment, and though the ordinances amended may have been invalid at the time, because the penalty then permitted by them exceeded the jurisdiction of the municipal court; and the ordinance of May 8, 1877 (3 C. P. 38), relative to disorderly houses, providing a penalty which might be both fine and imprisonment, as amended by said ordinances, is valid. State v. McDonald, 121 Minn. 207, 141 N. W. 110.

There is authority for the proposition that an unconstitutional ordinance is not subject to amendment. State v. McDonald, 121 Minn. 207, 141 N. W. 110.

6788. Approval by mayor—Approval by the mayor is generally essential to the enactment of an ordinance. Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131.

The prescribed time within which a mayor may veto an ordinance is mandatory and cannot be extended by an agreement for the clerk to withdraw an ordinance already submitted to the mayor and present it to him later. State v. Roderick, 129 Minn. 94, 151 N. W. 904.

6789. Publication—When takes effect—The publication of an ordinance is generally essential to its enactment. Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131.

The fact that a resolution was first published before it was approved by the mayor held a mere irregularity not fatal to a special election. Backus v. Virginia, 123 Minn. 48, 142 N. W. 1042.

A contract relating to rates for gas provided that the council should fix the rates by ordinance, and further provided that plaintiff might test in the courts the reasonableness of the rates so fixed. Held that, unless stayed by injunction, such ordinance takes effect at the time and in the manner prescribed by the charter provisions relating to the enactment of ordinances, notwithstanding the bringing of an action to test the reasonableness of the rates fixed therein. Minneapolis Gaslight Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728.

The publication of an ordinance of the city of St. Paul under the 1900 Home Rule Charter might lawfully be made on Memorial Day. St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

6793. Pleading—In a criminal prosecution for violation of a village ordinance, the complaint is sufficient if it refers to the ordinance by number, chapter, or section, and it is not necessary to introduce the ordinance in evidence. Minneota v. Martin, 124 Minn. 498, 145 N. W. 383.

(77, 79) Minneota v. Martin, 124 Minn. 498, 145 N. W. 383.

(80) State v. Overby, 116 Minn. 304, 133 N. W. 752.

LICENSING EMPLOYMENTS, ETC.

6794. Nature and scope of power—An ordinance permitting tanneries already in existence to continue in operation, but providing that no tannery shall be established thereafter without first obtaining permission therefor from the city council, has been sustained. The varying circumstances and conditions to be taken into account cannot be accurately anticipated in advance, and uniform and unvarying restrictions previously prescribed are liable to prove inadequate or inapplicable. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

Where a municipal officer or body is clothed with authority to grant or revoke licenses the courts will not control the exercise of the authority except to require a fair and honest exercise of discretion within reasonable and legal limits. Bainbridge v. Minneapolis, 131 Minn. ——, 154 N. W. 964.

(86) State v. Redington, 119 Minn. 402, 138 N. W. 430; Bainbridge v. Minneapolis, 131 Minn. ——, 154 N. W. 964. See State v. Wittles, 118 Minn. 364, 136 N. W. 883.

See Note, 129 Am. St. Rep. 249.

6797. Power to license cannot be delegated—(89) State v. Redington, 119 Minn. 402, 138 N. W. 430.

6798. Places of amusement—Under the charter of the city of St. Paul, the power to license and regulate the exhibition of shows of all kinds, including theaters and moving picture shows, is with the common council, is a legislative power, and cannot be delegated to the city clerk. Certain ordinances passed by the common council considered, and held not to be an exercise of its legislative or discretionary power to license and regulate all shows and theaters, and that the council still retained the power to license and regulate such shows and theaters, including the power to grant or refuse a license in a particular case. State v. Redington, 119 Minn. 402, 138 N. W. 430.

(90) Bainbridge v. Minneapolis, 131 Minn. ——, 154 N. W. 964 (authority of mayor to revoke license of theater).

6800. License fees—(93) Minneota v. Martin, 124 Minn. 498, 145 N. W. 383.

(94) Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417; Minneota v. Martin, 124 Minn. 498, 145 N. W. 383.

(98) Minneota v. Martin, 124 Minn. 498, 145 N. W. 383.

PROSECUTIONS UNDER ORDINANCES

6801. Violation of ordinance a public offence—The violation of an ordinance is properly punishable under our state constitution by fine or by imprisonment, and is a crime. State v. McDonald, 121 Minn. 207, 141 N. W. 110.

6804. Complaint—A complaint against defendant, charging him with disorderly conduct in violation of the ordinances of the city of Minneapolis, as entered in the records of the court below, held sufficiently specific and definite, within the meaning of section 17, c. 34, Sp. Laws 1889. The purpose of that statute was to simplify municipal court procedure in petty offences, and is not unconstitutional. The "brief statement" of the offence there authorized to be entered by the clerk in the records of the court, and to "stand in the place of the complaint," need not be as full and specific as a formal written complaint. State v. Olson, 115 Minn. 153, 131 N. W. 1084.

A complaint for using indecent language held defective in not alleging that it was spoken in a public place. State v. Claire, 121 Minn. 521, 140 N. W. 747.

In a criminal prosecution for violation of a village ordinance, the complaint is sufficient if it refers to the ordinance by number, chapter, *or* section, and it is not necessary to introduce the ordinance in evidence. Minneota v. Martin, 124 Minn. 498, 145 N. W. 383.

6805. Defences—The fact that others violated the ordinance without being prosecuted is immaterial. State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

6806. Evidence—Sufficiency—Evidence held to justify a conviction for obstructing a street with an automobile. Duluth v. Esterly, 115 Minn. 64, 131 N. W. 791.

Evidence held to justify a conviction under an ordinance to prevent free passage on sidewalks. State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

A conviction for improper use of a street-railway transfer, under an ordinance of St. Paul, held justified by the evidence. St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

6807. Punishment—Under a general welfare clause a municipality has authority to provide for either fine, not exceeding one hundred dollars, or imprisonment not exceeding three months, or both. The im-

prisonment need not be for the non-payment of a fine. State v. Bates, 108 Minn. 55, 121 N. W. 225; State v. McDonald, 121 Minn. 207, 141 N. W. 110.

LIABILITY FOR TORTS

6808. In general—Distinction between corporate and public powers—When a municipality maintains public utilities, such as water and light plants, it is liable to an individual for negligence in their operation. Brantman v. Canby, 119 Minn. 396, 138 N. W. 671.

(17) Keever v. Mankato, 113 Minn. 55, 129 N. W. 158, 775; Hoppe v. Winona, 113 Minn. 252, 261, 129 N. W. 577.

See 25 Harv. L. Rev. 648; Note, 30 Am. St. Rep. 376.

6809. Exercise of governmental powers—A municipality is not liable for an assault by one of its police officers even though the officer is known to be of a violent and vicious disposition by the municipal officers appointing him. The failure of the municipality to require a bond of the police officer does not render it liable for such an assault. Lamont v. Stavanaugh, 129 Minn. 321, 152 N. W. 720.

In establishing, caring for and maintaining streets, highways and public parks, municipalities act in their governmental and not in their proprietary capacity. Cities and villages are liable for injuries resulting from dangerous conditions in their streets; but, with this single exception, municipalities are not liable in damages for negligence in performing their governmental functions, unless such liability has been imposed by statute. Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976.

6810. Exercise of corporate or proprietary powers—A municipality is liable for negligence in furnishing contaminated water to its patrons through its waterworks. Keever v. Mankato, 113 Minn. 55, 129 N. W. 158, 775. See Frasch v. New Ulm, 130 Minn. 41, 153 N. W. 121.

A municipality held liable where a workman was killed by an electric discharge from a wire on a bridge of the municipality which he was painting. Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577.

Where a city undertakes to serve both public and private convenience by maintaining a municipal lighting plant to light its streets, and also furnish gas to private consumers, it is not exercising a governmental function so as to escape responsibility for negligence in the management of such plant whereby an injury is caused to the person or property of an individual. Brantman v. Canby, 119 Minn. 396, 138 N. W. 671.

6814. Exceptional rule as to streets, etc.—(39) Sundell v. Tintah, 117 Minn. 170, 134 N. W. 639; Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976.

LIABILITY FOR DEFECTIVE STREETS AND SIDEWALKS

6818. In general—When a municipality authorizes a third person to place upon its public streets agencies of a character likely to endanger the traveling public, even though the privilege granted be beyond its authority, liability arises upon injury to a person lawfully upon the street who is free from fault. Hoppe v. Winona, 113 Minn. 252, 129 N. W. 577.

Municipal corporations are under legal obligation to exercise reasonable care to keep and maintain all their streets and public places in safe condition for public use, and are liable for a negligent failure of compliance therewith. The rule applies to all streets within the borders of the municipality, whether in the settled or platted part thereof or in the outlying districts, with the qualification or limitation that the same diligence and care is not required in respect to streets remote from the settled part of the municipality. Sundell v. Tintah, 117 Minn. 170, 134 N. W. 639.

A municipality held not liable for a runaway caused by noise from a gasolene engine operated on premises adjacent to a public alley. Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

Street curbs are a part of the street within the general rule of liability. Kimball v. St. Paul, 128 Minn. 95, 150 N. W. 379.

The liability is not affected by the expense necessarily involved in the exercise of due care. Due care does not require the same precautions in the outlying districts of a city as where travel is dense. Watson v. Duluth, 128 Minn. 446, 151 N. W. 143.

(44, 60) Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976.

See Note, 103 Am. St. Rep. 257; 20 L. R. A. (N. S.) 513.

6819a. Parks and parkways—A city that constructs and maintains walks and footpaths in its parks which are used as thoroughfares in passing from one part of the city to another is liable for injuries resulting from dangerous conditions in such walks caused by the negligence of its employees. Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976.

6820. Adjacent premises—To what extent, if any, a municipality is liable to a private individual for its failure to abate a nuisance on private property adjacent to its streets is an open question in this state. See Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

(62) See Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484; Digest, § 6825.

6822. Defective plan of construction—A covered culvert, extending across a rural driveway and ending abruptly seven and one-half feet

beyond the line of the way improved for travel, is not under ordinary circumstances a negligent construction. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

(70) See Klaseus v. Kasota, 128 Minn. 47, 150 N. W. 221; Watson v. Duluth, 128 Minn. 446, 151 N. W. 143; Genereau v. Duluth, 131 Minn. ——, 154 N. W. 664.

6823. Notice to municipality of defect—Where a municipality had notice of obstructions to a street at or near the point of an accident it is immaterial whether it had notice of the particular obstruction causing the accident. Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219.

In an action against a city and abutting owner actual notice need not be brought home to either defendant. Latell v. Cunningham, 122 Minn. 144, 142 N. W. 141.

(73) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507; Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80; Smith v. Cloquet, 120 Minn. 50, 139 N. W. 141; Latell v. Cunningham, 122 Minn. 144, 142 N. W. 141; Weide v. St. Paul, 126 Minn. 491, 148 N. W. 304.

(76) Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120.

(79) See 7 Mich. L. Rev. 526.

6825. Duty to maintain guards, railings, etc.—(84) Weidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484; Watson v. Duluth, 128 Minn. 446, 151 N. W. 143. See Empey v. Lovell, 117 Minn. 520, 134 N. W. 289; Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

6826. Notice of decayed wood—(86) Williams v. Dickson, 122 Minn. 49, 141 N. W. 849.

6829. Ice and snow on sidewalks—(90, 91) Smith v. Cloquet, 120 Minn. 50, 139 N. W. 141; Genereau v. Duluth, 131 Minn. ——, 154 N. W. 664 (accumulation of ice in dangerous ridges where there was an abrupt slant in a sidewalk—recovery sustained). See Note, 45 L. R. A. (N. S.) 75.

6831. Defects and obstructions in streets—An open drain at the edge of a covered culvert where a catch-basin was located. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

A depression of six or eight inches in a street near the tracks of a street railway company held to justify a recovery for an injury to one who drove into it with a team. Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120.

A recovery sustained for a defective street curb where a team backed against the curb, which gave way, and the team and driver fell down a steep bluff. Kimball v. St. Paul, 128 Minn. 95, 150 N. W. 379.

(12) Korpi v. Oliver Iron Mining Co., 114 Minn. 525, 131 N. W. 372.

6833. Defects in sidewalks—A plank across a sidewalk near where a bridge was being constructed. Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219.

Hinges of iron shutters over areaway extending about an inch above the level of the sidewalk. Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461.

Limestone flagging worn smooth and slippery. O'Brien v. St. Paul, 116 Minn. 249, 133 N. W. 981.

A smooth and slippery iron coal-hole cover. Latell v. Cunningham, 122 Minn. 144, 142 N. W. 141.

A cement sidewalk undermined by falling away of supporting soil. Weide v. St. Paul, 126 Minn. 491, 148 N. W. 304.

An abrupt slant. Genereau v. Duluth, 131 Minn. ——, 154 N. W. 664.

Flags of pavement bulging up several inches, slanting, uneven and irregular. Murphy v. St. Paul, 130 Minn. 410, 153 N. W. 619.

(37) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507.

See Note, 43 L. R. A. (N. S.) 1158 (unevenness).

6834. Proximate cause—Where one upon a highway is forced off to the side of the traveled way by a rapidly approaching vehicle, and is injured by falling into an opening upon the side of the traveled way, the negligence, if found, in leaving the opening unguarded, is the proximate cause of the injury. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

(40) Watson v. Duluth, 128 Minn. 446, 151 N. W. 143.

6835. Horses taking fright—Proximate cause—(41) See Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120.

6838. Contributory negligence—Notice of defect—It is not, as between a pedestrian and the municipality, negligence as a matter of law to walk upon the left side of a street or driveway, nor, for the purpose of avoiding a rapidly approaching vehicle, to turn to the left. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

(44) Johnson v. Willmar, 111 Minn. 58, 126 N. W. 397. See Note, 21 L. R. A. (N. S.) 614; 48 Id. 628.

(45) Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80; Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120.

(46) Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219.

(48) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507; Johnson v. Willmar, 111 Minn. 58, 126 N. W. 397; Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219; Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120; Genereau v. Duluth, 131 Minn. ——, 154 N. W. 664.

(49) See Johnson v. Willmar, 111 Minn. 58, 126 N. W. 397.

6839. Joinder of parties defendant—A city and a contractor engaged in the construction of a bridge for the city joined as defendants. Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219.

A city, abutting owner and lessee held properly joined as defendants. Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461.

An abutting owner who cut away a bluff and weakened the support of a curb to a street held liable jointly with the municipality, where a team backed against the curb, which gave way, and the team and driver fell to the bottom of the bluff. Kimball v. St. Paul, 128 Minn. 95, 150 N. W. 379.

6840. Pleading—An allegation of the service of notice of claim as required by statute is necessary when the statute is applicable. An amendment to cure a defect in this regard should be allowed as a matter of course. McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1334, 142 N. W. 134.

A complaint alleging a defective sidewalk whereby the plaintiff was caused to stumble, and became confused and stepped into the entrance of a building which had become dilapidated so as to constitute a trap and pitfall, the sidewalk being unguarded, and was precipitated some ten feet to the floor below, and was injured, states a cause of action. Murphy v. St. Paul, 130 Minn. 410, 153 N. W. 619.

6841. Variance—(58) O'Brien v. St. Paul, 116 Minn. 249, 133 N. W. 981.

6842. Law and fact—(59) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507; Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484; Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219; Smith v. Cloquet, 120 Minn. 50, 139 N. W. 141; Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120; Latell v. Cunningham, 122 Minn. 144, 142 N. W. 141; Watson v. Duluth, 128 Minn. 446, 151 N. W. 143.

6843. Evidence—Admissibility—(60) O'Brien v. St. Paul, 116 Minn. 249, 133 N. W. 981 (other accidents from the same cause).

6844. Evidence—Sufficiency—(62) Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219; Smith v. Cloquet, 120 Minn. 50, 139 N. W. 141; Kimball v. St. Paul, 128 Minn. 95, 150 N. W. 379; Genereau v. Duluth, 131 Minn. ——, 154 N. W. 664.

6845. Liability of abutting owners—A verdict against an abutting owner held justified by the evidence and not excessive. Lamberson v. Whitcomb, 115 Minn. 495, 132 N. W. 991.

Evidence held to justify a verdict against an abutting owner for an injury resulting from an opening between trapdoors in a sidewalk. Kirby v. Milton Dairy Co., 115 Minn. 504, 132 N. W. 995.

An abutting owner held liable for an injury resulting from a smooth

and slippery iron coal-hole cover. Latell v. Cunningham, 122 Minn. 144, 142 N. W. 141.

See § 6839; Note, 115 Am. St. Rep. 993.

ACTIONS—IN GENERAL

6846. Limitation of actions—In an action brought against a municipality to recover damages for personal injuries received by a person while in its employ as a servant, and by reason of its negligent failure to discharge the duties of a master, section 768, R. L. 1905, does not apply, either as to the service of written notice or as to the limitation of one year within which the action must be brought. Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716. See G. S. 1913, §§ 1786, 1787. Note change in statute.

(70) Senecal v. West St. Paul, 111 Minn. 252, 126 N. W. 826.

6847. Municipal boards—The water, light, power and building commission of East Grand Forks held not entitled to sue or liable to be sued. State v. Gorman, 117 Minn. 323, 136 N. W. 402.

SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS

6850. Definition and nature—(82) Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77.

6852. Works held local improvements—A rural highway is a local improvement justifying special assessments. Murray v. Smith, 117 Minn. 490, 136 N. W. 5, overruling Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177.

(91) Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

(95) Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 269.

(96) State v. Great Northern Ry. Co., 131 Minn. 480, 153 N. W. 879.

6853. Works held not local improvements—(7) See Murray v. Smith, 117 Minn. 490, 136 N. W. 5, overruling Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177.

6854. Only municipal corporations can levy—(12) Murray v. Smith, 117 Minn. 490, 136 N. W. 5.

6855. Delegation of authority to levy—(14, 16) State v. Burnes, 124 Minn. 471, 145 N. W. 377.

6856. Legislature may levy directly—(18) State v. Burnes, 124 Minn. 471, 145 N. W. 377.

6857. Petition of property owners—(19) State v. Bury, 101 Minn. 424, 112 N. W. 534. See State v. District Court, 113 Minn. 312, 129 N. W. 585.

See Digest, § 6652.

6858. Authority of municipalities statutory—Strict construction—(22) State v. Ely, 129 Minn. 40, 151 N. W. 545.

6859. Constitutional provisions—Under the present constitution the only limitations on the power to levy special assessments are that they be uniform on the same class of property, be confined to property specially benefited, and do not exceed such special benefits. State v. Ely, 129 Minn. 40, 151 N. W. 545.

6860. Equality—Frontage plan—The only limitations upon the power to levy special assessments are that they be uniform upon the same class of property, be confined to property specially benefited, and do not exceed such special benefits; and a charter provision, requiring that the cost of constructing sewers and street improvements be assessed upon the abutting property according to the frontage rule, does not infringe such limitations. The legislative judgment that such property is benefited to the extent of the assessment and in proportion to frontage is presumed to be correct until the contrary appears. A provision which, in effect, permits the council to apportion the cost of an improvement, extending along a corner lot lengthwise, upon such lot and the inside lots lying between such lot and the center line of the block, does not violate the uniformity rule. Levying special assessments according to the frontage rule does not violate the fourteenth amendment to the federal constitution. State v. Ely, 129 Minn. 40, 151 N. W. 545.

(32) State v. Burnes, 124 Minn. 471, 145 N. W. 377; State v. Ely, 129 Minn. 40, 151 N. W. 545. See Note, 28 L. R. A. (N. S.) 1124.

6862. Cannot exceed benefit—Special assessments for local improvements are based upon the theory that the property assessed is specially benefited, and, if in excess of such benefits, constitute a taking of property without compensation. State v. Ely, 129 Minn. 40, 151 N. W. 545.

(38) Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77; State v. Ely, 129 Minn. 40, 151 N. W. 545. See Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

6865. Fixing limits of taxing district—(42, 43, 47) Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77.

6866. Apportionment within a single taxing district—Chapter 312, Laws 1903, which delegates to the cities of the fourth class the power to establish sewer districts, is not unconstitutional because it requires that each lot or tract of land within the district shall be assessed for the cost of the improvements, in the ratio of area in square feet to the total assessable area of the district. In establishing sewer districts and sewers therein under the act, the common council is required to exercise its judgment, so as to include within the district such real estate as will be benefited by the improvement, and to apportion the cost thereof on all

of the property according to the benefits. In the establishment of a sewer district and sewers therein by the common council of the city of Shakopee, the evidence is not sufficient to show that the council proceeded upon an illegal principle, applied a wrong rule of law, or acted upon a demonstrable mistake of fact. Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77.

6870. Determination of benefits—Evidence held not to show that a village council did not ascertain or determine the amount of benefits to defendant's property. State v. Burnes, 124 Minn. 471, 145 N. W. 377.

(65) See Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

6871. Fund for future improvements—(67) See State v. Ely, 129 Minn. 40, 151 N. W. 545.

6874. Lien—Priorities—Chapter 200, Laws 1905, is retrospective as well as prospective in its application to assessments for local improvements, and placed all assessment liens not held by purchasers at the date of its passage, whether prior or subsequent in point of time to state tax liens, upon a parity with the latter. Smith v. St. Paul, 116 Minn. 44, 133 N. W. 74.

The last lien takes precedence over all prior liens. In the absence of statute to the contrary the lien is extinguished on the perfection of a title under it. Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

(75) Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

(76) Gould v. St. Paul, 110 Minn. 324, 125 N. W. 273; Smith v. St. Paul, 116 Minn. 44, 133 N. W. 74.

6877. Exemptions—(82) State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879. See 25 Harv. L. Rev. 723; 6 Mich. L. Rev. 153; 14 Col. L. Rev. 61; Note, 40 L. R. A. (N. S.) 935; L. R. A. 1915A, 129 (assessments for drains or sewers).

See Note, 132 Am. St. Rep. 291.

6878. Assessment how far conclusive on courts—Conclusiveness of assessment for sewers under Laws 1903, c. 312. Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77.

(95) See Everington v. Board of Park Commissioners, 119 Minn. 334, 138 N. W. 426.

6879. Notice to owner—There is no fixed rule as to what kind of a notice is necessary in order to make due process of law. It is not correct to say there must be the same degree of certainty in a description as is required in a deed. An assessment for a local improvement is a public matter, a species of tax, and the due process clause of the constitution is satisfied easier in such cases. Everington v. Board of Park Commissioners, 119 Minn. 334, 138 N. W. 426.

(4, 6) Everington v. Board of Park Commissioners, 119 Minn. 334, 138 N. W. 426.

(98) Everington v. Board of Park Commissioners, 119 Minn. 334, 138 N. W. 426; State v. Burnes, 124 Minn. 471, 145 N. W. 377. See State v. Western Union Tel. Co., 111 Minn. 21, 29, 124 N. W. 380, 126 N. W. 403.

6882. An administrative not a judicial proceeding—(10) See Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

6882a. Enforcement—Two general methods—The cities of this state are divided into two classes with respect to the enforcement of local assessment liens. In the one class, as in Minneapolis and in Duluth under its present charter, the charge for local assessments is added to the state tax entered on general tax lists and collected by the regular county officers. A judgment, if any, is entered for the aggregate amount of taxes and assessments. In the other class, as in the city of St. Paul and in some smaller cities, the local assessment is a separate charge, with a separate lien enforced by appropriate city officers. Gould v. St. Paul, 110 Minn. 324, 125 N. W. 273.

6883. Application for judgment—Objections admissible—(11) See State v. District Court, 113 Minn. 312, 129 N. W. 585 (assessment under charter of South St. Paul—irregularity in awarding contract not fatal on application for judgment).

(14) See State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

6887. Formal defects not fatal—(19) State v. District Court, 113 Minn. 312, 129 N. W. 585.

6887a. Estoppel of owner—Where a property owner stands by and witnesses the expenditure of public funds in improvements which confer special benefits upon his property, and where the character of the improvement is such that it must be paid for by an assessment upon the land benefited, he will not be permitted to question the validity of an equitable assessment levied for improvements made under color of law. State v. Johnson, 111 Minn. 255, 126 N. W. 1074. See § 2839a.

6889. Refundments—(26) See State v. Ries, 123 Minn. 397, 143 N. W. 981.

6889a. Action to set aside—Where, under the charter of a city, the assessment of benefits for public improvements is given to a board of commissioners, with a right of appeal from the assessment to the district court, the owner of property assessed cannot maintain an action to set aside the contract for the improvement and the assessment against his property on any grounds not going to the want of power or jurisdiction on the part of the city to make the improvement or the assessment. His

remedy by a hearing before the commissioners and by appeal is exclusive. A. A. White Townsite Co. v. Moorhead, 120 Minn. 1, 138 N. W. 939.

6890. Injunction—(27) See State v. Ely, 129 Minn. 40, 151 N. W. 545; Digest, § 2839.

6891. Abuses—Remedy political not judicial—(31) See A. A. White Townsite Co. v. Moorhead, 120 Minn. 1, 138 N. W. 939.

6892. Cases under charter of St. Paul—(34) Gould v. St. Paul, 110 Minn. 324, 125 N. W. 273 (Laws 1905, c. 200, equalizing lien for special assessments and general taxes sustained); Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292 (notice of sale held sufficient—section 138, St. Paul City Charter 1893, requiring the city treasurer, after completing a sale of property in local assessment proceedings, to attach to the certified copy of the judgment directing the sale a copy of the advertisement and notice of sale, held not designed or intended for the benefit or protection of the property owner, and a failure of the treasurer to comply therewith not fatal to the validity of the sale); Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293 (equality of lien with lien of state for general tax—merger of lien in perfected title—purchase by city—rights of city and purchaser of state tax lien—tenants in common); Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886 (amendment of charter adopted in 1912 construed—provision requiring determination of assessment district before execution of contracts construed—amendment of 1912 held valid against various objections—newspapers in which amendment was published were papers of general circulation within the constitutional requirement—the fact that a resolution authorizing the issuance of bonds was passed by the council before the final order for the improvement had been approved by the mayor and published did not invalidate the resolution).

6893. Cases under the charter of Minneapolis—In proceedings to assess the cost of lands acquired for park purposes in Minneapolis, held, that the owners of land to be assessed were at some stage of the proceedings entitled to a hearing de novo upon all objections they might have, in order to constitute "due process of law." The trial in the district court on the application to confirm the assessment of the park assessors is not such a hearing. The order or judgment confirming such assessment is a final order or judgment, and precludes the objectors from having such a hearing thereafter. The hearing provided by the law to be held before the park assessors is such a hearing. Notice of the time and place thereof, served by publication, describing the location of the proposed park, but not describing the property to be assessed therefor, or the boundaries of the assessment district, is a sufficient notice to constitute due process of law. The decision of the trial court, to the

effect that the assessors did not act on illegal or erroneous principles in assessing the property of objectors as specially benefited by the park, is sustained by the evidence. It was not prejudicial error to try the case on affidavits, with permission to objectors to apply to be permitted to offer oral testimony in addition. Everington v. Board of Park Commissioners, 119 Minn. 334, 138 N. W. 426.

6898. Cases under various charters—The city of Ely entered into contracts for the construction of sewers and street improvements, whereby it assumed a general and unlimited obligation to pay for doing such work. Held, that the city charter authorized the making of such contracts; that it gave the council power to provide the funds to pay the liabilities so assumed; that it did not require such payments to be made from the proceeds of special assessments nor from any particular fund; but that it did require the council to levy and enforce special assessments against the property benefited to reimburse the city for such expenditures. Held, further, that a general taxpayer may, by mandamus, compel the city council to levy and enforce such special assessments, but that he cannot enjoin the city from paying for the construction of such improvements at the time and in the manner stipulated in its contracts. State v. Ely, 129 Minn. 40, 151 N. W. 545.

(40) Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77 (sewer districts —Laws 1903, c. 312, sustained).

6899. Cases under general law for villages—Laws 1901, ch. 167, providing that a village council may on its own motion order a sidewalk constructed, is not unconstitutional because it does not give property owners an opportunity to be heard as to the propriety or necessity of the proposed improvement. The opportunities which the property owner has to be heard when the assessment is fixed, and on the application for judgment, satisfy the due process of law requirement. It does not appear that the village council did not ascertain or determine the amount of benefits to defendant's property. An assessment of abutting property on the basis of frontage is not illegal in an improvement of this character. The council had the right to postpone the construction of the sidewalk from October, 1909, until the first of May following. Such postponement was not an abandonment of the work, and it was not necessary to give property owners another opportunity to build the walk themselves. State v. Burnes, 124 Minn. 471, 145 N. W. 377.

MUNICIPAL COURTS

ORGANIZED UNDER GENERAL LAWS

6899a. Statute creating not a part of charters—Statutory provisions establishing municipal courts do not constitute any part of the charter of the municipality in which the court is situated. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

6900. Courts of record—(45) State v. McDonough, 117 Minn. 173, 134 N. W. 509.

6900a. State courts—Effect of home rule charters—A municipal court organized under the general statutes is a state court requiring for its establishment a two-thirds vote of the legislature. A special municipal judge of such a court is a state officer, and cannot be legislated out of office, nor his term shortened, by an adoption of a home rule charter. State v. Fleming, 112 Minn. 136, 127 N. W. 473. See Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953.

6901. Change of venue—Actions in municipal courts are within the purview of G. S. 1913, § 7721, defining the county residence of railroad companies for the purpose of actions against them; and, where the venue in such an action is properly laid thereunder, the defendant has no right under section 272 to change it to another municipal court in the same county, though the latter is nearer its principal general office in the state and its principal business in the county. State v. Municipal Court, 128 Minn. 225, 150 N. W. 924.

6903a. Contempt of court—Where a duly elected and qualified judge of a municipal court is engaged in the hearing of a preliminary examination of a prisoner duly brought before him, he has jurisdiction to punish for contempt of court committed in open court, though there have been proceedings taken under the statute to oust him of jurisdiction to hear the particular case on the ground of prejudice. State v. McDonough, 117 Minn. 173, 134 N. W. 509.

A commitment held to show that the court imposed a fine and not a jail sentence. The court had authority to impose a fine of ten dollars and in default of payment to commit the offender to the county jail till the fine was paid, not exceeding ten days. State v. McDonough, 117 Minn. 173, 134 N. W. 509. See State v. Langum, 125 Minn. 304, 146 N. W. 1102.

6905. Appeal to district court—A motion by an intervener to dismiss an appeal from a judgment of a municipal court to the district court held properly denied. Thief River Co-operative Store Co. v. Skahl, 131 Minn. —, 154 N. W. 953.

ORGANIZED UNDER SPECIAL LAWS

6906. Of Minneapolis—(55) State v. Olson, 115 Minn. 153, 131 N. W. 1084 (the "brief statement" of the offence authorized to be entered by the clerk in the records of the court and to stand in the place of the complaint need not be as full and specific as a formal written complaint); State v. Overby, 116 Minn. 304, 133 N. W. 792 (judicial notice of ordinances); Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530 (court has no jurisdiction of a counterclaim for an amount exceeding five hundred dollars); State v. McDonald, 121 Minn. 207, 141 N. W. 110 (ordinance providing for alternative punishment by fine or imprisonment for the violation of municipal ordinances sustained—section 9 of chapter 11 of the city charter of Minneapolis does not prevent the infliction of imprisonment as a punishment, or limit its use to the coercion of the payment of a fine); Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785 (the municipal court of Minneapolis has no jurisdiction in any cause involving the title to real estate—the title to real estate is not involved in an action, unless the title is disputed and there is a real controversy in regard thereto—proof that property leased by husband and wife is the property of the wife, where that fact is not controverted, does not involve the title to real estate, and does not oust the jurisdiction of the municipal court); State v. Langum, 125 Minn. 304, 146 N. W. 1102 (the maximum sentence for a direct contempt is a fine of $20 or two day's imprisonment in the county jail); Andrus v. Dyckman Hotel Co., 126 Minn. 406, 148 N. W. 565 (the court has jurisdiction of an action to recover possession of leased premises for non-payment of rent brought under the unlawful detainer statute, and is not ousted of such jurisdiction by the fact that the unpaid rent amounts to a larger sum than can be recovered in such court—the evidence must show that the title to the property is in controversy before such action can be certified to the district court, and the evidence in this case fails to show such controversy).

6907. Of St. Paul—(56) Wentworth v. Nat. Life Stock Ins. Co., 110 Minn. 107, 124 N. W. 977 (section 4160, R. L. 1905, applies to the municipal court of the city of St. Paul, and under it that court may, in its discretion, in a proper case, relieve a party from his failure to bring to trial an appeal from a judgment of a justice of the peace within the time prescribed by section 28 of the St. Paul municipal court act); Holmes v. Igo, 110 Minn. 133, 124 N. W. 974 (section 3991, R. L. 1905, authorizing an affirmance of a judgment of a justice of the peace when an appeal therefrom to the district court is dismissed for any cause, applies to proceedings in the municipal court of the city of St. Paul—when such an appeal to the municipal court is for any cause dismissed,

the court may, under that statute, order the judgment appealed from affirmed, with costs); Juster v. Court of Honor, 120 Minn. 325, 139 N. W. 701 (jurisdiction of the person cannot be acquired by service of summons out of county—where complaint claims $500, with interest, the court is without jurisdiction of the subject-matter—where judgment in such an action is entered for the amount so claimed, the court has no jurisdiction to cure the defect by allowing a deduction from the amount of the judgment so as to bring it within the jurisdictional limit); State v. Chicago, G. W. R. Co., 125 Minn. 332, 147 N. W. 109 (provision against a stay of proceedings after conviction until payment of fine held inapplicable to prosecution under state law—payment of fine after refusal of court to grant a stay held not voluntary so as to be a waiver of a right to appeal); State v. Fjolander, 125 Minn. 529, 147 N. W. 273 (authority to stay sentence); St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777 (no right to jury trial for petty offences under municipal ordinances).

6908. Of Duluth—It was the intention of Laws 1913, c. 102, that the preferential system of voting, for which provision was made in the Duluth home rule charter of 1912, should apply to the election of the municipal judges of the city; and said act, though not passed by a two-thirds vote, legally provided an assistant judge, and a branch or division of the court, and fixed the terms of office and times of election of the judges and otherwise regulated the court and proceedings therein. Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953. See State v. Prince, 131 Minn. —, 155 N. W. 628; State v. Windom, 131 Minn. —, 155 N. W. 629.

6909. Of Mankato—(58) Mankato v. Olger, 126 Minn. 521, 148 N. W. 471 (the omission of the judge to indorse on a complaint an order for a warrant as required by law cannot avail defendant after plea, trial and conviction without raising the objection).

NAMES

6912. Middle name—At one time it was quite universally held that a middle initial formed no part of a person's name, and that any discrepancy in that respect would be disregarded. But this rule has been greatly modified by recent decisions, and now it is the rule that, where the wrong middle initial is used in a process the object of which is to acquire jurisdiction over the person whose name is incorrectly given, the error, particularly in the case of substituted service, is fatal. And where in a deed the grantor's name differs in this respect from the name in which the record title appears, it will not be presumed that the grantor was the owner. Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508.

Effect of initials of middle names under recording acts. 24 Harv. L. Rev. 505.

(62) Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508.

6913. Initials—The use of a wrong initial in the name of a defendant is not fatal to the jurisdiction of the court, where the summons is in fact served upon the right party. The rule is different where the service is by publication. Willard v. Marr, 121 Minn. 23, 139 N. W. 1066.

See Note, 132 Am. St. Rep. 563.

6916. Foreign names—(71) State v. Provencher, 129 Minn. 409, 152 N. W. 775.

6918a. Married women—Marriage confers on the woman the surname of the husband. Designating a married woman by her maiden surname in published summons is fatal. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

6920. Mistakes held fatal—The use of a wrong initial in process served by publication. Willard v. Marr, 121 Minn. 23, 139 N. W. 1066.

Designating a married woman by her maiden surname in published summons. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

See Axdell v. Tonesson, 111 Minn. 541, 126 N. W. 1134 (action to quiet title—judgment against "Axtell" as a cloud against "Axdell").

(80) See Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508.

6921. Held not fatal—"G. C. Hartke" for "George A. Hartke" on a note and in a discharge in bankruptcy. Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508.

"David E. Willard" for "David Willard," in a summons personally served. Willard v. Marr, 121 Minn. 23, 139 N. W. 1066.

"Boise" for "Boyce," in a notice not to sell liquor to an habitual drunkard. State v. Provencher, 129 Minn. 409, 152 N. W. 775.

"Albert Guilfuss" for "Albert B. Geilfuss" in a published summons. Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575, 1026, affirmed, 234 U. S. 385.

(91) See Morrison County Lumber Co. v. Duclos, 131 Minn. ——, 154 N. W. 952.

6922. Held idem sonans—Macomber and McComber. Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851.

Boise and Boyce. State v. Provencher, 129 Minn. 409, 152 N. W. 775.

NAVIGABLE WATERS

IN GENERAL

6925. What constitutes—A channel leading to a private dock in a lake held navigable water. Peterson v. Skarp, 117 Minn. 102, 134 N. W. 503.

Natural bodies of water are classed as navigable or non-navigable. The term "navigable," as used in this connection, has been extended beyond its technical signification. It is unnecessary that the water should be capable of commerce of pecuniary value. The division of waters into navigable and non-navigable is but another way of dividing them into public and private waters. If a body of water is adapted for use for public purposes it is a public or navigable water. State v. Korrer, 127 Minn. 60, 148 N. W. 617.

(10) Torgerson v. Crookston Lumber Co., 123 Minn. 476, 144 N. W. 154.

See Note, 126 Am. St. Rep. 710; 42 L. R. A. 305.

6926. Public and private waters—Lakes—(13) Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169; State v. Korrer, 127 Minn. 60, 148 N. W. 617.

FEDERAL AND STATE CONTROL

6931. Federal control—See § 6944.

6933. State control—(21) Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517.

6934. Legislative discretion—(22, 23) Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517.

NAVIGATION

6935. General nature of public right—Reasonable use—(25) Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517.

PUBLIC USES OTHER THAN NAVIGATION

6937. In general—Right to fish in public waters. Note, 131 Am. St. Rep. 750.

6941. Taking water for municipal uses—(32) See 29 Harv. L. Rev. 108.

6943. Floating logs—The rights of mill and other riparian owners upon navigable rivers are subordinate to the right of the state to improve the river for navigation, and to the rights conferred upon logging corporations organized under section 6263, G. S. 1913, with the limitation that the rights so conferred must be exercised in a reasonable manner and so as not unnecessarily to injure or damage riparian rights. The construction of flooding dams by such corporation is not unlawful, and no damages can be recovered therefor, unless the construction thereof and the conduct of the same be unreasonable. Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517; Johnson v. Wild Rice Boom Co., 127 Minn. 490, 150 N. W. 218.

(40–43) Torgeson v. Crookston Lumber Co., 123 Minn. 476, 144 N. W. 154; Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517 (negligence not shown).

See Digest, § 5691.

OBSTRUCTION AND INTERFERENCE

6944. Bridges—Fenders—Federal control—Nuisance—Where the federal government, in the exercise of its authority to control and regulate commerce and navigation, sanctions the erection of a railroad bridge across a navigable river, and subsequently the railroad company, by and according to its direction, proceeds to construct a fender in the river to guide water craft through the draw span of the bridge, a riparian owner in front of whose property the fender will be located, and whose access to the main channel of the river will thereby be interfered with, but none of his fast property taken, is neither entitled to compensation as for a taking of his property, nor has any remedy in the premises; and this, whether the fender be regarded as an integral part of the bridge or as an aid to navigation necessitated by the previous erection thereof; the injury in either case being merely consequential upon the exercise of the paramount power of Congress over commerce and navigation, subject to which all riparian rights in, to, or over navigable waters, or in the lands beneath them, are originally acquired and subsequently held. Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 147 N. W. 431.

6945. Public service corporations—A public service corporation cannot divert water from the navigable streams of one drainage basin into those of another drainage basin, if such diversion will impair the navigability

of the streams from which the water is proposed to be taken. Minnesota Canal & Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

6947. When private action lies—(48) Peterson v. Skarp, 117 Minn. 102, 134 N. W. 503 (stake left in a channel leading to a private dock in a lake—collision of launch with stake); Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 147 N. W. 431.

RIPARIAN RIGHTS

6949. In general—The shore owner has well-defined riparian rights in the adjacent water and the soil under it below low-water mark. These rights include the right of access, the right to accretions and relictions, the right to wharf out and the right, absolute as respects every one but the state, to improve, reclaim and occupy the surface of the submerged land out to the point of navigability for any private purpose. These rights are not unrestricted, but are subject to the control of the state. The state has power to conserve the integrity of its public lakes and rivers. The riparian owner has no right against the protest of the state to destroy the bed of a public lake for the private purpose of taking ore therefrom. The question is not wholly one of interference with present public use. The fact that in the opinion of the court the portions of the lake in controversy are, during low-water mark, not capable of any substantial beneficial use does not prevent the state from objecting to its diversion to a private use foreign to the public uses of the water and the soil under it. The fee to the soil between high and low water is in the abutting owner subject to the right of the public to use or reclaim it for public purposes. The shore owner has the right during periods of recession of water to take ore from this space, provided the state does not require it for public purposes and provided he shall not measurably interfere with the utilization of it for such prospective uses. State v. Korrer, 127 Minn. 60, 148 N. W. 617.

An abutting owner on a navigable river may enjoin others from wrongfully removing gravel from the bed of the river. Archer v. Greenville Sand & Gravel Co., 233 U. S. 60.

(52) State v. Korrer, 127 Minn. 60, 148 N. W. 617. See Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 147 N. W. 431; 4 Harv. L. Rev. 14; Note, 127 Am. St. Rep. 40.

6950. Subordinate to public uses—(57) Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 147 N. W. 431; Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517.

6953. Right to accretions—(60) State v. Korrer, 127 Minn. 60, 148 N. W. 617. See Hall v. Hobart, 174 Fed. 433; Id., 186 Fed. 426; 24 Harv. L. Rev. 667; Note, 35 Am. St. Rep. 307.

(63) See 3 Mich. L. Rev. 568; Note, 35 Am. St. Rep. 307.

6954. Right to relictions—(64) State v. Korrer, 127 Minn. 60, 148 N. W. 617. See State v. District Court, 119 Minn. 132, 137 N. W. 298.

6954a. Right to minerals—A riparian owner has no right against the protest of the state to destroy the bed of a public lake for the private purpose of taking ore therefrom. The fee to the soil between high and low-water is in the abutting owner, subject to the right of the public to use or reclaim it for public purposes. The shore owner has the right, during periods of recession of water, to take ore from this space, provided the state does not require it for public purposes, and provided he does not measurably interfere with the utilization of it for such prospective uses. State v. Korrer, 127 Minn. 60, 148 N. W. 617.

6955. Reclamation and improvement of submerged land—(65) See State v. Korrer, 127 Minn. 60, 148 N. W. 617; Hall v. Hobart, 174 Fed. 433; Id., 186 Fed. 426.

6956. In lakes—(69) State v. Korrer, 127 Minn. 60, 148 N. W. 617.

LANDS UNDER NAVIGABLE WATERS

6961. Title held by state in trust—(75) Note, 53 Am. St. Rep. 289.

(76) See Hall v. Hobart, 174 Fed. 433; Id., 186 Fed. 426.

6962. Between high and low-water mark—The fee to the soil between high and low-water is in the abutting owner, subject to the right of the public to use or reclaim it for public purposes. The shore owner has the right, during periods of recession of water, to take ore from this space, provided the state does not require it for public purposes, and provided he does not measurably interfere with the utilization of it for such prospective uses. State v. Korrer, 127 Minn. 60, 148 N. W. 617.

(78) See State v. District Court, 119 Minn. 132, 137 N. W. 298.

CONVEYANCES AND CONTRACTS

6965. Private grants—(84) See Gridley v. Northern Pacific Ry. Co., 111 Minn. 281, 126 N. W. 897 (deed of land to railroad company—land described by metes and bounds—land partly dry and partly under shallow waters of a navigable river—held to exclude riparian rights).

NEGLIGENCE

IN GENERAL

6969. Definition—The term negligence is sometimes used in the sense of a failure to discharge a legal duty. Howard v. Illinois Central R. Co., 114 Minn. 189, 130 N. W. 946.

(95) Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710. See 29 Harv. L. Rev. 40.

(97) Lacey v. Minneapolis St. Ry. Co., 118 Minn. 301, 305, 136 N. W. 878. See, as to the duty of the court to give a definition to the jury. Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 78, 134 N. W. 307.

(99) Of course it is not error to use the word ordinary, but it is better to use the word reasonable, explaining to the jury that reasonable care is such care as persons of ordinary prudence usually exercise under similar circumstances. If the word ordinary is used it should not be emphasized so as to give the jury the idea that a low degree of care is sufficient.

6970. General standard of care—Ordinary or reasonable care—Due care includes ordinary care and is generally synonymous with it. Wiggin v. Northwest Paper Co., 119 Minn. 273, 137 N. W. 1113.

The care usually exercised to prevent injury from articles in common use is the test of due care in that regard. Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796.

Due care is the care usually exercised by men of ordinary prudence under similar circumstances. Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796.

(6) Erickson v. Great Northern Ry. Co., 117 Minn. 348, 135 N. W. 1129; Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796.

(7) Greer v. Great Northern Ry. Co., 115 Minn. 213, 218, 132 N. W. 6.

6972. Due care varies with the circumstances—Negligence is failure to use ordinary care; that is, the care demanded by particular circumstances. The care must be what a prudent and reasonable man, taking into view the common course of things, would deem to be required in the particular case. Hence the conduct owed to one person with reference to the same subject-matter may be wholly different from that due another, and the same conduct may impose a liability on the wrongdoer as to one, but not as to another not similarly circumstanced. Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

In the law of negligence everything is relative—depends on differences of degree. Le Roy Fibre Co. v. Chicago etc. Ry. Co., 232 U. S. 340, 354.

(13) Hanson v. Great Northern Ry. Co., 128 Minn. 122, 150 N. W. 380. See 29 Harv. L. Rev. 40.

(14) Great Northern Express Co. v. National Surety Co., 113 Minn. 162, 129 N. W. 127 (degree of care fixed by indemnity bond—care required varies with the risks of the situation); Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305.

(17) Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305.

6973. Necessity of duty and breach—Elements of cause of action—The elements of a cause of action for negligence are: (1) that defendant owed plaintiff the duty to exercise due care under the circumstances; (2) that he failed to exercise such care; (3) that his failure was the proximate cause of the injury alleged; and (4) that plaintiff was thereby damaged. St. Paul Realty & Assets Co. v. Tri-State Telephone & Telegraph Co., 122 Minn. 424, 142 N. W. 807.

In actions for negligence the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury. McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131; Tuder v. Oregon Short Line R. Co., 131 Minn. —, 155 N. W. 200.

(18) Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626; Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

(20) Shields v. Minneapolis etc. Co., 124 Minn. 327, 144 N. W. 1092 (negligence presupposes a duty).

6974. General duty to exercise care—Doctrine of Heaven v. Pender—(21) O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012 (rule applied to contractor furnishing a defective bridge for public use—rule stated not to be universal); Brown v. Smith, 121 Minn. 165, 141 N. W. 2 (plumbers leaving a sewer pipe open); Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491 (doctrine applied to fires started by stranger burning on one's premises and threatening adjacent property). See Donovan v. Tilden Produce Co., 131 Minn. —, 155 N. W. 104 (persons near each other—duty to anticipate natural movements—plaintiff stooping near refrigerator—servant of defendant opened door of refrigerator). 44 Am. L. Reg. (N. S.) 209, 273, 337.

(22) See Erickson v. Great Northern Ry. Co., 117 Minn. 348, 354, 135 N. W. 1129.

6974a. Duty to anticipate natural movements of others—In an action for damages, caused by the alleged negligence of defendant's servant in opening a refrigerator door while plaintiff was in a stooping posture underneath, the act of opening the door, although in itself proper and properly done, might nevertheless be found negligent when considered with relation to the position occupied by plaintiff and the duty of defendant's servant to anticipate what movements plaintiff might reasonably be expected to make; and the jury's finding of negligence cannot

be disturbed. Donovan v. Tilden Produce Co., 131 Minn. ——, 155 N. W. 104.

6975. Duty of persons working together—A general contractor in charge of a building in the course of construction, knowing that workmen of other contractors are working in or about the building, is bound to exercise reasonable care to avoid injuring them. Healy v. Hoy, 112 Minn. 138, 127 N. W. 482.

(23) Morey v. Shenango Furnace Co., 112 Minn. 528, 127 N. W. 1134; Patry v. Northern Pacific Ry. Co., 114 Minn. 375, 131 N. W. 462; Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518. See Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 139 N. W. 289, 618.

6976. Duties created by statute or ordinance—When the purpose of a statute is the protection of individuals one who violates it is liable to those for whose protection it was intended for injuries directly resulting from its violation. It is said that a violation of the statute is negligence per se; or that from its violation negligence is conclusively determined as a matter of law. When there is such violation the question whether the acts of the one charged with liability, the statute aside, constitutes negligence, is not debatable nor open to judicial inquiry. If the disobedience of the statute results in injury to one for whose protection it was passed liability follows. Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275. See 26 Harv. L. Rev. 531; 27 Id. 281; Note, 5 L. R. A. (N. S.) 186; 9 Id. 338; L. R. A. 1915E, 500; 95 Am. St. Rep. 72.

To entitle one to recover for the violation of a statutory duty he must show (1) that he is within the class for whose benefit a statute, not creating a purely public duty, was designed; (2) that there was a violation of the statute by the defendant; and (3) that he suffered damage as the proximate result of such violation. Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279.

If a statute is designed to create a purely public duty a private action will not lie for its violation. There is no general test by which to determine whether a private action will lie. It is a question of legislative intent. Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279; Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830; 27 Harv. L. Rev. 317.

An instruction that the violation of a penal statute, as to starting trains without signal, constituted a breach of duty owed by defendant to plaintiff could not prejudice defendant, where the employee on whom the statute imposes the duty of giving the signal is the engineer, and the finding of the jury negatives negligence on the part of the engineer. McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446.

If the failure of the defendant to observe a statute for the protection of the plaintiff concurs with the negligence of the plaintiff the defendant is liable. Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

The fact that a person causing an accident complied with a statute or ordinance regulating conduct under the circumstances is not conclusive that he was in the exercise of due care. A person is under the constant duty to exercise reasonable care. Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

The liability under the statute is not ordinarily absolute. The plaintiff must prove that the injury was a proximate result of the negligence. St. Louis etc. Ry. Co. v. McWhirter, 229 U. S. 265.

(24) Judson v. Great Northern Ry. Co., 63 Minn. 248, 65 N. W. 447 (statute requiring engineers of locomotives to give signals at public crossings); Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674 (statute requiring the inspection of boilers); Summer v. Chicago etc. Ry. Co., 122 Minn. 44, 141 N. W. 854 (ordinance requiring flagman at railroad crossing); Howley v. Scott, 123 Minn. 159, 143 N. W. 257 (R. L. 1905, § 871, requiring county auditor to mark on the tax lists the words, "Sold for taxes"); Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746 (G. S. 1913, § 4399, requiring passenger trains to stop a sufficient time to safely receive and discharge passengers); Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799 (federal safety appliance act); Chapman v. Peoples Ice Co., 125 Minn. 168, 145 N. W. 1073 (statute requiring openings in ice to be guarded); Phillipps v. Webb, 125 Minn. 300, 146 N. W. 1100 (action under G. S. 1913, § 5666, for interference with construction of a ditch); Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434 (Laws 1911, c. 365, § 16, relating to the speed of motor vehicles); Wardwell v. Cameron, 126 Minn. 149, 148 N. W. 110 (statute requiring fire escapes); Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275 (statute regulating the use of motor vehicles); Diebel v. Wolpert, Davis & Co., 129 Minn. 77, 151 N. W. 541 (statute requiring barriers or gates at elevator); Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542 (ordinance requiring drivers of vehicles on the streets, before turning the vehicle, to look to the rear); Terrill v. Virginia Brewing Co., 130 Minn. 46, 153 N. W. 136 (G. S. 1913, § 2634, requiring vehicles to keep to the right of the center of the street). See Foster v. Malberg, 119 Minn. 168, 137 N. W. 816 (neglect of ministerial duties by public officers).

(25) Terrill v. Virginia Brewing Co., 130 Minn. 46, 153 N. W. 136 (violation of statute held "at least" evidence of negligence). See Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275.

See Digest, §§ 5895–5900, 7031.

6977. Duties of humanity—(26) See Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491; 8 Col. L. Rev. 513; 5 Mich. L. Rev. 710.

6980. Care toward children—(29) Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804; Zuponcic v. Val Blatz Brewing Co., 131 Minn. —, 154 N. W. 790. See Digest, §§ 6489, 8158, 9021; Note, 49 Am. St. Rep. 406.

6983. Sic utere tuo ut alienum non laedas—(33) Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491; Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

(34) See comments of Justice Holmes in 8 Harv. L. Rev. 3.

6983a. Persons practicing a profession—A person practicing a profession is bound to exercise the degree of care and skill usually exercised by members of the profession under similar circumstances. East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181 (expert accountant); Cowles v. Minneapolis, 128 Minn. 452, 151 N. W. 184 (engineer); Mille Lacs County v. Kennedy, 129 Minn. 210, 152 N. W. 406 (engineer).

DANGEROUS PREMISES

6984. Persons on premises by invitation—One who builds an approach to premises to which the public is invited is bound to use reasonable care to maintain it at a reasonably safe height. Larson v. Red River Transportation Co., 111 Minn. 427, 127 N. W. 185.

An owner of land who allows another to place personal property on the land is bound to exercise reasonable care to avoid injuring the property. L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 423, 144 N. W. 145 (railroad ties piled on railroad right of way destroyed by fire from locomotive—recovery sustained).

(37) Stuelpnagel v. Paper, Calmenson & Co., 111 Minn. 3, 126 N. W. 281 (person going to warehouse on business); Larson v. Red River Transportation Co., 111 Minn. 427, 127 N. W. 185 (archway to grain elevator); Conway v. Charles H. Wood & Co., 113 Minn. 476, 129 N. W. 1045 (express agent entering hotel); Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434 (person entering premises at request of a servant of defendant to perform a duty of the servant); Resnikoff v. Friedman, 124 Minn. 343, 144 N. W. 1095 (tinner employed by the job to put in gutters for defendant—injured while using scaffold erected by independent contractor); Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796 (general rule stated—dangerous machinery—dredging machine); Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20 (shop for farm implements and automobile repairs). See McColl v. Cameron, 126 Minn. 144, 148 N. W. 108 (roomer of tenant).

(38) Strunk v. Wells Bros. Co., 120 Minn. 77, 138 N. W. 1030.

6985. Licensees—A distinction is sometimes made between bare licensees and licensees by invitation, express or implied. L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 423, 144 N. W. 145.

(40) Kohler v. W. J. Jennison Co., 128 Minn. 133, 150 N. W. 235. See Larson v. Red River Transportation Co., 111 Minn. 427, 127 N. W. 185 (person riding on a load of grain to assist in unloading it struck by arch over entrance to grain elevator—held not a mere volunteer); L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 426, 144 N. W. 145; Fox v. Warner-Quinlan Asphalt Co., 204 N. Y. 240, 97 N. E. 497. See 25 Harv. L. Rev. 667.

6986. Trespassers—One who properly enters premises upon implied invitation may become a trespasser or intruder by going to portions of the premises to which the implied invitation does not extend. See Conway v. Charles H. Woods & Co., 113 Minn. 476, 129 N. W. 1045.

It is the general rule that a trespasser takes his chances and must look out for himself, and that no duty rests upon an owner to so care for his property that a wrongful intermeddler shall not be exposed to danger. Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796.

A young girl without invitation climbing into a delivery wagon backed against the curb of a street held not a trespasser in the sense that defendant was not bound to exercise reasonable care to avoid injuring her. Zuponcic v. Val Blatz Brewing Co., 131 Minn. —, 154 N. W. 790.

See, as to duty where trespassers are seen or known customarily to be, Digest, § 8164; 27 Harv. L. Rev. 403.

(42) See Digest, § 8164.

6987. Stores and shops—Where plaintiff, a farmer, was injured by an automobile while he was passing through the rear portion of a village automobile repair and farm implement shop in order to transact business in the front, the fact that he reached the place where he was injured by passing through a rubbish-strewn alley and the rear entrance of the building did not, upon the facts of the case, constitute him a bare licensee, so as to preclude him from invoking the rights of one upon premises by invitation. The fact that two of defendants were sued as partners did not make a recovery necessarily depend upon the establishment of such relation. Where there is a holding out of a partnership relation concerning the control of a place where business is transacted and an invitation extended, under such circumstances of publicity as to warrant the inference that a person subsequently injured therein through the negligence of an employee of those in charge must have had the right to believe that those extending the invitation were in control of the premises, a recovery may be had without regard to the actual existence of the partnership relation; liability in such case, however, depending, not wholly upon the doctrine of estoppel, nor that of respondeat superior, but upon the assumption of a definite status with reference to the property and a specific relation to the person injured, to

which the law attaches direct and positive duties. Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20. See 20 Col. L. Rev. 80; 28 Harv. L. Rev. 331.

(44) See Larson v. Red River Transportation Co., 111 Minn. 427, 127 N. W. 185.

6988. Places of public entertainment—It has been frequently held that one who invites the public to places of amusement, such as theaters, shows, and exhibitions, must exercise a high degree of care for the safety of those invited. As to stairways, platforms, walks, and other structures, it may be said that the duty is somewhat similar in degree and nature to that owing from a common carrier to its passengers. One who maintains grounds to which the public is invited to witness games of baseball is not an insurer against the dangers incident to witnessing the game, but is required to use the care and precaution of the ordinary prudent person to protect the spectators against such dangers. He is not required to anticipate the improbable. Persons who know and appreciate the danger from thrown or batted balls assume the risk, and they cannot claim the management guilty of negligence when a choice is given between a seat in the open and one behind a screen of reasonable extent. It is a question for the jury what precaution and care should be taken by the management of a baseball exhibition to warn and safeguard the spectators against the dangers incident to the game. Evidence that in conspicuous places in the grand stand were signs in large letters stating that the management will not be responsible for injuries received from thrown or batted balls was admissible as tending to prove a precaution taken to warn spectators of the perils. Wells v. Minneapolis Baseball & Atlethic Assn., 122 Minn. 327, 142 N. W. 706.

See Note, 32 L. R. A. (N. S.) 713.

6989. Doctrine of the turntable cases—Doctrine repudiated in Michigan. Berg v. Duluth etc. Ry. Co., 111 Minn. 305, 126 N. W. 1093.

Doctrine held applicable to explosive fuse caps left in a tool house. Vills v. Cloquet, 119 Minn. 277, 138 N. W. 33.

Doctrine held applicable to carbide. Juntti v. Oliver Iron Mining Co., 119 Minn. 518, 138 N. W. 673.

Doctrine held applicable to an unconcealed, unguarded, and unprotected bark machine, consisting of an endless chain running in a slanting trough, and used for removing bark from a river within a city, where children frequently bathed, fished and gathered wood. Berg v. B. B. Fuel Co., 122 Minn. 323, 142 N. W. 321.

Doctrine held inapplicable to gasolene, naptha and kerosene kept in a proper receptacle. Dahl v. Valley Dredging Co., 125 Minn. 90, 145 N. W. 796.

Doctrine held inapplicable to a hole in the ice in a millpond where children were accustomed to skate and slide. Kohler v. W. J. Jennison Co., 128 Minn. 133, 150 N. W. 235.

(46) See 19 L. R. A. (N. S.) 1094; 51 Id. 672; 52 Id. 129.

(49) See Note, 47 L. R. A. (N. S.) 1101.

(01) Decker v. Itasca Paper Co., 111 Minn. 439, 127 N. W. 183.

(55) Decker v. Itasca Paper Co., 111 Minn. 439, 127 N. W. 183 (child under seven years of age held not guilty of contributory negligence as a matter of law); Berg v. B. B. Fuel Co., 122 Minn. 323, 142 N. W. 321 (evidence held not to show contributory negligence as a matter of law).

6991. Open trapdoors and coal holes in sidewalks—(57) Woodruff v. Bearman Fruit Co., 108 Minn. 118, 121 N. W. 426.

6992a. What constitutes due care—Rotten wood—An owner of wooden structures is chargeable with notice of the natural tendency of wood to decay, and due care sometimes requires an inspection to discover defects due to decayed wood. Williams v. Dickson, 122 Minn. 49, 141 N. W. 849. See Digest, § 6826.

6993. Contributory negligence—(61) Conway v. Charles H. Wood & Co., 113 Minn. 476, 129 N. W. 1045; Carlson v. Superior Terminal Elevator Co., 129 Minn. 479, 152 N. W. 881.

6994. Cases classified as to facts—An approach to a grain elevator. Larson v. Red River Transportation Co., 111 Minn. 427, 127 N. W. 185.

A driver of an express wagon entered a hotel to deliver a parcel. In attempting to pass from the baggage room to the clerk's desk to look for the porter he fell down the shaft of the elevator. Conway v. Charles H. Wood & Co., 113 Minn. 476, 129 N. W. 1045.

Explosive fuse caps left in a tool house accessible to children. Vills v. Cloquet, 119 Minn. 277, 138 N. W. 33.

A covered way over a sidewalk adjacent to a building in the course of construction. Strunk v. Wells Bros. Co., 120 Minn. 77, 138 N. W. 1030.

An unguarded hole in ice on a mill pond. Kohler v. W. J. Jennison Co., 128 Minn. 133, 150 N. W. 235.

(64) See Digest, § 1210.

(78) L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 426, 144 N. W. 145.

(79) See Digest, § 6991.

(01) Stuelpnagel v. Paper, Calmenson & Co., 111 Minn. 3, 126 N. W. 281.

See Digest, § 5369.

MISCELLANEOUS FORMS OF NEGLIGENCE

6995. Negligence in manufacture of articles for sale—(80) O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012 (bridge for public use); Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626 (bean and pea thresher—defective standing board on top of thresher). See Neiman v. Channellene Oil & Mfg. Co., 112 Minn. 11, 127 N. W. 394; Note. 100 Am. St. Rep. 192; 111 Id. 701; 48 L. R. A. (N. S.) 213; 44 Am. L. Reg. (N. S.) 337.

6995a. Breach of contract—Damage to third party—A contract between A and B may bring A and C into such relation that a negligent failure of A to perform his contract with B will give C a cause of action against A, not on the contract, but for the negligence. Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428 (covenant in lease to keep premises heated—liability of landlord to employee of lessee).

(81) O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012. See Note, 100 Am. St. Rep. 192; 12 L. R. A. (N. S.) 924; 32 Id. 968; 48 Id. 213.

6996. Falling objects—A general contractor held liable for injury to a servant of a subcontractor for the fall of a wall which the general contractor and the subcontractor were building. Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 139 N. W. 289, 618.

Door of freight car being pried open by railroad employees fell on plaintiff as he was passing the car. Carlson v. Superior Terminal Elevator Co., 129 Minn. 479, 152 N. W. 881.

6997. Unguarded openings in ice—By statute persons cutting ice in the waters of this state are liable for injuries resulting from a failure to place guards about the openings in the ice caused by the cutting. G. S. 1913, § 8781; Chapman v. Peoples Ice Co., 125 Minn. 168, 145 N. W. 1073 (owner of team loaned to an ice company held entitled to the protection of the statute—driver of team held servant of owner).

The owner of a millpond who permits children to use as a playground the ice formed thereon in winter is not liable for the death of a child from falling into a hole caused by the ordinary operation of the mill, even though the dust from the mill has caused the hole and the ice about it to become so covered with dust that it is impossible for the eye to distinguish between the ice and the water. Kohler v. W. J. Jennison Co., 128 Minn. 133, 150 N. W. 235.

6998. Leaving horses unhitched—Using spirited horses—Where a farmer used a spirited team in husking corn and thereby injured a servant who was working in the field, it was held that the evidence did not show that the defendant was negligent in using the team for such purpose. Schultz v. Duel, 128 Minn. 213, 150 N. W. 786.

(90) See Schultz v. Duel, 128 Minn. 213, 150 N. W. 786; Zuponcic v. Val Blatz Brewing Co., 131 Minn. —, 154 N. W. 790. Note, 10 L. R. A. (N. S.) 845.

6998a. Noises—Frightening horses—Gasolene engines—Due care may require persons operating gasolene engines near public highways to muffle the exhaust so as to avoid frightening horses. Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

PROXIMATE CAUSE

6999. In general—(93) Simek v. Korbel, 114 Minn. 533, 131 N. W. 1134 (collision between carriages in wedding procession—negligence of defendant in holding ribbon across street to stop procession held not the proximate cause of the injury); Murphy v. Twin City Taxicab Co., 122 Minn. 363, 142 N. W. 716; Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434; Ebeling v. International Harvester Co., 125 Minn. 466, 147 N. W. 441; Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093.

(96) See, as to the use of this maxim as a general test of legal cause, 25 Harv. L. Rev. 106.

See, for a general discussion of legal cause, 25 Harv. L. Rev. 103, 223, 303.

7000. Definitions and general rules—The question of proximate cause is one of fact and not ordinarily to be determined on demurrer. Morey v. Shenango Furnace Co., 112 Minn. 528, 127 N. W. 1134. See § 7059.

The word "proximate," for the want of a better one, is generally used to designate the legal cause of an injury. It is synonymous with "direct" or "immediate." Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674.

(1) Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 139 N. W. 289, 618. See Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

(2) See Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434 (facts held not to bring case within rule). As to the meaning of the phrase "of itself sufficient to stand as the cause of the mischief," see 25 Harv. L. Rev. 326.

(3) The Santa Rita, 176 Fed. 890. See, as to the intervention of a conscious responsible agent, 44 Am. L. Reg. (N. S.) 344.

(8) Coultas v. Hennepin Paper Co., 114 Minn. 309, 131 N. W. 319; Healy v. Hoy, 115 Minn. 321, 132 N. W. 208.

(9) Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427.

(10) It is permissible to use the word "direct" or "immediate" instead of "proximate." Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674.

In his draft of a Civil Wrongs Bill for India Pollock uses the word "principal" in place of proximate. The words "principal," "chief," "controlling," "predominant" are better than "proximate" in charging a jury in the generality of cases, but in rare cases they are not applicable. See 25 Harv. L. Rev. 316n.

(98) The principal or predominant cause is generally the legal cause but not always. See 25 Harv. L. Rev. 316n.

See 25 Harv. L. Rev. 103, 223, 303.

7001. Existence and extent of liability distinct questions—(12) Johnson v. Oakes, 110 Minn. 94, 124 N. W. 633; 25 Harv. L. Rev. 103, 223, 303.

7002. Foreseeable consequences—(14) Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655. See 25 Harv. L. Rev. 118.

(15) Johnson v. Oakes, 110 Minn. 94, 124 N. W. 633; Hoppe v. Winona, 113 Minn. 252, 256, 129 N. W. 577; Vills v. Cloquet, 119 Minn. 277, 138 N. W. 33; Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142; Laine v. Consolidated V. & E. Co., 123 Minn. 254, 143 N. W. 783; Munsey v. Webb, 231 U. S. 150. See 25 Harv. L. Rev. 240.

(16) Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713; Fox v. Chicago etc. Ry. Co., 121 Minn. 511, 141 N. W. 845.

7004. Condition or occasion not a cause—Inducing causes—(18) See Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; 25 Harv. L. Rev. 108, 110.

7005. Intervening causes—The intervening cause must be one which not only comes between the original cause and the injury in point of time, but it must turn aside the natural sequence of events and produce a result which would not otherwise have followed. Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

If an intervening cause could not reasonably have been anticipated as likely to happen, it will break the causal connection. Horan v. Watertown, 217 Mass. 185, 104 N. E. 464.

(20) See 25 Harv. L. Rev. 321.

7006. Concurrent negligence of several—Concurrent negligence is not always equivalent to proximate cause. Hill v. Republic Iron and Steel Co., 112 Minn. 244, 127 N. W. 925.

Where a general contractor and a subcontractor are constructing a building, the negligence of the subcontractor or of his servants, does not relieve the general contractor, if his negligence concurs with theirs in causing the injury. Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 139 N. W. 289, 618.

(22) Anderson v Settergren, 110 Minn. 294, 111 N. W. 279; Hill v. Republic Iron & Steel Co., 112 Minn. 244, 127 N. W. 925; Koller v. Chi-

cago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220; Hufman v. Crookston, 113 Minn. 232, 129 N. W. 219; Coleman v. Minneapolis St. Ry. Co., 113 Minn. 364, 129 N. W. 762; Patry v. Northern Pacific Ry. Co., 114 Minn. 375, 131 N. W. 462; Laine v. Consolidated V. & E. Co., 123 Minn. 254, 143 N. W. 783; Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434; Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Klaseus v. Kasota, 128 Minn. 47, 150 N. W. 221. See Note, 16 Am. St. Rep. 250.

7007. Concurring causes—In general—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. Vills v. Cloquet, 119 Minn. 277, 282, 138 N. W. 33.

(23) Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434. See 25 Harv. L. Rev. 324.

7008. Unforeseeable accidents—Even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that, if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

As a general rule loss from an accident must rest where it falls. One is not ordinarily liable for a result which ordinary human care and foresight could not guard against. Chicago v. Sturges, 222 U. S. 313.

(24) Frisk v. Cannon, 110 Minn. 438, 442, 126 N. W. 67; Strunk v. Wells Bros. Co., 120 Minn. 77, 138 N. W. 1030; Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710 (fall of timber from bridge). See Donovan v. Tilden Produce Co., 131 Minn. ——, 155 N. W. 104.

(25) Strunk v. Wells Bros. Co., 120 Minn. 77, 138 N. W. 1030; Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710 (fall of timber from bridge). See Hall v. New York Tel. Co., 214 N. Y. 49, 108 N. E. 182.

7011. Law and fact—(28) Healy v. Hoy, 115 Minn. 321, 132 N. W. 208; Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713; Casey v. Pillsbury Flour Mill Co., 122 Minn. 474, 142 N. W. 726 (evidence conclusive); Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434; Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W.

427; Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434; Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655; Klaseus v. Kasota, 128 Minn. 47, 150 N. W. 221.

(29) Coultas v. Hennepin Paper Co., 114 Minn. 309, 131 N. W. 319; Healy v. Hoy, 115 Minn. 321, 132 N. W. 208; Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427.

(30) Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466. See Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

CONTRIBUTORY NEGLIGENCE

7012. Definition—(31) See, to effect that contributory negligence must be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action. Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

(32) See Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307 (duty of court to define contributory negligence in its charge); Lacey v. Minneapolis St. L. Ry. Co., 118 Minn. 301, 136 N. W. 878 (suggestions as to the best way to charge on the subject of contributory negligence).

(34) Steele v. Red River Lumber Co., 110 Minn. 219, 124 N. W. 978. See Carver v. Luverne Brick and Tile Co., 121 Minn. 388, 141 N. W. 488 (contributed "in some degree" to cause the injury).

(35) See Thompson, Negligence, 2 ed. § 170.

7013. Basis of doctrine—Not to recognize contributory negligence as a defence would be to allow one to recover for self-inflicted injuries. Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

(40) The doctrine is sometimes rested on the rule that the law will not undertake to apportion the consequences of concurring acts of negligence. McKay v. Syracuse Rapid Transit Ry. Co., 208 N. Y. 359, 101 N. E. 885.

7015. Must be proximate cause of injury—It is not a decisive test of contributory negligence that the accident would not have happened without the plaintiff's negligence. Cotton Lumber & Mercantile Co. v. St. Louis River Dam & Imp. Co., 115 Minn. 484, 132 N. W. 1126.

One whose negligence contributes to his injury cannot recover damages of another whose negligence concurred to cause it, even though the carelessness of the latter was the more proximate cause of it. Chicago etc. Ry. Co. v. Bennett, 181 Fed. 799.

(42) Cotton Lumber & Mercantile Co. v. St. Louis River Dam & Imp. Co., 115 Minn. 484, 132 N. W. 1126. See Howley v. Scott, 123 Minn. 159, 143 N. W. 257.

(43) Steele v. Red River Lumber Co., 117 Minn. 199, 135 N. W. 389; Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

7016. Simultaneous and successive acts of negligence—(44) See Howley v. Scott, 123 Minn. 159, 143 N. W. 257.

7017. Last chance doctrine—(45) The Plymouth, 186 Fed. 105.
(48) See Note, 45 L. R. A. (N. S.) 896.
(49) See Howley v. Scott, 123 Minn. 159, 143 N. W. 257.

7019. Ignorance of danger—(55) See Carlson v. Superior Terminal Elevator Co., 129 Minn. 479, 152 N. W. 881.

7020. Sudden emergency—Imminent peril—Distracting circumstances—In case of sudden emergency it is not negligent as a matter of law to take a dangerous course when a safe one is available. Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

(56) Simonson v. Minneapolis etc. Ry. Co., 117 Minn. 243, 135 N. W. 745; Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613; Wardwell v. Cameron, 126 Minn. 149, 148 N. W. 110; Larson v. Duluth St. Ry. Co., 127 Minn. 328, 149 N. W. 538; Louisville etc. Ry. Co. v. Wilson, 188 Fed. 417; Chicago etc. Ry. v. Brown, 229 U. S. 317. See Note, 37 L. R. A. (N. S.) 44.

7022. Assumption that others will exercise due care—(59) New York Lubricating Oil Co. v. Pusey, 211 Fed. 622.

7023. Risking known danger—(63) Chicago etc. Ry. v. Brown, 229 U. S. 317.

7025. Attempting to save life or property—(65) Campbell v. Chicago, G. W. R. Co., 108 Minn. 104, 121 N. W. 429 (attempting to save horse from train); Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W. 12 (attempting to save human life). See 24 Harv. L. Rev. 406, 407; Note, 49 L. R. A. 715; 27 L. R. A. (N. S.) 1069.

7025a. Failing to save property—Failure to make due exertion to save property imperilled by the negligence of another will defeat or reduce a recovery. Mullen v. Otter Tail Power Co., 130 Minn. 386, 153 N. W. 746.

7027. Illegal conduct—The fact that the plaintiff, at the time of the accident, was violating a statute or ordinance, is not conclusive of negligence on his part, but is a mere item of evidence to be considered in connection with all the other evidence in the case. Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795; Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275.

Where one's violation of law contributes directly and proximately to his injury he is remediless. Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746.

The fact that a person who sustains injury at the hands of another is at the time engaged in violation of some law may have an important bearing upon his right to recover. His violation of the law may be evidence against him, and in some cases may wholly defeat recovery. But it is not every violation of the law that is even material evidence against him. The right of a person to maintain an action for a wrong committed upon him is not taken away because he was at the time of the injury disobeying a statute law which in no way contributed to his injury. He is not placed outside all protection of the law, nor does he forfeit all his civil rights merely because he is committing a statutory misdemeanor. The wrong on the part of plaintiff, which will preclude a recovery for an injury sustained by him, must be some act or conduct having the relation to that injury of a cause to the effect produced by it. Plaintiff's violation of the law, in order to affect his case, must, like any other act, be a proximate cause, in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action. A collateral unlawful act not contributing to the injury will not bar a recovery. Armstead v. Lounsberry, 129 Minn. 34, 151 N. W. 542.

(67) Erickson v. Duluth etc. R. Co., 57 Minn. 26, 58 N. W. 822; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795; Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275. See Gee v. Great Northern Ry. Co., 119 Minn. 438, 138 N. W. 684.

7028. Drunkenness—(68) Patterson v. Adan, 119 Minn. 283, 137 N. W. 1112; Summer v. Chicago etc. Ry. Co., 112 Minn. 44, 141 N. W. 854. See Note, 47 L. R. A. (N. S.) 730.

7028a. Deafness—Effect of deafness on a person's duty to exercise care for his own safety. Note, 41 L. R. A. (N. S.) 193.

7029. Children—A boy, six years old, riding with his father, cannot be charged with contributory negligence for failing to take precautions for his own safety at a railroad crossing. Brennan v. Minnesota, D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611.

Held not error to submit to the jury the question of whether a boy between five and six years old was guilty of contributory negligence. Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250. See Decker v. Itasca Paper Co., 111 Minn. 439, 127 N. W. 183 (query whether child under seven is ever chargeable with contributory negligence).

(69) Erdner v. Chicago & N. W. Ry. Co., 115 Minn. 392, 132 N. W. 339; Lutzer v. St. Paul Table Co., 121 Minn. 254, 141 N. W. 115; Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616; Zuponcic v. Val Blatz Brewing Co., 131 Minn. ——, 154 N. W. 790.

(70) Pickell v. St. Paul City Ry. Co., 120 Minn 340, 139 N. W. 616.

7031. Actions under statutes—If the failure of the defendant to observe a statute for the protection of the plaintiff concurs with the negligence of the plaintiff the defendant is liable. Otos v. Great Northern Ry. Co., 128 Minn. 283, 150 N. W. 922.

(72) Foster v. Malberg, 119 Minn. 168, 137 N. W. 816. See Digest, §§ 5895–5899, 6000, 8175(75), 8178(98), 8145(81); 25 Harv. L. Rev. 463.

7032. Burden of proof—Presumption of due care—Where one is killed by the negligence of another the presumption is that he was in the exercise of due care at the time of the accident. The presumption is based upon a law of nature, the universal and insistent instinct of self-preservation. Though the presumption must yield to clear proof of contributory negligence the question is one of fact for the jury unless the evidence so conclusively rebuts the presumption that fair-minded men could not reasonably draw different conclusions therefrom. See § 2616.

(73) Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40. See Note, 33 L. R. A. (N. S.) 1085.

(74) Mellon v. Great Northern Ry. Co., 116 Minn. 449, 134 N. W. 116.

(01) Carlson v. Duluth St. Ry. Co., 111 Minn. 244, 126 N. W. 825; Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752. See § 2616.

7033. Law and fact—(76) Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180; Cawley v. Great Northern Ry. Co., 113 Minn. 489, 129 N. W. 842; Tostason v. Minneapolis Threshing Machine Co., 113 Minn. 394, 129 N. W. 593; Kotefka v. Chicago etc. Ry. Co., 114 Minn. 403, 131 N. W. 482; Carlson v. Superior Terminal Elevator Co., 129 Minn. 479, 152 N. W. 881 (going near a freight car while servants of defendant were prying off the door—contributory negligence held a question for the jury).

7034. Question on appeal—(78) Weiss v. Great Northern Ry. Co., 119 Minn. 355, 138 N. W. 423; Jenkins v. Minneapolis & St. Louis R. Co., 124 Minn. 368, 145 N. W. 40; Eisenmenger v. St. Paul City Ry. Co., 125 Minn. 399, 147 N. W. 430.

7036. Wilful or wanton negligence or injury—Where the complaint alleged both ordinary and wilful negligence and the evidence clearly justified a verdict for ordinary negligence, it was held that error, if any, in submitting the question of wilful negligence, was harmless. Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790.

(81) Demerany v. Great Northern Ry. Co., 114 Minn. 496, 131 N. W. 634; Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571; Havel v. Minneapolis & St. L. R. Co., 120 Minn. 195, 139 N. W. 137; Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894; Gill v. Minneapolis etc. Traction Co., 129 Minn. 142, 151 N. W. 896.

(82) Havel v. Minneapolis & St. L. R. Co., 120 Minn. 195, 139 N. W. 137.

(83) Bloomquist v. Minneapolis St. Ry. Co., 113 Minn. 12, 129 N. W 130; Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 12, 138 N. W 790; Demeray v. Great Northern Ry. Co., 121 Minn. 516, 141 N. W. 804, Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804.

(85) Demeray v. Great Northern Ry. Co., 121 Minn. 516, 141 N. W. 804; Gillespie v. Great Northern Ry. Co., 127 Minn. 234, 149 N. W. 302; Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250.

(86) Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894.

(87) Johnson v. Scott, 119 Minn. 470, 138 N. W. 694; Havel v. Minneapolis & St. L. R. Co., 120 Minn. 195, 139 N. W. 137; Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; Gill v. Minneapolis etc. Traction Co., 129 Minn. 142, 151 N. W. 896.

IMPUTED CONTRIBUTORY NEGLIGENCE

7037. In general—Joint enterprise—(90) Ward v. Meeds, 114 Minn. 18, 130 N. W. 2. See Judge v. Wallen, 152 N. W. 318 (Neb.).

7038. Driver of vehicle and passenger—The negligence of a driver of a vehicle is not imputed to a passenger riding therein; nevertheless the passenger is required to exercise reasonable care for his own safety. To charge him conclusively with contributory negligence, when about to cross a railroad track, in failing to see an approaching train, something more than ability to see the train and failure to look must be shown. In general, a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or is not taking proper precaution, and, being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety. Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164.

(91) Ward v. Meeds, 114 Minn. 18, 130 N. W. 2 (young woman riding in a one-seated carriage with three others—pleasure drive—man driving—collision with automobile); Tereau v. Meeds, 114 Minn. 517, 130 N. W. 3 (id.); Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790 (plaintiff riding in hired cab); Meyers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184 (passenger of automobile let for hire with driver); Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745 (wife in carriage—husband standing on ground holding team—team frightened by passing automobile—negligence of husband not imputed to wife). See Rebillard v. Minneapolis etc. Ry. Co., 216 Fed. 503 (passenger held chargeable with negligence); 8 L. R. A. (N. S.) 597; L. R. A. 1915 A 761.

7039. Master and servant—Firemen are not servants or agents of the owner of property they are attempting to save so that their negligence can be imputed to him. Erickson v. Great Northern Ry. Co., 117 Minn. 348, 135 N. W. 1129.

7040. Carrier and passenger—(93) Note, 8 L. R. A. (N. S.) 597.

7041. Parent and child—Guardians—(94) Fox v. Chicago etc. Ry. Co., 121 Minn. 511, 141 N. W. 845; Brennan v. Minnesota, D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611.

PRESUMPTIONS AND BURDEN OF PROOF

7044. Res ipsa loquitur—The maxim is a rule of evidence, not a rule of pleading, and it cannot supply an allegation of an essential ultimate fact in a pleading. City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

The maxim does not shift the burden of proof. It means that the facts of the occurrence warrant an inference of negligence, not that they compel such an inference. It does not convert a defendant's general denial into an affirmative defence. Sweeney v. Erving, 228 U. S. 233.

The doctrine of "res ipsa loquitur" is that the circumstances attendant on an accident are themselves of such a character as to justify the conclusion that the accident was caused by negligence; the inference of negligence being deducible, not from the mere happening of the accident, but from the attendant circumstances. Marceau v. Rutland Railroad Co., 211 N. Y. 203, 105 N. E. 206. See 29 Harv. L. Rev. 105.

(1) Campbell v. Duluth & N. E. Ry. Co., 111 Minn. 410, 127 N. W. 413 (action against carrier for injury to passenger—breaking of train due to not connecting air hose brake—rule held inapplicable); City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817 (rule applied to breaking of dam); Barnard v. Fergus Falls, 115 Minn. 506, 132 N. W. 998 (id.); Johnson v. Finch, Van Slyck & McConville, 115 Minn. 252, 132 N. W. 276 (movement of elevator); Hartikka v. D. G. Cutler Co., 117 Minn. 344, 135 N. W. 1005 (movement of cars ordinarily blocked to prevent their running down the grade on a spur track); Jones v. Tri-State Tel. & Tel. Co., 118 Minn. 217, 136 N. W. 741 (exposure to X-rays); Narbonne v. Storer, 121 Minn. 505, 141 N. W. 835 (action against landlord by tenant for injury from leaks in water pipe—rule inapplicable in absence of proof that pipes or fixtures were under the control of the landlord); Koury v. Chicago, G. W. R. Co., 125 Minn. 78, 145 N. W. 786 (rule held inapplicable to movement of railroad cars on sidetrack); Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427 (basis of doctrine considered); Whitwell v. Wolf, 127 Minn. 529, 149 N. W. 299 (rule applied to skidding automobile). See Note, 43 L. R. A. (N. S.) 591 (application of rule to injuries on highways).

(2) Johnson v. Finch, Van Slyck & McConville, 115 Minn. 252, 133 N. W. 276 (movement of elevator); Rose v. Minneapolis etc. Ry. Co., 121 Minn. 363, 141 N. W. 487 (defective air brake hose); Wiles v. Great Northern Ry. Co., 125 Minn. 348, 147 N. W. 427 (rule applicable where the injury is caused by the use of an appliance which it was the absolute duty of the master to furnish and keep in a reasonably safe condition for use—pulling out of drawbar of a freight train held a proper basis for application of rule); Marceau v. Rutland Railroad Co., 211 N. Y. 203, 105 N. E. 206. See Digest, § 6027; Note, 6 L. R. A. (N. S.) 337; 16 Id. 214; 113 Am. St. Rep. 1006.

(3) Sweeney v. Erving, 228 U. S. 233.

7047. Degree of proof—Speculation and conjecture—(7) Thomas v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297; Healy v. Hoy, 115 Minn. 321, 132 N. W. 208; Webster v. Chicago etc. Ry. Co., 119 Minn. 72, 137 N. W. 168; Murphy v. Twin City Taxicab Co., 122 Minn. 363, 142 N. W. 716; Bartness v. Pittsburgh Iron Ore Co., 123 Minn. 131, 143 N. W. 117; McColl v. Cameron, 126 Minn. 144, 148 N. W. 108; Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539; Peterson v. Chicago etc. Ry. Co., 131 Minn. ——, 154 N. W. 1093; Noltmier v. Rosenberger, 131 Minn. ——, 155 N. W. 618.

(8) Bruckman v. Chicago etc. Ry. Co., 110 Minn. 308, 125 N. W. 263; Nillson v. Barnett & Record Co., 123 Minn. 308, 143 N. W. 789; Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434; Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539; Kludzinski v. Great Northern Ry. Co., 130 Minn. 222, 153 N. W. 529; Noltmier v. Rosenberger, 131 Minn. ——, 155 N. W. 618.

(9) Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310; Murphy v. Twin City Taxicab Co., 122 Minn. 363, 142 N. W. 716; Diebel v. Wolpert, Davis & Co., 129 Minn. 77, 151 N. W. 541.

(10) Bruckman v. Chicago etc. Ry. Co., 110 Minn. 308, 125 N. W. 263; Murphy v. Twin City Taxicab Co., 122 Minn. 363, 142 N. W. 716; Mitton v. Cargill Elevator Co., 124 Minn. 65, 144 N. W. 434; Crandall v. Chicago, G. W. R. Co., 127 Minn. 498, 150 N. W. 165; Kludzinski v. Great Northern Ry. Co., 130 Minn. 222, 153 N. W. 529.

(12) Decker v. Itasca Paper Co., 111 Minn. 439, 127 N. W. 183; Thomas v. Chicago, G. W. R. Co., 112 Minn. 360, 128 N. W. 297; Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752; Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310; Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488; Hedin v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; Crandall v. Chicago, G. W. R. Co., 127 Minn.

498, 150 N. W. 165; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539; Kludzinski v. Great Northern Ry. Co., 130 Minn. 222, 153 N. W. 529. See Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106.

(14) Stage v. C. H. Young Co., 120 Minn. 205, 139 N. W. 298; Narbonne v. Storer, 121 Minn. 505, 141 N. W. 835; Lewis v. Chicago, G. W. R. Co., 124 Minn. 487, 145 N. W. 393; Longmore v. Great Northern Ry. Co., 125 Minn. 12, 145 N. W. 399; Koury v. Chicago, G. W. R. Co., 125 Minn. 78, 145 N. W. 786; Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106. See Digest, § 7160.

LAW AND FACT

7048. In general—(19) Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180 (the test must be applied with caution lest courts usurp the functions of the jury and unwittingly deprive parties of their constitutional right to a jury trial); Schultz v. Duel, 128 Minn. 213, 150 N. W. 786; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539.

(20) Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539.

(24) Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180.

EVIDENCE

7049. Customary practice—Evidence of customary practice is admissible without being specially pleaded. Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104.

(25) Elmer v. Mutual Steamship Co., 114 Minn. 257, 130 N. W. 1104; B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609; L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 423, 144 N. W. 145 (practice of piling railroad ties and wood on right of way of railroad for shipment); Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626; Stash v. Great Northern Ry. Co., 128 Minn. 329, 151 N. W. 124; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539; Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305; O'Neil v. Potts, 130 Minn. 353, 153 N. W. 856. See McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446 (an offer of evidence that on other roads it is customary for a trainman, before going under a train, to personally notify the engineer, was properly rejected since defendant's witnesses testified that personal notice to the engineer was not required on this division of defendant's road if the conductor was notified.)

(26) Empey v. Lovell, 117 Minn. 520, 134 N. W. 289 (where a failure to do an act constitutes negligence as a matter of law, evidence that others customarily failed to do it is properly excluded); Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660; Stash v. Great Northern Ry. Co., 128 Minn. 329, 151 N. W. 124; Watson v. Duluth,

128 Minn. 446, 151 N. W. 143; Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305.

(27) Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305; O'Neil v. Potts, 130 Minn. 353, 153 N. W. 856.

7050. Unusual practice—(29) McMahon v. Illinois Central R. Co., 127 Minn. 1, 148 N. W. 446.

7051. Careful habit—(30) See Lucker v. Whitridge, 205 N. Y. 50, 98 N. E. 209.

7053. Other accidents from same cause—(33, 34) O'Brien v. St. Paul, 116 Minn. 249, 133 N. W. 981. See Note, 33 L. R. A. (N. S.) 1085.

(35) See Stash v. Great Northern Ry. Co., 128 Minn. 329, 151 N. W. 124.

7054. Private rules of conduct—(37) Gillespie v. Great Northern Ry. Co., 127 Minn. 234, 149 N. W. 302. See Digest, §§ 5819, 6014.

7055. Subsequent repairs and precautions—(38) Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100. See Note, 33 L. R. A. (N. S.) 1085.

7056a. As to cause of accident—Any material evidence is admissible which tends to overcome plaintiff's theory of the cause of the accident, but evidence of a cause which is possible but highly improbable may be excluded. Peterson v. Chicago etc. Ry. Co., 131 Minn. ——, 154 N. W. 1093.

7056b. Warnings by defendant—In an action against the owner of a ball park, evidence that in conspicuous places in the grand stand of the park there were large signs stating that the management would *not* be responsible for injuries received from balls, held admissible. Wells v. Minneapolis Baseball & Athletic Assn., 122 Minn. 327, 142 N. W. 706.

ACTIONS

7057a. Parties defendant—Joinder—Where several persons without any concert of action, by their several acts of negligence concur in causing the plaintiff's injury, he may join them in an action for damages therefor. Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461; Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518; Petcoff v. St. Paul City Ry. Co., 124 Minn. 531, 144 N. W. 474.

7058. Complaint—Where general allegations of negligence are followed by specific allegations the former are restricted by the latter. Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4.

The plaintiff may allege all the grounds giving rise to his cause of action, and is not required to elect, at the beginning of the trial, whether he will establish by his proofs one or another of such grounds. He is

not required to elect to proceed under a statute or under the common law. Tuder v. Oregon Short Line R. Co., 131 Minn. —, 155 N. W. 200.

The allegations "scope of employment" and "course of employment" are allegations of fact and not mere conclusions of law. Kuhl v. United States etc. Ins. Co., 112 Minn. 197, 127 N. W. 628. See Foran v. Levin, 76 Minn. 178, 78 N. W. 1047; Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

The maxim res ipsa loquitur is not a rule of pleading and cannot supply the place of an essential allegation in a pleading. City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

The negligence of the defendant must be alleged directly or by necessary inference. If only the evidentiary facts are alleged the inference of negligence must inevitably follow or the complaint is insufficient on demurrer. City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

A complaint by a spectator at a ball game, against a baseball association, the charge of negligence being a failure to properly screen the place where spectators sat, held to state a cause of action. Wells v. Minneapolis Baseball and Athletic Assn., 122 Minn. 327, 142 N. W. 706.

(42) Duff v. Bayne, 112 Minn. 44, 127 N. W. 385; City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817; Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716; Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143.

(44) Evertson v. McKay, 124 Minn. 260, 144 N. W. 950. See § 2580.

(46) Laine v. Consolidated V. & E. Co., 123 Minn. 254, 143 N. W. 783.

(50) Demerany v. Great Northern Ry. Co., 114 Minn. 496, 131 N. W. 634 (allegations that the acts of the defendant's servants were wilful and in reckless disregard of plaintiff's safety held to add nothing to the facts—complaint held to state a cause of action for wilful negligence); Johnson v. Scott, 119 Minn. 470, 138 N. W. 694 (query whether wilful negligence may be proved under an allegation of ordinary negligence); Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804 (complaint held to allege both wilful and ordinary negligence so that proof of ordinary negligence did not constitute a fatal variance). See Dunnell, Minn. Pl., 2 ed. § 816.

7059. **Demurrer—Contributory negligence—Proximate cause**—The question of proximate cause is not ordinarily determinable on demurrer, but if the want of causal connection between the alleged act of negligence and the injury clearly appears, a demurrer will lie. Laine v. Con-

solidated V. & E. Co., 123 Minn. 254, 143 N. W. 783; Morey v. Shenango Furnace Co., 112 Minn. 528, 127 N. W. 1134.

(52) Sheehy v. Minneapolis & St. L. R. Co., 126 Minn. 133, 147 N. W. 964.

7060. Answer—General denial—Contributory negligence—If a complaint does not negative negligence on the part of the plaintiff contributory negligence on his part is new matter to be specially pleaded by the defendant and is not admissible under a general denial. Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831; Lee v. H. N. Leighton Co., 113 Minn. 373, 129 N. W. 767; Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117.

If the complaint negatives negligence on the part of the plaintiff contributory negligence on his part is admissible under a general denial. St. Anthony Falls etc. Co. v. Eastman, 20 Minn. 277 (249, 265); Hocum v. Weitherick, 22 Minn. 152, 156; O'Malley v. St. Paul etc. Ry. Co., 43 Minn. 289, 294, 45 N. W. 440; Hoblit v. Minneapolis St. Ry. Co., 111 Minn. 77, 126 N. W. 407. See Note, 33 L. R. A. (N. S.) 1207.

If contributory negligence on the part of the plaintiff appears from his evidence, or from evidence unobjected to, the defendant may take advantage of it though he did not plead it. Blakeley v. Le Duc, 19 Minn. 187 (152); Woodruff v. Bearman Fruit Co., 108 Minn. 118, 121 N. W. 426; Mellon v. Great Northern Ry. Co., 116 Minn. 449, 134 N. W. 116; Erickson v. Great Northern Ry. Co., 117 Minn. 351, 135 N. W. 1129. See Skow v. Dahl Punctureless Tire Co., 129 Minn. 324, 152 N. W. 755; Note, 33 L. R. A. (N. S.) 1207.

If contributory negligence is not made an issue by the pleadings, or litigated by consent, it is error to submit it to the jury. Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117.

An amendment on the trial to let in the defence of contributory negligence should ordinarily be allowed as a matter of course, upon a seasonable request. See Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

The defendant may prove that the cause of the accident was other than that charged. Any material evidence tending to overcome the plaintiff's theory of the cause of the accident is admissible under a general denial. Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093.

See Dunnell, Minn. Pl., 2 ed. § 818.

7060a. Reply—Where an answer pleaded contributory negligence in general terms it was held that a reply was not necessary. McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

7061. Variance—A variance between wilful and ordinary negligence held harmless. Johnson v. Scott, 119 Minn. 470, 138 N. W. 694.

Where there are several grounds of negligence alleged a failure to

prove all of them is not a failure of proof requiring a dismissal. But it may be the rule that when the complaint, in a single count, contains several averments, all of which, combined together, make up the one cause of action alleged, it is necessary to prove all of the averments. Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142.

A complaint held to allege both wilful and ordinary negligence so that proof of ordinary negligence did not constitute a fatal variance. Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804.

It is sufficient if there is a substantial correspondence between the pleadings and the proof. Standard Oil Co. v. Brown, 218 U. S. 78.

(55) Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4. See Digest, § 6026.

(56) Duff v. Bayne, 112 Minn. 44, 127 N. W. 385; Hoppe v. Winona, 113 Minn. 252, 258, 129 N. W. 577; Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472; Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

NEWSPAPERS

7064. Qualifications for legal publications—Statute—The affidavit required by section 9418, G. S. 1913, to be filed with the county auditor, is prima facie evidence of the qualification of a newspaper only in case it states "the required facts," and showing that such an affidavit has been filed without showing the facts stated therein does not establish such qualification. Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517.

(59) Olsen v. Bibb Co., 117 Minn. 214, 135 N. W. 385 ("Finance and Commerce," a daily paper published in Minneapolis, held qualified as a medium of official and legal publications); Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886 (newspaper held one of "general circulation" as required by the constitution).

NEW TRIAL

IN GENERAL

7069. Power to grant new trials inherent—Effect of statute—A trial court has no authority to grant a new trial for errors not duly excepted to on the trial or in the notice of motion for a new trial. Farris v. Koplau, 113 Minn. 397, 129 N. W. 770. See Digest, § 7091.

A new trial may be granted to clarify the claims of the respective parties, and enable the court to determine the case upon the merits as then presented. Ibs v. Hartford Life Ins. Co., 119 Minn. 113, 118, 137 N. W. 289; Id., 121 Minn. 310, 311, 141 N. W. 289.

(67) See Farris v. Koplau, 113 Minn. 397, 129 N. W. 770.

(70) Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029; Montee v. Great Northern Ry. Co., 129 Minn. 526, 151 N. W. 1101. See Farris v. Koplau, 113 Minn. 397, 129 N. W. 770.

7070. Statute—Application—A new trial may be granted in proceedings for the consolidation of school districts. Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723.

7073. Necessity of motion to secure review on appeal—(79) See Digest, §§ 393, 5085.

7074. Granted only for material error—De minimis—Nominal damages—Technical errors—New trials and consequent delays are expensive and often vexatious, and should not be granted, unless legal error is made to appear, or the trial court, in the exercise of judicial discretion, deems it advisable in the interest of justice. King v. Board of Education, 116 Minn. 433, 133 N. W. 1018.

Although on appeal it is held that a new trial was improperly granted upon one ground, if it should appear from the record that it would have been error for the trial court to refuse a new trial on one or more of the other grounds stated in the motion, the order granting a new trial would be affirmed. Upton v. Merriman, 116 Minn. 358, 133 N. W. 977.

Where a new trial would not result in substantial relief it may be denied, though there are technical grounds for granting it. Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705.

A new trial will not be granted to a plaintiff who is not entitled to a verdict in any amount. Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705.

A new trial should not be granted if the adverse party is entitled to a verdict and the judgment should be in his favor. Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705; Redwood County v. Minneapolis, 126 Minn. 512, 148 N. W. 469.

Where the trial court fails to observe a rule of procedure prescribed by the legislature a new trial will not be granted if the error did not change the result and was without substantial prejudice. Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259.

(85) Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938; State v. Georgian, 124 Minn. 515, 145 N. W. 385 (the law cannot regard trifling and technical irregularities); Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259.

(88) See Foster v. Wagener, 129 Minn. 11, 151 N. W. 407.

(89) Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259.

See Digest, § 417.

7079. Of part of the issues—When leave is given to make a supplemental answer after verdict, a new trial of all the issues is proper only when those made by the original pleadings and those made by the supplemental pleadings are interdependent. Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644.

It is a well settled rule that a new trial may be granted of a part of the issues. All that is necessary for the application of this rule is that the issues should be so distinct and separable that one issue can be justly determined without a determination of the other. In an action at law, where the issues are usually single and entire, the practice must of necessity be indulged with caution. In actions equitable in their nature and in proceedings such as this, where distinct issues are framed for a jury to pass upon, the practice may be much more liberally resorted to. Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

A new trial may be ordered as to the amount of damages. Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772.

Where error in the case bears only on the question of the amount of damages, a new trial may be granted upon that issue alone. Where defendants' testimony admits a certain amount, plaintiff may be given the option of accepting that amount in preference to taking a new trial. Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

(8) Clark v. Clark, 114 Minn. 22, 129 N. W. 1052 (action for divorce —new trial on the question of alimony); Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100 (proceedings for registration of title to land—new trial of issues as between certain of the parties); Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975; Buck v. Buck, 122 Minn. 463, 142 N. W. 729; Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359; Buck v. Buck, 126 Minn. 275, 148 N. W. 117; Hagstrom v. McDougall, 131 Minn. ——, 155 N. W. 391.

7080. Renewal of motion—Held discretionary with trial court to relieve a party from his failure to file any motion papers and to allow him

to renew his motion for a new trial.. National Citizens Bank v. McKinley, 111 Minn. 214, 126 N. W. 526.

7081. Setting aside order granting—That notice of a motion for new trial was served seven, instead of eight, days before the hearing, was a mere irregularity, such as did not require that the trial court, on application made after a delay of seventeen months, vacate an order granting a new trial. Noonan v. Spear, 129 Minn. 528, 152 N. W. 270.

7082. Effect of granting—Vacating judgment—(15, 18) Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

7083. Imposing conditions—(20) See Dahlin v. Eddy, 125 Minn. 359, 147 N. W. 200 (requiring a refundment by adverse party as condition of denying a new trial).

7084. Stating grounds in order granting a new trial—Statute—The statutory presumption applies only to evidence actually adduced on the trial and not to newly discovered evidence. Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997.

Where a motion for a new trial is based on excessive damages, appearing to have been given under the influence of passion and prejudice, and that the evidence does not justify the verdict, an order granting such motion, without stating that the evidence does not justify the verdict, will not be presumed to have been the exercise of judicial discretion as to excessive damages. King v. Board of Education, 116 Minn. 433, 133 N. W. 1018.

An amended order held to show that it was one granting a new trial on the ground that the verdict was not justified by the evidence. Dorffi v. Duluth etc. R. Co., 117 Minn. 276, 135 N. W. 529.

An order granting a new trial will be treated as made on the ground that the verdict is not sustained by the evidence, when the language of the order or of the memorandum clearly shows the new trial to have been granted on that ground, though the fact is not therein specifically stated. Christie Lithograph & Printing Co. v. American Bonding Co., 119 Minn. 11, 137 N. W. 188.

When a new trial is granted exclusively for errors of law occurring at the trial the court should so state in the order or in its memorandum, so that the adverse party may appeal if he desires. Heide v. Lyons, 128 Minn. 488, 151 N. W. 139.

Since G. S. 1913, § 8001, was enacted, an order granting a new trial is not appealable unless it is expressly stated in the order or memorandum of the trial court that the order is "based exclusively upon errors occurring at the trial." Montee v. Great Northern Ry. Co., 129 Minn. 526, 151 N. W. 1101.

(23) Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644; Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997;

Farris v. Koplau, 113 Minn. 397, 129 N. W. 770; King v. Board of Education, 116 Minn. 433, 133 N. W. 1018; Dorffi v. Duluth etc. R. Co., 117 Minn. 276, 135 N. W. 529; Peters v. Tackaberry, 117 Minn. 373, 135 N. W. 805; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180; Buck v. Buck, 122 Minn. 463, 142 N. W. 729; Nichols v. Atwood, 127 Minn. 425, 149 N. W. 672.

7085. Who may hear motion—(26) Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

TIME OF MOTION

7087. When made on a case or bill of exceptions—(32) Noonan v. Spear, 125 Minn. 475, 147 N. W. 654.

7088. When made on affidavits—(34) See Humphrey v. Monida & Yellowstone Stage Co., 120 Minn. 94, 139 N. W. 132 (new trial denied for want of diligence).

7090. After appeal—Remand—The matter of granting a new trial for new evidence discovered after an appeal lies in the discretion of the trial court. The supreme court will not remand a case with leave to apply to the trial court. It is solely for the latter court to determine whether it will entertain such a motion. Archer v. Whitten, 117 Minn. 122, 134 N. W. 508; Id., 120 Minn. 433, 139 N. W. 815.

An affirmance of a judgment does not preclude a subsequent application for a new trial. Daily v. St. Anthony Falls Water Power Co., 129 Minn. 432, 152 N. W. 840.

7090a. Time of service—Waiver—Where a notice is personally served the fact that it is not served in time will be deemed waived if it is not promptly returned on that ground. Noonan v. Spear, 129 Minn. 528, 152 N. W. 270.

NOTICE OF MOTION

7091. Specification of errors or ground of motion—A trial court has no authority to grant a new trial for errors not duly excepted to on the trial or specified in the notice of motion for a new trial. Farris v. Koplau, 113 Minn. 397, 129 N. W. 770.

A claim that a new trial was granted on a ground not specified in the notice of motion held not sustained by the record. Wornecka v. St. Paul, 118 Minn. 207, 136 N. W. 561.

(39) State v. Drew, 110 Minn. 247, 254, 124 N. W. 1091; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Argall v. Sutor, 114 Minn. 371, 131 N. W. 466; Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307; Gourd v. Morrison County, 118 Minn. 294, 136 N. W. 874; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn.

454, 137 N. W. 180; Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186; Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120; Sanders v. Thiesen, 122 Minn. 533, 142 N. W. 1134; Coppoletti v. Citizens Ins. Co., 123 Minn. 325, 143 N. W. 787; McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613; Nordheimer v. Kanter, 129 Minn. 529, 152 N. W. 270; Pink v. Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532; Petruschke v. Kamerer, 131 Minn. —, 155 N. W. 205.

BASIS OF MOTION

7096. Affidavits—Minutes—Case or bill of exceptions—(52) See National Citizens Bank v. McKinley, 111 Minn. 214, 126 N. W. 526 (oral motion—necessity of moving papers).

IRREGULARITY

7097a. Failure to swear juror—To justify the supreme court in reversing an order denying a new trial, and in ordering a new trial upon the ground that one of the jurors was not sworn as required by law, the fact that the juror was not sworn should affirmatively and clearly appear. Where on the showing made the question is left in doubt, the decision of the trial court will be treated as final. Bakke v. Melby, 119 Minn. 504, 138 N. W. 950.

7098. Improper remarks of court—An inadvertently incorrect statement by the court during the course of the trial in the hearing of the jury as to the issue in the case, not excepted to, is not ground for reversal; the court clearly and correctly stating the issues in its charge. State v. Mueller, 122 Minn. 91, 141 N. W. 1113.

A new trial will rarely be granted by the supreme court for alleged misconduct of the trial court in rebuking counsel for continually interjecting remarks during the examination of witnesses by counsel of the adverse party. Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812; Faunce v. Searles, 122 Minn. 343, 142 N. W. 816.

While the trial court has a wide discretion in the conduct of the trial, it must not invade the province of the jury by making comments, insinuations, or suggestions indicative of belief or unbelief in the integrity or credibility of witnesses. Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

(62) Quirk v. Consumers Power Co., 127 Minn. 526, 149 N. W. 193 (jury prejudiced against attorney of defendant by court—error not cured by charge).

(63) State v. Lindquist, 110 Minn. 12, 124 N. W. 215; Willard v. St. Paul City Ry. Co., 116 Minn. 183, 133 N. W. 465; Nelson v. Gjestrum,

118 Minn. 284, 136 N. W. 858; State v. Roby, 128 Minn. 187, 150 N. W. 793; Clark v. McMullen, 129 Minn. 533, 152 N. W. 1101.

7099. Miscellaneous forms of misconduct of court—Absence of judge during trial. Note, 122 Am. St. Rep. 721.

MISCONDUCT OF COUNSEL OR PREVAILING PARTY

7101. Interference with jury—(69) Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104.

7102. Improper remarks or argument of counsel—(70) Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282; State v. Schreiber, 111 Minn. 138, 126 N. W. 536; State v. Clark, 114 Minn. 342, 131 N. W. 369 (new trial granted for improper argument of prosecuting attorney); State v. McPherson, 114 Minn. 498, 131 N. W. 645 (argument of prosecuting attorney held improper and constituting, with other errors, a ground for a new trial); Patterson v. Adan, 114 Minn. 529, 131 N. W. 1134 (new trial granted); Humphrey v. Monida & Yellowstone Stage Co., 115 Minn. 18, 131 N. W. 498; Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057; Gutmann v. Klimek, 116 Minn. 110, 133 N. W. 475; Brown v. Andrews, 116 Minn. 150, 133 N. W. 568; Ferber v. State Bank, 116 Minn. 261, 133 N. W. 611; State v. Henriksen, 116 Minn. 366, 133 N. W. 850; Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 117 Minn. 59, 134 N. W. 309; Landro v. Great Northern Ry. Co., 117 Minn. 306, 135 N. W. 991; Schaeffer v. Rush, 118 Minn. 174, 136 N. W. 754; Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858; Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9; Patterson v. Adan, 119 Minn. 283, 137 N. W. 1112; Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611; State v. Wallen, 123 Minn. 128, 143 N. W. 119; Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322; Hively v. Golnick, 123 Minn. 498, 144 N. W. 213; State v. Brand, 124 Minn. 408, 145 N. W. 39 (prosecuting attorney calling the accused a scoundrel and going beyond the limits of legitimate argument); Gunderson v. Minneapolis St. Ry. Co., 126 Minn. 168, 148 N. W. 61; Wendt v. Bowman, 126 Minn. 509, 148 N. W. 568; Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476; Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 660; State v. Roby, 128 Minn. 187, 150 N. W. 793; Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804; Blakely v. J. Neils Lumber Co., 128 Minn. 465, 151 N. W. 182; State v. Virgens, 128 Minn. 422, 151 N. W. 190; Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203; Wadman v. Trout Lake Lumber Co., 130 Minn. 80, 153 N. W. 269; Anderson v. Canadian Northern Ry. Co., 130 Minn. 373, 153 N. W. 863; State v. La Bar, 131 Minn. ——, 155 N. W. 211.

See Digest, §§ 9799, 9800.

7103. Miscellaneous forms of misconduct of counsel—The failure of the prosecuting attorney in a criminal case to call an eyewitness of the crime, held not a ground for a new trial. State v. James, 123 Minn. 487, 144 N. W. 216.

It is not advisable for a county attorney to talk with reporters concerning the issues of a criminal trial, even though he informs them that his remarks are not for publication. Such a conversation, however, is not a ground for a new trial, though published in the papers, and probably reaching the jurors, if no prejudice results. State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

Where counsel puts an improper question to a witness, and upon objection being sustained, makes an offer of evidence which is improper and calculated to prejudice or mislead the jury, his misconduct may justify a new trial, but the granting of a new trial in such a case rests almost wholly in the discretion of the trial court. Wadman v. Trout Lake Lumber Co., 130 Minn. 80, 153 N. W. 269.

(74) See State v. Johnson, 114 Minn. 493, 131 N. W. 629; State v. Findling, 123 Minn. 413, 144 N. W. 142; State v. O'Hagan, 124 Minn. 58, 144 N. W. 410 (failure to object on the trial); Duer v. Gagnon, 129 Minn. 517, 152 N. W. 880 (improper cross-examination of defendant tending to disgrace him held not a ground for reversal).

See Note, 100 Am. St. Rep. 689.

7103a. Misconduct of plaintiff—Misconduct of the plaintiff in an action for personal injury in misleading defendant as to the nature of the injury, held ground for a new trial. Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309.

MISCONDUCT OF JURY

7104. By trial court—A matter of discretion—(78) State v. Snow, 130 Minn. 206, 153 N. W. 526.

(80) State v. Snow, 130 Minn. 206, 153 N. W. 526. See Johnson v. Scott, 119 Minn. 470, 138 N. W. 694.

7105. By supreme court—The trial court is in a much better position than the appellate court to determine whether substantial prejudice resulted from the misconduct. State v. Briggs, 122 Minn. 493, 142 N. W. 823.

(81) Johnson v. Scott, 119 Minn. 470, 138 N. W. 694; State v. Briggs, 122 Minn. 493, 142 N. W. 823; Evertson v. McKay, 124 Minn. 260, 144 N. W. 950; Toreson v. Quinn, 126 Minn. 48, 147 N. W. 716; Gunderson v. Minneapolis St. Ry. Co., 126 Minn. 168, 148 N. W. 61; State v. Snow, 130 Minn. 206, 153 N. W. 526 (new trial granted on appeal).

7107. Objections on the trial—Waiver—(83) Johnson v. Scott, 119 Minn. 470, 138 N. W. 694. See Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104.

7108. Presumption of prejudice—Burden of proof—Where the facts shown are as consistent with rightful conduct as with wrongful conduct, the presumption is that the conduct was rightful. Reick v. Great Northern Ry. Co., 129 Minn. 14, 151 N. W. 408.

(85) State v. Snow, 130 Minn. 206, 153 N. W. 526.

7109. Affidavits of jurors and others—Admissibility—The testimony of a juror cannot be received to impeach the verdict, unless it appears that the matters to which he testifies took place outside of court. While the jurors are kept together in the custody of the officer for the purpose of deliberating upon their verdict, they are not outside of court, but remain within the control of the court, and the verdict cannot be impeached by the testimony of a juror as to what transpired during the period they were so kept together. It is essential to the efficiency of the jury system that the jury consult together in secret free from any outside influence, and, to afford them complete freedom while so doing, the court will make no inquiry into the nature or extent of their deliberations. Hurlburt v. Leachman, 126 Minn. 180, 148 N. W. 51.

(86) Hurlburt v. Leachman, 126 Minn. 180, 148 N. W. 51. See 14 Col. L. Rev. 248.

(88) Hurlburt v. Leachman, 126 Minn. 180, 148 N. W. 51.

7112. Separation of jury—(1) State v. Georgian, 124 Minn. 515, 145 N. W. 385.

See Note, 103 Am. St. Rep. 155.

7113. Drinking intoxicating liquors—(2) State v. Snow, 130 Minn. 206, 153 N. W. 526.

See Note, 134 Am. St. Rep. 1033; L. R. A. 1915C, 302.

7114. Visiting locus in quo—It is misconduct on the part of jurors, in an action for injuries resulting from a collision, to examine a vehicle involved in the collision, or the place where it occurred, without the knowledge of the court or the parties; and the complaining party is entitled to a new trial if such misconduct had, or might have had, an effect upon the result unfavorable to him. But, if the court can determine with reasonable certainty that such misconduct did not affect the result, the verdict should stand. The duty to determine whether such misconduct may have been prejudicial rests primarily upon the trial court, and its determination thereof has the same weight as its determination of other questions of fact, and will not be reversed, where the record does not contain the evidence upon which it was based. Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716.

(10) MacKinnon v. Minneapolis, 117 Minn. 261, 135 N. W. 814; Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716; Gunderson v. Minneapolis St. Ry. Co., 126 Minn. 168, 148 N. W. 61.

7115. Unauthorized communications with jury—(11) See State v. Snow, 130 Minn. 206, 153 N. W. 526.

See Note, 134 Am. St. Rep. 1033.

7115a. Quotient verdicts—A verdict rendered pursuant to an agreement between the jurors that each should designate an amount, that the aggregate of such amounts should be divided by twelve, and that the quotient should constitute the verdict, could not be permitted to stand; but the record fails to show that such method, or any other improper method, was adopted in determining the amount of the verdict in question. Reick v. Great Northern Ry. Co., 129 Minn. 14, 151 N. W. 408. See McDonald v. Pless, 238 U. S. 264 (affidavit of juror inadmissible to show quotient verdict).

7116. Miscellaneous forms of misconduct—Where, during the course of a jury trial, a person interested in the result associates much with the members of the jury, meeting with them during the recesses of the court, walking to and from the courthouse with them, talking with them, and generally keeping in their company and associating and drinking with them in saloons, the jurors permitting such association and participating in it, there is such misconduct as will vitiate any verdict favorable to the interest of such meddler. State v. Snow, 130 Minn. 206, 153 N. W. 526.

(12) Johnson v. Scott, 119 Minn. 470, 138 N. W. 694 (during course of trial juror visited a saloon surreptitiously with a witness and partisan of plaintiff and accepted a cigar from him); Burho v. Minneapolis & St. L. R. Co., 121 Minn. 326, 141 N. W. 300 (case involved use of defective couplers contrary to federal safety appliance act—fact that two jurors saw certain couplers in an anteroom to the courtroom during the trial held not a ground for a new trial, the court and the attorneys for defendant knowing of the presence of the couplers and their liability of being observed by jurors); State v. Briggs, 122 Minn. 493, 142 N. W. 823 (juror reading newspaper comments on case); Tuttle v. Farmer's Handy Wagon Co., 124 Minn. 204, 144 N. W. 938 (claim that jury was guilty of misconduct in the manner in which they arrived at the amount of the verdict, held not substantiated); Evertson v. McKay, 124 Minn. 260, 144 N. W. 950 (juror talking about the case with others than his fellow jurors, taking drink with party and sleeping with him after the verdict); Thoreson v. Quinn, 126 Minn. 48, 147 N. W. 716 (examining automobile causing accident).

See Note, 134 Am. St. Rep. 1033; 42 L. R. A. (N. S.) 741 (juror reading newspaper account of trial).

ACCIDENT OR SURPRISE

7117. By trial court—A matter of discretion—(14) Dobrowoloske v. Parpala, 121 Minn. 455, 141 N. W. 803.

(15) Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104.

7118. By supreme court—(17) Walker v. Duluth St. Ry. Co., 114 Minn. 238, 130 N. W. 1026; Dobrowoloske v. Parpala, 121 Minn. 455, 141 N. W. 803; H. W. Johns-Manville Co. v. Great Northern Hotel Co., 128 Minn. 311, 150 N. W. 907.

(18) Pylaczinski v. Great Northern Ry. Co., 120 Minn. 74, 139 N. W. 147.

7119. Objection on the trial—A new trial will not ordinarily be granted when counsel is negligent on the trial, as, for example, when he fails to examine papers submitted to the jury. Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104.

7121. New trial granted—Where counsel was misled by the court as to the instructions which were to be given. Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858.

Where the plaintiff in a personal injury action misled the defendant as to the nature of the injury. Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309.

7122. New trial denied—Where counsel misconstrued the pleadings. Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815.

Where it was claimed that an interpreter who acted on the trial was interested in the case. Pylaczinski v. Great Northern Ry. Co., 120 Minn. 74, 139 N. W. 147.

Where it was claimed that one of the jurors was temporarily insane during the trial. Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322.

The fact that a witness called by the plaintiff wilfully gave false testimony on the trial to the prejudice of the defendants' interests, and in favor of the plaintiff's claims upon the vital questions involved, did not require the granting of the defendants' motion for a new trial, where it did not appear that the plaintiff was in any way responsible for or implicated in the giving of such false testimony, except that he produced the witness, and where the trial court fully granted the defendants' request for instructions concerning such witness and his testimony, which testimony, furthermore, was known by the defendants on the trial to be false, and was contradicted by witnesses produced by the defendants for that purpose. Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300.

Where at the close of a trial the attorneys for both parties, acting jointly, collected the exhibits for delivery to the jury, and both, suppos-

ing that a certain package contained exhibits only, permitted it to be given to the jury without examining its contents, although both had an opportunity to do so, the discovery, after verdict, that, unknown to either party, such package, in fact, contained a document not offered in evidence, will not justify granting a new trial, at least unless it be made to appear that such document improperly influenced the jury. Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104.

Unknown disqualification of juror existing at the time of his selection. Note, 50 L. R. A. (N. S.) 933.

(42) Daly v. Chicago etc. Ry. Co., 121 Minn. 523, 140 N. W. 1034; H. W. Johns-Manville Co. v. Great Northern Hotel Co., 128 Minn. 311, 150 N. W. 907.

(68, 69) See Dobrowoloske v. Parpala, 121 Minn. 455, 141 N. W. 803.

NEWLY DISCOVERED EVIDENCE

7123. By trial court—To be granted with extreme caution—(71) Savino v. Griffin Wheel Co., 115 Minn. 219, 132 N. W. 201; Gates v. Chicago etc. Ry. Co., 131 Minn. ——, 154 N. W. 441.

7125. By supreme court—(73) Grattan v. Rogers, 110 Minn. 493, 126 N. W. 134; State v. Schreiber, 111 Minn. 138, 126 N. W. 536; National Bank of Commerce v. Kierski, 111 Minn. 538, 126 N. W. 1134; Paine v. Crane, 112 Minn. 439, 128 N. W. 574; Austin v. Moffett, 113 Minn. 290, 129 N. W. 388; Ward v. Meeds, 114 Minn. 18, 130 N. W. 2; Walker v. Duluth St. Ry. Co., 114 Minn. 238, 130 N. W. 1026; Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081; Upton v. Merriman, 116 Minn. 358, 133 N. W. 977 (order granting a new trial reversed on appeal); Peterson v. Skarp, 117 Minn. 102, 134 N. W. 503; Northwestern Lumber & Wrecking Co. v. Parker, 118 Minn. 211, 136 N. W. 855; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795; Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322; Goldish v. Andrew Schoch Grocery Co., 125 Minn. 134, 145 N. W. 803; Gunn v. McAlpine, 125 Minn. 343, 147 N. W. 111; German American State Bank v. Lyons, 127 Minn. 390, 149 N. W. 658; State v. Flockey, 128 Minn. 40, 150 N. W. 168; State v. Lucken, 129 Minn. 402, 152 N. W. 769; Crowley v. Farley, 129 Minn. 460, 152 N. W. 872; Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613; George A. Hormel Co. v. Minneapolis St. Ry. Co., 130 Minn. 469, 153 N. W. 867; Gates v. Chicago etc. Ry. Co., 131 Minn. ——, 154 N. W. 441; State v. Hunter, 131 Minn. ——, 154 N. W. 1083.

7126. Motion for postponement condition precedent—(76) George A. Hormel Co. v. Minneapolis St. Ry. Co., 130 Minn. 469, 153 N. W. 867.

7127. Showing on motion—Affidavits—Before a new trial will be granted on the ground of newly discovered evidence, it must be made to

appear positively, and not merely as a matter of conjecture and speculation, that evidence may be produced which is material upon an issue determined on the former trial adversely to the moving party. Upton v. Merriman, 116 Minn. 358, 133 N. W. 977.

A new trial will not be granted on affidavits containing nothing but hearsay. Peterson v. Skarp, 117 Minn. 102, 134 N. W. 503.

Upon such motion the rule requiring the personal affidavit of the moving party showing lack of knowledge on his part of the evidence at the time of trial is not inflexible. In this case the trial court was warranted in acting on the affidavit of the attorney, who had sole charge of the preparation of the case; the plaintiff suing as administrator, and it not appearing that he had any personal knowledge of the issues, relevant facts, or witnesses. Savino v. Griffin Wheel Co., 115 Minn. 219, 132 N. W. 201.

7128. **Evidence discoverable before trial**—Newly remembered evidence is not a ground for a new trial. Wunder v. Turner, 120 Minn. 13, 138 N. W. 770.

As a general rule a new trial should not be granted where it appears that the only reason for not producing the evidence on the trial is that its existence was forgotton. Archer v. Whitten, 120 Minn. 433, 139 N. W. 815.

Misconstruction of a pleading by an attorney is no legal excuse for a failure to produce witnesses upon the trial, nor may the testimony of such witnesses be considered newly discovered evidence; the attorney all the time knowing its purport. Farrington v. Farrington, 117 Minn. 272, 135 N. W. 815.

Order granting a new trial sustained though the failure to produce the evidence on the trial was not very satisfactorily explained. Northwestern Lumber & Wrecking Co. v. Parker, 118 Minn. 211, 136 N. W. 855.

(83) Snyder v. Crescent Creamery Co., 111 Minn. 234, 126 N. W. 822; Erdman v. Watab Rapids Power Co., 112 Minn. 175, 127 N. W. 487, 128 N. W. 454; Humphrey v. Monida & Yellowstone Stage Co., 120 Minn. 94, 139 N. W. 132; Mark v. Fink, 125 Minn. 401, 147 N. W. 279; Crowley v. Farley, 129 Minn. 460, 152 N. W. 872.

(85) Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793.

7129. **Contradictory or impeaching evidence**—(90) Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674.

(92) Savino v. Griffin Wheel Co., 115 Minn. 219, 132 N. W. 201.

7130. **Cumulative evidence**—(94) State v. Schreiber, 111 Minn. 138, 126 N. W. 536; Erdman v. Watab Rapids Power Co., 112 Minn. 175, 127 N. W. 487, 128 N. W. 454; Wunder v. Turner, 120 Minn. 13, 138 N. W. 770; Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793; Mark v

Fink, 125 Minn. 401, 147 N. W. 279; State v. Lee, 126 Minn. 402, 148 N. W. 280; Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

(1, 3) Archer v. Whitten, 120 Minn. 433, 139 N. W. 815.

See Note, 46 L. R. A. (N. S.) 903 (in criminal cases).

7131. Evidence must be likely to change result—Newly discovered evidence relating to collateral facts is not a ground for a new trial. Wunder v. Turner, 120 Minn. 13, 138 N. W. 770.

(4) State v. Schreiber, 111 Minn. 138, 126 N. W. 536; Upton v. Merriman, 116 Minn. 358, 133 N. W. 977; Archer v. Whitten, 120 Minn. 433, 139 N. W. 815; Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

(5) Upton v. Merriman, 116 Minn. 358, 133 N. W. 977.

7131a. **New defensive matter—Supplemental pleadings**—(7) Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644.

7131b. Evidence affecting damages—A new trial may be granted as to the amount of damages for newly discovered evidence affecting them. Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772.

EXCESSIVE OR INADEQUATE DAMAGES

7133. By trial court—A matter of discretion—(10, 11) Ott v. Tri-State Telephone & Telegraph Co., 127 Minn. 373, 149 N. W. 544.

7134. Necessity of passion or prejudice—(13) Halness v. Anderson, 110 Minn. 204, 124 N. W. 830; Ott v. Tri-State Telephone & Telegraph Co., 127 Minn. 373, 149 N. W. 544.

7136. By supreme court—Whether a verdict as reduced by the trial court should be sustained depends largely on whether the trial court abused its discretion in the matter. Gibson v. Chicago, G. W. R. Co., 117 Minn. 143, 134 N. W. 516; Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

The supreme court may remand the case with leave to make application to the trial court for a new trial as to damages on the ground of newly discovered evidence affecting them. Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772.

The general rule as to the weight to be given on appeal to the findings of the trial court or jury does not apply to the award of damages in condemnation proceedings. Potts v. Minneapolis etc. Ry. Co., 124 Minn. 413, 145 N. W. 161.

In determining whether passion and prejudice influenced the jury to give excessive damages, the whole record may be examined, and not alone the erroneous rulings whereby evidence tending to create passion and prejudice was received. Petruschke v. Kamerer, 131 Minn. —, 155 N. W. 205.

In an action brought under the federal Employers' Liability Act, contributory negligence not being a bar, but being proper for consideration in the reduction of damages, the court will not assume, when the ground of the motion for new trial is inadequacy of damages given under the influence of passion or prejudice, that the jury did not find contributory negligence and reduce the damages; and in this case it is held that the trial court did not commit error in refusing a new trial upon the ground stated. Burke v. Chicago & N. W. Ry. Co., 131 Minn. ——, 154 N. W. 960.

The supreme court will consider the evidence in the light most favorable to the plaintiff. Reick v. Great Northern Ry. Co., 129 Minn. 14, 151 N. W. 408.

(19) Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149; Ott v. Tri-State Telephone & Telegraph Co., 127 Minn. 373, 149 N. W. 544.

(20) Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389; Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149.

(21) Teryll v. St. Paul City Ry. Co., 125 Minn. 528, 147 N. W. 273; Reick v. Great Northern Ry. Co., 129 Minn. 14, 151 N. W. 408.

(22) Minneapolis etc. Traction Co. v. Enggren, 111 Minn. 373, 127 N. W. 391; Weide v. St. Paul, 126 Minn. 491, 148 N. W. 304.

(23) Mohr v. Williams, 95 Minn. 261, 104 N. W. 12.

(24) Landro v. Great Northern Ry. Co., 114 Minn. 162, 130 N. W. 553; Germann v. Great Northern Ry. Co., 114 Minn. 247, 130 N. W. 1021; Teryll v. St. Paul City Ry. Co., 121 Minn. 530, 141 N. W. 304; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

7138. **Remitting excess**—Whether a new trial upon the ground of excessive or inadequate damages should be granted or an excessive verdict reduced rests largely in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. Mohr v. Williams, 95 Minn. 261, 104 N. W. 12; Clark v. Scandinavian-American Bank, 113 Minn. 93, 128 N. W. 1114; Kerling v. G. W. Van Dusen & Co., 113 Minn. 501, 129 N. W. 1048; Ott v. Tri-State Telephone & Telegraph Co., 127 Minn. 373, 149 N. W. 544.

If a verdict is so excessive that it should be reduced one-half a new trial should be granted rather than a reduction of the verdict. Germann v. Great Northern Ry. Co., 114 Minn. 247, 130 N. W. 1021; Faunce v. Searles, 122 Minn. 343, 142 N. W. 816; Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309.

A reduction of a verdict for plaintiff may be sustained on the appeal of the defendant, on the ground that it was so large that it was in favor of defendant. Faunce v. Searles, 122 Minn. 343, 142 N. W. 816.

Where the evidence is sufficient to support the verdict as to amount, but such amount exceeds the sum asked for in the complaint, it is not error to deny a new trial, conditioned upon plaintiff's consent to reduce the verdict to the sum claimed in the complaint. Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715.

Where a party admits a liability in a certain amount he may be given the option of accepting that amount in preference to taking a new trial. Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

It has been said that a verdict will not be reduced except upon the ground that the damages were awarded under the influence of passion or prejudice. Ott v. Tri-State Telephone & Telegraph Co., 127 Minn. 373, 149 N. W. 544. This is clearly an inadvertent mistake. See Note 31 and § 7152.

(27) Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466.

(29) Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100.

(30) Hirsch v. Bayne, 112 Minn. 68, 127 N. W. 389; Clark v. Scandinavian-American Bank, 113 Minn. 93, 128 N. W. 1114; Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309; Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100. See Faunce v. Searles, 122 Minn. 343, 142 N. W. 816.

(31) See McBrady v. Monarch Elevator Co., 113 Minn. 104, 129 N. W. 163.

(32) Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903; Magnuson v. Burgess, 124 Minn. 374, 145 N. W. 32; Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

7139. Setting aside successive verdicts—Where the plaintiff has a constitutional right to a trial by jury, and the damages to be awarded are largely within its discretion, the trial judge ought not to grant a second new trial for excessive damages, unless they are so excessive as unmistakably to indicate that the verdict must have been the result of passion or prejudice. Halness v. Anderson, 110 Minn. 204, 124 N. W. 830.

7141. Inadequate damages—(41) Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705.

(42) Reynolds v. Great Northern Ry. Co., 119 Minn. 251, 138 N. W. 30.

INSUFFICIENCY OF EVIDENCE

7142. By trial court—In general—The function of the trial court in determining whether a verdict is not justified by the evidence differs from its function in determining whether it is contrary to law, in that

in the former case there is the element of discretion, while in the latter case there is not. Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

(51) Hull v. Minneapolis etc. Ry. Co., 116 Minn. 349, 133 N. W. 852; Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

7142a. On court's own motion—Directed verdict—The trial court may, on its own motion, grant a new trial for insufficiency of evidence in aggravated cases, as where the verdict is so manifestly and palpably against the evidence that it would have been an abuse of discretion to deny a new trial, had the party aggrieved made a motion therefor. This rule applies, even though the verdict was directed by the court. Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

7145. Duty to weigh evidence—Credibility of witnesses—Discretion of trial court—(55) Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375; Hull v. Minneapolis etc. Ry. Co., 116 Minn. 349, 133 N. W. 852; Murphy v. Kuntze, 122 Minn. 530, 142 N. W. 1134.

7151. After successive verdicts—(67) Stuelpnagel v. Paper, Calmenson & Co., 111 Minn. 3, 126 N. W. 281; Minneapolis Brewing Co. v. Grathen, 111 Minn. 265, 126 N. W. 827; Patzke v. Minneapolis & St. L. R. Co., 113 Minn. 168, 129 N. W. 124; Ladwig v. Supreme Assembly, 125 Minn. 72, 145 N. W. 798.

7152. Remitting excess—(70) Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

7152a. Where there are several issues or grounds of liability—Where there are several grounds of negligence charged and in issue, and there is a general verdict, a new trial will be granted if a verdict on any of the grounds is not justified. Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804. See Digest, § 7079.

7154. By supreme court—In general—Whether the case made by the evidence of a party is one of fabrication, or his version thereof so inherently improbable as to be unworthy of belief, is primarily for the jury and trial court to determine. Only in exceptional cases will an appellate court so declare, and then only when the question is entirely free from doubt. Rosenblatt v. Chicago etc. Ry. Co., 115 Minn. 108, 131 N. W. 1060; Johnson v. Finch, Van Slyck & McConville, 115 Minn. 252, 132 N. W. 276.

(73) Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375.

(74) Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375; Kirby v. Milton Dairy Co., 115 Minn. 504, 132 N. W. 995; Hull v. Minneapolis etc. Ry. Co., 116 Minn. 349, 133 N. W. 852; Hegna v. Modern Brotherhood, 118 Minn. 368, 136 N. W. 1035.

(75) Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375.

7155. When order granting new trial reversed—Rule of Hicks v. Stone—(78) Christie Lithograph & Printing Co. v. American Bonding Co., 119 Minn. 11, 137 N. W. 188; Melin v. Stuart, 122 Minn. 523, 141 N. W. 812; Chippewa County State Bank v. Haubris, 123 Minn. 530, 143 N. W. 1123; Weiss v. Peterson, 124 Minn. 84, 144 N. W. 450; Ladwig v. Supreme Assembly, 125 Minn. 72, 145 N. W. 798.

7156. When rule of Hicks v. Stone applies—The rule of Hicks v. Stone applies only in those cases where the trial court, for reasons peculiarly within its knowledge, is justified in concluding that the ends of justice will be best served by submitting the evidence to another jury. Where the trial court expressly assigns reasons for granting a new trial and such reasons relate exclusively to the failure of the successful party to offer a particular item of evidence, holding that the absence thereof is fatal to the verdict, the rule does not apply, and the order granting a new trial will be reversed on appeal if the trial court was in error in deeming the particular evidence essential. Hull v. Minneapolis etc. Ry. Co., 116 Minn. 349, 133 N. W. 852.

The rule applies after successive verdicts for the same party. Park v. Electric Thermostat Co., 75 Minn. 349, 77 N. W. 988; Ladwig v. Supreme Assembly, 125 Minn. 72, 145 N. W. 798.

(85) Buck v. Buck, 126 Minn. 275, 148 N. W. 117 (issue involving mental capacity of testator).

(92) Zeuli v. Foot, Schulze & Co., 130 Minn. 184, 153 N. W. 310.

7157. When order denying a new trial reversed—The mere fact that the testimony of a party may be open to suspicion and criticism is not alone sufficient to justify an appellate court in rejecting it as untrue or as casting such a cloud on his veracity as to justify a reversal of an order of the trial court denying a new trial. Stuelpnagel v. Paper, Calmenson & Co., 111 Minn. 3, 126 N. W. 281.

It is not the province of the supreme court to reconcile conflicting evidence or to solve doubts arising therefrom. Koller v. Chicago etc. Ry. Co., 113 Minn. 173, 129 N. W. 220.

(93) Hegna v. Modern Brotherhood, 118 Minn. 368, 136 N. W. 1035; Marek v. Jelinek, 121 Minn. 468, 141 N. W. 788; Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149; Van Cappellan v. Chicago etc. R. Co., 126 Minn. 251, 148 N. W. 104; Buck v. Buck, 126 Minn. 275, 148 N. W. 117 (issue involving mental capacity of testator); Zeuli v. Foot, Schulze & Co., 130 Minn. 184, 153 N. W. 310.

(94) Maroney v. Minneapolis & St. L. R. Co., 123 Minn. 480, 144 N. W. 149.

(98) Patzke v. Minneapolis & St. L. R. Co., 113 Minn. 168, 129 N. W. 124; Hanowitz v. Great Northern Ry. Co., 122 Minn. 241, 142 N. W. 196;

Kling v. Thompson-McDonald Lumber Co., 127 Minn. 468, 149 N. W. 947.

(99) Van Cappellan v. Chicago etc. Ry. Co., 126 Minn. 251, 148 N. W. 104.

7160. Verdicts based on speculation or conjecture—In applying the rule that verdicts cannot rest on speculation or conjecture precedents are of trifling or no value. Each case must necessarily be determined on its own facts. Minneapolis Sash & Door Co. v. Great Northern Ry. Co., 83 Minn. 370, 86 N. W. 451; State v. James, 123 Minn. 487, 144 N. W. 216.

(3) Virtue v. Creamery Package Mfg. Co., 114 Minn. 167, 172, 130 N. W. 996; State v. James, 123 Minn. 487, 144 N. W. 216. See Digest, § 7047.

VERDICT CONTRARY TO LAW

7161. In general—Inconsistency in verdicts of a jury, general or special, is ground for a new trial. Bell v. Northern Pacific Ry. Co., 112 Minn. 488, 128 N. W. 829.

A verdict contrary to the instructions of the court is contrary to law, but it may be contrary to law for other reasons. A motion on this ground should be granted if, as a matter of law, there is no sufficient evidence to support it; that is, when the evidence is such that, conceding all that it tends to prove, it will not justify a verdict as a matter of law. Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

ERRORS OF LAW ON THE TRIAL

7162. What are errors on the trial—(17) Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109; Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302 (error in directing a verdict for the plaintiff is not a ground for a reversal or a new trial if the plaintiff was entitled to recover as a matter of law); Weide v. St. Paul, 126 Minn. 491, 148 N. W. 307 (error in denying a motion for a directed verdict for defendant is cured if the plaintiff subsequently makes out a cause of action).

ERRONEOUS INSTRUCTIONS

7165. In general—An erroneous and misleading statement of the facts of the case, or of the pivotal fact of the case, by the court in its charge may be ground for a reversal of a judgment or a new trial. Larkin v. Minneapolis, 112 Minn. 311, 127 N. W. 1129.

When the charge, taken as a whole, submits all the issues fully and fairly, the case will not be reversed for isolated erroneous statements, which could not mislead the jury. Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843.

Confusing and erroneous instructions may be rendered harmless by subsequent clear and correct instructions on the same point. Strite Governor Pulley Co. v. Lyons, 129 Minn. 372, 152 N. W. 765.

(30) Hively v. Golnick, 123 Minn. 498, 144 N. W. 213; Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445 (action for breach of covenant in a lease—erroneous charge as to measure of damages); Gran v. Gran, 129 Minn. 531, 152 N. W. 269; Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

(33) Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894.

7166. How far discretionary—Question on appeal—(34, 35) Grimes v. Minneapolis etc. Traction Co., 130 Minn. 285, 153 N. W. 596.

(36) Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997; Hartikka v. D. G. Cutler Co., 117 Minn. 344, 135 N. W. 1005; Grimes v. Minneapolis etc. Traction Co., 130 Minn. 285, 153 N. W. 596.

(37) Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116 (charge which virtually directed the jury to disregard the arguments of counsel).

7167. Inconsistent and contradictory instructions—(38) Howard v. Illinois Central R. Co., 114 Minn. 189, 130 N. W. 946.

7168. Where there are several issues—Where there are two grounds of recovery and a general verdict, an erroneous submission of one of the gounds necessitates a new trial. Roy v. Dannehr, 124 Minn. 233, 144 N. W. 758.

When there are several grounds of negligence charged and there is a general verdict, error in submitting either ground necessitates a new trial. Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804.

In an action against two defendants for negligence, the acts of negligence not being joint or of the same kind, a new trial was granted because of confusion of the issues in the charge. Beier v. Aberdeen Hotel Co., 118 Minn. 237, 136 N. W. 757.

Where upon one of the issues the successful party is entitled as a matter of law to the verdict rendered, error in instructions on another immaterial issue is harmless. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

(39) Rihmann v. George J. Grant Construction Co., 114 Minn. 484, 131 N. W. 478; Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975; Burmister v. P. C. Giguere & Son, 130 Minn. 28, 153 N. W. 134.

(40) Nichols v. Atwood, 127 Minn. 425, 149 N. W. 672; McDonnell v. Chicago etc. Ry. Co., 130 Minn. 125, 153 N. W. 255.

(43) See Nelson v. Saari, 123 Minn. 492, 144 N. W. 137; Creamus v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 616.

7168a. Where there are several causes of action—Where two causes of action are tried together, and the verdict may include damages for

both, error in an instruction relating to one of the causes of action necessitates a new trial. Johnson v. Wild Rice Boom Co., 127 Minn. 490, 150 N. W. 218; Juhl v. Wild Rice Boom Co., 127 Minn. 537, 148 N. W. 520.

7169. Charge in accord with theory of trial—Harmless error—(43) Raski v. Great Northern Ry. Co., 128 Minn. 129, 150 N. W. 618. See Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

7170. Where the verdict is right as a matter of law—Where there is a verdict for the plaintiff in an action for negligence, an error in the charge as to contributory negligence is harmless if the evidence would not have justified a finding of contributory negligence. Carver v. Luverne Brick & Tile Co., 121 Minn. 388, 141 N. W. 488.

Where a verdict establishes the fact that the plaintiff performed the contract sued upon, erroneous instructions as to the measure of damages for non-performance are harmless. Johnson v. Church of St. Charles, 126 Minn. 338, 148 N. W. 281.

Where upon one issue the successful party is entitled as a matter of law to the verdict rendered, error in the instructions on another immaterial issue is harmless. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

(46) McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

(48) Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

7170a. Where plaintiff has no cause of action—Where, as a matter of law, the plaintiff has no cause of action and the defendant is entitled to a judgment notwithstanding the verdict, error in the instructions is not a ground for a new trial. Judgment should be ordered. Melberg v. Wild Rice Lumber Co., 127 Minn. 524, 149 N. W. 1069.

7171. Erroneous instructions disregarded—Where the evidence shows that the verdict is for an amount not larger than plaintiff is fairly entitled to as compensatory damages, it will be presumed that the jury did not allow punitive damages, and an instruction that they might is error without prejudice. Lamson v. Great Northern Ry. Co., 114 Minn. 182, 130 N. W. 945.

7172. Impertinent abstract instructions—(52) Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118. See Lacey v. Minneapolis St. Ry. Co., 118 Minn. 301, 136 N. W. 875.

7172a. Different degrees of offence—Harmless error—An instruction which was proper in defining an assault in the third degree, but which was given as defining an assault in the second degree, was without prejudice, even if erroneous in respect to the second degree, where defendant was found not guilty in the second degree, but guilty in the third degree. State v. Lehman, 131 Minn. ——, 155 N. W. 399.

7173. Instructions too favorable to appellant—(54) Bragg & Co. v. Johnson, 128 Minn. 64, 150 N. W. 223.

7174. Improper submission of issues—No evidence—Conclusive evidence—It is prejudicial error for the court to submit a case upon a theory for which there is no basis in the evidence. Rihmann v. George J. Grant Const. Co., 114 Minn. 484, 131 N. W. 478.

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 for the jury on grounds not submitted, defendant would be entitled to a new trial, but is not entitled to judgment notwithstanding the verdict. Koski v. Chicago etc. Ry. Co., 116 Minn. 137, 133 N. W. 790; Daily v. St. Anthony Falls Water Power Co., 129 Minn. 432, 152 N. W. 840.

(55) Marshall v. Chicago etc. Ry. Co., 127 Minn. 244, 149 N. W. 296; Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275; Anderson v. Wormser, 129 Minn. 8, 151 N. W. 423; Zakrzewski v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 966; Lufkin v. Harvey, 131 Minn. —, 154 N. W. 1097.

(56) Johnson v. Sartell Bros. Co., 128 Minn. 239, 150 N. W. 784; McGray v. Cobb, 130 Minn. 434, 153 N. W. 736; Burmister v. P. C. Giguere & Son, 130 Minn. 28, 153 N. W. 134.

7175. Improper withdrawal of issues—(57) Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025.

7176. Improper introduction of issues—(58) Creteau v. Chicago & N. W. Ry. Co., 113 Minn. 418, 129 N. W. 855 (liability under the federal employer's liability act); Anderson v. Wormser, 129 Minn. 8, 151 N. W. 423 (contributory negligence); Skow v. Dahl Punctureless Tire Co., 129 Minn. 324, 152 N. W. 755 (assumption of risk); Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117 (contributory negligence).

7179. Failure to charge on particular points—Error cannot be predicated upon the court's failure to instruct in respect to the character of the evidence required to prove an issue, unless an instruction thereon was suggested or requested. Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244.

(61) Farris v. Koplau, 113 Minn. 397, 129 N. W. 770; Gasser v. Wall, 115 Minn. 59, 131 N. W. 850; Jacobsen v. Minneapolis, 115 Minn. 397, 132 N. W. 341; Ferber v. State Bank, 116 Minn. 261, 133 N. W. 611; Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9; Smith v. Cloquet, 120 Minn. 50, 139 N. W. 141; Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; Faunce v. Searles, 122 Minn. 343, 142 N. W. 816;

State v. Briggs, 122 Minn. 493, 142 N. W. 823; State v. Rusk, 123 Minn. 276, 143 N. W. 782; Gillespie v. Great Northern Printing Co., 124 Minn. 1, 144 N. W. 466; Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772; Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244; State v. Newman, 127 Minn. 445, 149 N. W. 945; Moe v. Paulson, 128 Minn. 277, 150 N. W. 914; Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650; State v. Sailor, 130 Minn. 84, 153 N. W. 271; Smith v. Great Northern Ry. Co., 131 Minn. ——, 153 N. W. 513 (failure to charge on contributory negligence in a personal injury action); Castigliano v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 744.

ERRONEOUS ADMISSION OR EXCLUSION OF EVIDENCE

7180. Erroneous admission of evidence—In general—A new trial should be granted for the erroneous admission of evidence only when it is apparent that substantial prejudice resulted therefrom. A different rule applies where competent and material evidence is excluded. Whitaker v. Chicago etc. Ry. Co., 115 Minn. 140, 131 N. W. 1061; Moe v. Paulson, 128 Minn. 277, 150 N. W. 914.

A new trial should not be granted for the erroneous admission of evidence if the error was clearly without prejudice to the substantial rights of the party. Miller v. Bricker, 117 Minn. 394, 136 N. W. 14.

A new trial for error in the admission of evidence should be granted with caution. Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305.

The supreme court is averse to granting new trials for the erroneous admission of evidence and will not do so unless it is quite probable that the result was affected by the evidence. It will be guided by practical rather than theoretical considerations in deciding the question. The experience gained as practicing lawyers and as trial judges will be utilized by the court. Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188.

The supreme court is reluctant to grant a new trial for the erroneous admission of evidence, but where it was obviously and substantially prejudicial there is no alternative. Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305 ; Anderson v. Great Northern Ry. Co., 126 Minn. 352, 148 N. W. 462.

A new trial will not be granted for the erroneous admission of evidence if it is clear that the result would have been the same if such evidence had been excluded. Christenson v. Madson, 128 Minn. 17, 150 N. W. 213.

The presumption of prejudice from error in the admission of evidence is of slight force under the later decisions. Practically a new

trial will not be granted unless substantial prejudice clearly appears. Moe v. Paulson, 128 Minn. 277, 150 N. W. 914.

(62) John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180; Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305; Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188; Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147 (action for slander); Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956 (action for assault and battery); Anderson v. Great Northern Ry. Co., 126 Minn. 352, 148 N. W. 462.

(63) Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305. See Moe v. Paulson, 128 Minn. 277, 150 N. W. 914 (presumption of slight force under later decisions).

(65) See Hinkley v. Freick, 112 Minn. 239, 241, 127 N. W. 940.

(66) See Meeker v. Lehigh Valley R. Co., 236 U. S. 434.

See Digest, § 2490.

7181. Erroneous exclusion of evidence—In general—The erroneous exclusion of evidence preventing a defendant from proving a substantial defence is ground for a new trial. Hinkley v. Freick, 112 Minn. 239, 127 N. W. 940.

Where the evidentiary value of excluded evidence is slight a new trial is properly denied. Barnes v. Spencer, 113 Minn. 101, 129 N. W. 140.

The supreme court will generally defer to the judgment of the trial court in holding that the exclusion of evidence was not prejudicial. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

New trials are more freely granted for the erroneous exclusive of evidence than for its erroneous admission. Whitaker v. Chicago etc. Ry. Co., 115 Minn. 140, 131 N. W. 1061; Moe v. Paulson, 128 Minn. 277, 150 N. W. 914.

When the trial court decides that the exclusion of evidence was prejudicial and grants a new trial the supreme court will not lightly annul its decision. McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

As a general rule the supreme court will not grant a reversal for error in the exclusion of evidence unless its admission might reasonably have resulted in a different verdict. Svensson v. Lindgren, 124 Minn. 386, 389, 145 N. W. 116.

A new trial should not be granted where, if the excluded evidence had been admitted, the result of the action would necessarily be the same. Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465.

(68) Harris v. Great Northern Ry. Co., 124 Minn. 357, 145 N. W. 115 (action for injuries to goods shipped—new trial granted).

7182. Where the verdict is right as a matter of law—Evidence upon the affirmative defence of a valid expulsion, after hearing, for certain

offences against a benefit society, including misrepresentation of age, being such that the court would have been justified in charging failure to establish it, and this being the only issue submitted, and there being no other proper to be submitted, admission of testimony tending to refute the charge of such misrepresentation was without prejudice to defendant, though irrelevant. Kulberg v. National Council, 124 Minn. 437, 145 N. W. 125.

Where upon one issue the successful party is entitled as a matter of law to the verdict rendered, error in the admission or exclusion of evidence on another immaterial issue is harmless. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

(69) Dobreff v. St. Paul Gaslight Co., 127 Minn. 286, 149 N. W. 465; Nichols v. Atwood, 127 Minn. 425, 149 N. W. 672.

(70) Christenson v. Madson, 128 Minn. 17, 150 N. W. 213 (fact conclusively established by other evidence).

(71) Gibson v. Nelson, 111 Minn. 183, 192, 126 N. W. 731.

7183. Immaterial evidence—The exclusion of evidence not obviously material is not a ground for a new trial. See Digest, § 9717.

(72) Barnes v. Spencer, 113 Minn. 101, 129 N. W. 140; Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430.

(73) Bakke v. Melby, 119 Minn. 504, 138 N. W. 950; Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430.

7184. Evidence of facts otherwise proved—Error in the admission of evidence in a criminal case is harmless if the defendant takes the stand in his own behalf and voluntarily testifies to substantially the same effect. State v. Newman, 127 Minn. 445, 149 N. W. 945.

(74) Lee v. H. N. Leighton Co., 113 Minn. 373, 129 N. W. 767; Wodham v. Fargo & Moorhead St. Ry. Co., 114 Minn. 16, 130 N. W. 23; State v. District Court, 114 Minn. 287, 131 N. W. 327; Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057; Johnson v. Carlin, 121 Minn. 176, 141 N. W. 4; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Record v. Farmington, 126 Minn. 488, 148 N. W. 296; Christenson v. Madson, 128 Minn. 17, 150 N. W. 213; Bragg & Co. v. Johnson, 128 Minn. 64, 150 N. W. 223; Doran v. Chicago etc. Ry. Co., 128 Minn. 193, 150 N. W. 800; Meagher v. Fogarty, 129 Minn. 417, 152 N. W. 833.

7185. Error in order of proof—(76) Meagher v. Fogarty, 129 Minn. 417, 152 N. W. 833.

7186. Evidence likely to prejudice jury against party—(77) Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305.

7187. Evidence of fact admitted, undisputed or presumed—(78) Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

(79) B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609.

7188. Evidence to impeach witness—(81) Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858 (point not essentially material made material by charge of court); Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112.

7192. Exclusion of evidence subsequently admitted—(85) Whitaker v. Chicago etc. Ry. Co., 115 Minn. 140, 131 N. W. 1061; Baker v. Barker, 118 Minn. 419, 137 N. W. 7; Anderson v. Wood, 125 Minn. 102, 145 N. W. 791; Meagher v. Fogarty, 129 Minn. 417, 152 N. W. 833.

7193. Evidence called out by moving party—Where a party elicits evidence of a certain character, he cannot thereafter be heard to say that such evidence is not admissible, and where he offers evidence that certain conditions exist, he cannot complain that the court permits his evidence to be rebutted. Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100.

7195. Similar evidence admitted without objection—(89) McGray v. Cobb, 129 Minn. 434, 152 N. W. 262.

7198. Where there are several issues—If a special finding on one of the issues in a case shows that plaintiff has no cause of action, regardless of a finding on another issue, error in the admission of evidence on the latter issue is immaterial. Nichols v. Atwood, 127 Minn. 425, 149 N. W. 672.

Where upon one issue the successful party is entitled as a matter of law to the verdict rendered, error in the admission or exclusion of evidence on another immaterial issue is harmless. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

7202. Evidence in rebuttal of incompetent evidence—(98) Whitney v. Kaliske, 131 Minn. ——, 154 N. W. 1100.

7205. Evidence relating to damages—Error in the exclusion of evidence bearing on the question of punitive damages is ordinarily harmless where compensatory damages alone are recoverable. The erroneous exclusion of evidence in mitigation of damages is ground for a new trial. Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147.

The fact that evidence of special damages not pleaded is admitted does not necessitate a new trial. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

A new trial may be granted for error in excluding evidence tending to show that the damages might have been lessened by reasonable efforts

on the part of the prevailing party. Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140.

(4) Lead v. Inch, 116 Minn. 467, 134 N. W. 218; Wood v. Chicago & N. W. Ry., 118 Minn. 362, 136 N. W. 1095 (apparent from amount of verdict that evidence erroneously admitted did not affect the result).

7205a. Evidence not responsive to question—Error in failing to strike out testimony not responsive to the question asked is no ground for a new trial if the party assigning the error might have elicited the testimony by another question. Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843.

7206. Error cured by striking out evidence—(7) Strasser v. Stabeck, 112 Minn. 90, 127 N. W. 384 (held that error could not be cured); Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126 (indefinite order striking out—duty of counsel to request more definite order).

7207. Error cured by instructions—Where, during a trial, objectionable evidence is received, but, before final submission, the court perceives the error and instructs the jury to disregard such evidence, the presumption is that no prejudice resulted from its reception, and, if the instruction in that regard is lacking in clearness or definiteness counsel, by failing to call the court's attention thereto, waives the defect. Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244. See Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126.

(8) King v. Board of Education, 116 Minn. 433, 133 N. W. 1018; Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126; Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188, Turner v. American S. & T. Co., 213 U. S. 257.

7207a. Error waived by acquiescence—Error in excluding evidence is harmless if counsel acquiesces in the ruling of the court or immediately withdraws the question. State v. Lucken, 129 Minn. 402, 152 N. W. 769.

7208. When the trial is by the court without a jury—The fact that evidence erroneously admitted affected the determination may be disclosed by the findings. State v. Great Northern Ry. Co., 114 Minn. 293, 131 N. W. 330.

Where there is material error in the admission of evidence, and it cannot be ascertained from the record whether the trial court predicated its decision on such evidence, or on other evidence properly admitted, there must be a reversal. Especially is this true in a criminal prosecution. State v. Hager, 119 Minn. 512, 138 N. W. 935.

Though the trial court in an equity case erroneously excludes testimony bearing upon material facts in issue, and rejects offers to prove them, the case will not be reversed for such errors if with the facts taken as the party offering the proof claims them to be there could be no re-

sult in the case other than that reached by the trial court. Green v. N. W. Trust Co., 128 Minn. 30, 150 N. W. 229.

Where it is clear that the result would have been the same if excluded evidence had been received a new trial will not be granted. Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W. 907.

(9) Fallon v. Fallon, 110 Minn. 213, 124 N. W. 994; Wilkins v. Sublette, 111 Minn. 339, 342, 126 N. W. 1089; Jarecki Mfg. Co. v. Ryan, 114 Minn. 38, 129 N. W. 1055, 130 N. W. 948; Lamont v. Lamont, 128 Minn. 525, 151 N. W. 416 (new trial granted).

(16) See State v. Great Northern Ry. Co., 114 Minn. 293, 131 N. W. 330.

STATUTORY NEW TRIAL AS OF RIGHT

7209. To what actions applicable—The statute has been repealed. See Laws 1911, c. 139.

Statute held inapplicable to an action to compel a conveyance by the defendant to the plaintiff of the latter's land, the legal title to which was alleged to have been obtained by the defendant in fraud of plaintiff. Bracken v. Trones, 118 Minn. 18, 136 N. W. 281.

Statute held inapplicable to an equitable action to try title, in which a counterclaim in ejectment was interposed, but was dismissed prior to the trial. Upton v. Merriam, 122 Minn. 158, 142 N. W. 150.

(18, 21) Hovelsrud v. Hovelsrud, 115 Minn. 421, 132 N. W. 910.

7211. Statute construed liberally—(31) Bracken v. Trones, 118 Minn. 18, 136 N. W. 281.

7216. Time of demand—Notice of judgment—(41) Voigt v. Woll, 110 Minn. 6, 124 N. W. 446.

7217. Demand—Proof of service—(45) Voigt v. Woll, 110 Minn. 6, 124 N. W. 446.

NOTARIES PUBLIC

7226. Seal—The conclusion of the trial court to the effect that an indistinct impression of a seal attached to an affidavit immediately to the left of the jurat was the impression of the seal of the notary public before whom the affidavit was made, and who signed the same as notary, held sustained by the record. Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292.

(63) Curtiss & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

7228. Bonds—(67) Baune v. Solheim, 129 Minn. 221, 152 N. W. 267 (action for negligence in taking an acknowledgment—evidence held to justify a verdict for defendants).

NOTICE

7230. Actual and constructive notice distinguished—Constructive notice may be deemed included in actual notice, on the principle that the greater includes the less. Constructive notice is admissible under an allegation of actual notice. Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80.

7231. Constructive notice—In general—Ignorance due to negligence is the equivalent of notice. State v. Ryder, 126 Minn. 95, 107, 147 N. W. 953.

(71) Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899; Howard v. Farr, 115 Minn. 86, 93, 131 N. W. 1071; Galbraith v. Galbraith, 119 Minn. 447, 138 N. W. 772; Twitchell v. Nelson, 131 Minn. ——, 155 N. W. 621. See Digest, §§ 10070–10081.

7232. From possession of property—(78) Riley v. Pearson, 120 Minn. 210, 139 N. W. 361. See § 10075.

7233a. Joint contractors—Notice to either of joint contractors is notice to both. Tevis v. Ryan, 233 U. S. 273.

7235. Must be given by competent authority—(81) See Whipple v. Christie, 122 Minn. 73, 84, 141 N. W. 1107; State v. Provencher, 129 Minn. 409, 152 N. W. 775.

7235a. Pleading—An allegation of actual notice admits evidence of constructive notice. Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80.

NOVATION

7238. Requisites—(84) National Citizens Bank v. Thro, 110 Minn. 169, 124 N. W. 965; J. I. Case Machine Co. v. Road Imp. Dist. No. 3, 210 Fed. 366.

NUISANCE

WHAT CONSTITUTES

7240. Definition—The injury must be substantial. The law does not redress every inconvenience or disturbance which an owner or occupant may be put by a neighbor's use of his property. The location, the degree of annoyance, its duration and the time of its occurrence are controlling considerations. See Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353.

(88) Lead v. Inch, 116 Minn. 467, 134 N. W. 218; Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353.

7244. Exercise of lawful business—(2) See Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353.

7246. Necessary incidents of urban life—(5) See Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353.

7248. Exercise of due care no defence—(8) Batcher v. Staples, 120 Minn. 86, 139 N. W. 140.

7249. Collection of dangerous substances—Doctrine of Rylands v. Fletcher—The doctrine of Rylands v. Fletcher is inapplicable to a dam across a natural watercourse designed to utilize the water power thereof. City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817; Barnard v. Fergus Falls, 115 Minn. 506, 132 N. W. 998 (id.).

The doctrine held inapplicable to a bridge under which a child was playing, the child being injured by the fall of a timber from the bridge as an automobile passed over it. Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

An embankment on a railroad right of way from which, at every heavy rain, destructive quantities of sand were cast on adjoining land, held a nuisance. Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311.

See 5 Harv. L. Rev. 183–186; 59 University of Penn. L. Rev. 423.

7250. Power to declare things nuisances—It is elementary that the legislature cannot prevent a lawful use of property by declaring a certain use to be a nuisance which is not in fact a nuisance, and prohibiting such use. On the other hand, it is equally clear that acts or conditions

which are detrimental to the comfort and health of the community may be effectively declared nuisances by the legislature, and in the exercise of that power specified acts or conditions may be declared a nuisance, although not so determined at common law. And the fact that the use or value of property as existing under the common law is thereby injuriously affected does not necessarily bring such legislative action within any constitutional prohibition. Whether the designation of a particular subject as a nuisance is within the legislative power is a question for judicial determination. But the scope of legislative action, when invoked to promote the general welfare, is very great. State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

See Note, 120 Am. St. Rep. 372.

7251. Things authorized by legislature—The validity of a provision in an ordinance expressly authorized by the legislature does not depend upon the expediency or public policy of its enactment, but upon its being within the legislative power of the state. State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

(18) See Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 147 N. W. 431.

(19) Richards v. Washington Terminal Co., 233 U. S. 546. See Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353; Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 147 N. W. 431; Note, 1 L. R. A. (N. S.) 49.

(20) See Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353; Richards v. Washington Terminal Co., 233 U. S. 546 and §§ 8117, 8153.

7252. Nuisances legalized by municipalities—(23) Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669.

7255. Things considered as nuisances—Houses of prostitution. See § 2752b.

A dam across a natural watercourse designed to utilize the water power thereof. City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

A stable for horses in a thickly settled portion of a city. Lead v. Inch, 116 Minn. 467, 134 N. W. 218; Johnson v. Shiely, 131 Minn. ——, 155 N. W. 390.

Railroad shops, roundhouses and switching yards. Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353. See § 8153.

An embankment on a railroad right of way from which, at every heavy rain, destructive quantities of sand were cast upon adjoining lands. Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311.

Three or more persons standing on a sidewalk and obstructing free passage. State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

(01) Nelson v. Swedish etc. Cemetery Assn., 111 Minn. 149, 126 N. W. 723, 127 N. W. 626.

(30) See Digest, §§ 7253, 7286.

(33) Batcher v. Staples, 120 Minn. 86, 139 N. W. 140.

(38) State v. Chicago etc. Ry. Co., 114 Minn. 122, 130 N. W. 545.

(53) See City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

WHO LIABLE

7259. Landlord and tenant—(65, 66) Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461.

7260. Occupier of premises—(68) Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461.

ACTIONS IN GENERAL

7271. Injunction—A barn, located in a thickly settled part of a city, in which a large number of horses are stabled, though not per se a nuisance, may become such by reason of the manner in which the same is managed and conducted. If the owner thereof so manages the same that noxious and offensive odors escape therefrom, to the detriment, annoyance, and discomfort of adjoining property owners, it is a nuisance, and may be restrained in equity. Where such a nuisance is continuing in character, equity will interfere to protect offended third persons, although the owner thereof be solvent and able to respond in damages. In the case of a nuisance like that involved in this action, and where the damage to adjoining property owners cannot well be measured from a pecuniary standpoint, the injury is irreparable, within the meaning of the law, and equity will interpose, though the pecuniary damage be not shown to be great. Lead v. Inch, 116 Minn. 467, 134 N. W. 218; Johnson v. Shiely, 131 Minn. —, 155 N. W. 390.

Independently of statute, the jurisdiction of equity extended to abatement of nuisances long prior to the enactment of Laws 1913, c. 562 (G. S. 1913, §§ 8717–8726), relating to abatement of bawdyhouses, and the legislature had power, subject only to constitutional limitations, to extend such jurisdiction to the general subject-matter of such act. State v. Ryder, 126 Minn. 95, 147 N. W. 953. See § 2752b.

(88) Nelson v. Swedish etc. Cemetery Assn., 111 Minn. 149, 126 N. W. 723, 127 N. W. 626 (conditions under which equity will enjoin the use of land for a cemetery); State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951; State v. Ryder, 126 Minn. 95, 147 N. W. 953.

(90) Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669.

(92) Lead v. Inch, 116 Minn. 467, 134 N. W. 218; Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311. See Digest, § 4476.

7274. Parties to actions—(3) Burghen v. Erie Railroad Co., 108 N. Y. S. 311; Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579.

See Digest, §§ 7284–7287.

7278. Complaint—A complaint by a municipality to abate a nuisance in its streets and to enjoin its maintenance, sustained on demurrer. Jordan v. Leonard, 119 Minn. 162, 137 N. W. 740.

A complaint in an action to recover damages suffered by reason of the discharge of a sewer of defendant into a creek near plaintiff's land, and to enjoin the further use of such sewer, construed, and held to state a cause of action. Batcher v. Staples, 120 Minn. 86, 139 N. W. 140. See Note, 47 L. R. A. (N. S.) 137.

7281. Law and fact—(26) Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353.

7283. Evidence—Sufficiency—(29) Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311.

PRIVATE ACTION FOR PUBLIC NUISANCE

7284. Municipalities—A municipality, whose public streets and grounds have been placed under the control of its common council, or other officers, may maintain an action to abate a nuisance therein and to enjoin its maintenance. The complaint herein alleges facts constituting such a cause of action. Jordan v. Leonard, 119 Minn. 162, 137 N. W. 740.

To what extent, if any, a municipality is liable to a private individual for its failure to abate a nuisance on private property adjacent to its streets is an open question in this state. Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655.

7285. Private individuals—(39) Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353. See Digest, § 7286.

(40) International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395; Painter v. Gunderson, 123 Minn. 323, 143 N. W. 910; Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669. See Digest, §§ 4180, 7286.

(41) Painter v. Gunderson, 123 Minn. 323, 143 N. W. 910.

7286. Private action held to lie—Where a street railway was operated without authority. International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395.

Where railroad switchyards caused plaintiff a special injury. Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353.

Where a tunnel cut off access to adjacent property through a public alley. Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669.

(46) See Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669.

(01) Nelson v. Swedish etc. Cemetery Assn., 111 Minn. 149, 126 N. W. 723, 127 N. W. 626.

7287. **Private action held not to lie**—Where a county road was closed, plowed and trees planted therein. Painter v. Gunderson, 123 Minn. 323, 143 N. W. 910.

DAMAGES

7288. **Measure**—(63) Batcher v. Staples, 120 Minn. 86, 139 N. W. 140 (discharge from sewer—damages held not excessive). See Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311.

7289. **To what time assessable**—(77) Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311.

OBSCENITY

7295a. **Obscene language**—In a prosecution for violating a city ordinance by using obscene language in a lecture to an assemblage of women in a public hall, it is no defence that the language was a quotation from a standard work on theology. State v. Lowry, 130 Minn. 532, 153 N. W. 305

OFFENSIVE TRADES—See Health, 4152.

ORDERS FOR THE PAYMENT OF MONEY—See Bills and Notes, 886a.

PARENT AND CHILD

RIGHTS OF PARENTS

7297. **To custody of child**—(6) Gauthier v. Walter, 110 Minn. 103, 124 N. W. 634. See State v. Klasen, 123 Minn. 382, 143 N. W. 984 (power of state to control the custody of children and interfere with the rights of a parent); State v. White, 123 Minn. 508, 144 N. W. 157 (custody of dependent children—juvenile courts); State v. Halverson, 127 Minn. 387, 149 N. W. 664 (welfare of child controlling consideration); Note, 41 L. R. A. (N. S.) 564.

7300. **To recover for injuries to child**—The statute applies to a non-resident minor child in whose behalf an action is brought in this state. Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172.

(18) Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172 (judgment as a bar to an action in a sister state).

(23) Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250 (query whether a parent may settle without suit brought since the amendment of 1907—settlement by parent before suit brought sustained against a charge of fraud).

7301. To recover for loss of services, etc.—A father who is supporting the family may maintain an action for loss of the services of a minor child without joining the mother as a party plaintiff. Ackeret v. Minneapolis, 129 Minn. 190, 151 N. W. 976.

(25) McClellan v. Louis F. Dow Co., 114 Minn. 418, 131 N. W. 485 (verdict for plaintiff sustained—fact that parent had emancipated the child and the bar of a former recovery new matter); Kanz v. J. Neils Lumber Co., 114 Minn. 530, 131 N. W. 645 (son seventeen years old—verdict for $1,025 held not excessive).

DUTIES OF PARENTS

7302. To maintain child—Where a parent knows that another is furnishing his child with necessaries with the expectation of being paid therefor, and the parent acquiesces, he is liable on an implied contract. Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

A parent is liable for necessary medical services rendered his child, at the request of another, in his absence. Bigelow v. Hill, 129 Minn. 399, 152 N. W. 763.

Parents are bound to provide a minor child with necessaries. If they neglect to so provide, they may become liable to a third person who furnishes necessaries even without their consent. Where they are ready to so provide, a third person can claim liability only on ground of contract, express or implied. This action is for necessaries supplied to a minor son, and it is based upon an implied contract. Defendants rely on a claim that their son had been emancipated, and hence a contract on their part to pay should not be implied. Emancipation may be complete, in which case it relieves the minor from custody and control of the parents and destroys the filial relation, or it may be partial. The evidence shows no more than a gift to the son of his earnings and the right to make contracts of employment. Complete emancipation cannot be inferred from such evidence. If the earnings given are sufficient to supply the son with all necessaries, the parents are under no further liability; if not, the parents remain liable for any necessaries which the wages are not sufficient to supply. Lufkin v. Harvey, 131 Minn. ——, 154 N. W. 1097.

(32) See 4 Mich. L. Rev. 483.

7305a. Liability of parent for torts of child—Where a parent keeps an automobile which he authorizes a child to use for pleasure at any time, and the child operates it so negligently as to cause injury to others, it

is error to rule that, as a matter of law, the parent is not responsible for such negligence. Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091. See Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; 28 Harv. L. Rev. 91. See Note, 10 L. R. A. (N. S.) 933; 74 Am. St. Rep. 801.

7305b. Prosecution for non-support—Evidence held insufficient to justify a conviction, under G. S. 1913, § 8667, for the non-support of a minor child. State v. Garrison, 129 Minn. 389, 152 N. W. 762.

RIGHTS OF CHILD

7307. Recovery for services—(39) Beneke v. Estate of Beneke, 119 Minn. 441, 138 N. W. 689. See Maycroft v. Maycroft, 120 Minn. 529, 139 N. W. 1134; McKnight v. Martin, 124 Minn. 191, 144 N. W. 941; Lansing v. Gregory, 128 Minn. 496, 151 N. W. 277; Note, 11 L. R. A. (N. S.) 873; 133 Am. St. Rep. 250; Woodward, Quasi Contracts, § 51.

EMANCIPATION

7309. What constitutes—Emancipation may be complete or partial. If it is complete it relieves the minor from the custody and control of the parents and destroys the filial relation. Lufkin v. Harvey, 131 Minn. —, 154 N. W. 1097.

DEEDS AND GIFTS

7310. Presumptions—(44) Howard v. Farr, 115 Minn. 86, 131 N. W. 1071; McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

7311. Fraud and undue influence—There is no such confidential or fiduciary relation between a parent and a child as to raise a presumption of fraud or undue influence in a deed from a parent to a child. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

(45) McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306; Manchester v. Manchester, 131 Minn. —, 154 N. W. 1102 (evidence held insufficient to show undue influence or fraud—new trial granted on appeal).

PARTIES

7314. Qualifications in general—(48) See Dunnell, Minn. Pl. 2 ed. § 32.

7315. Real party in interest—Statute—A bank is not the real party in interest and authorized as such to maintain an action to restrain the collector of taxes from levying upon and selling the shares of individual stockholders for taxes on such shares. Waseca County Bank v. McKenna, 32 Minn. 468, 21 N. W. 556.

A wife joining with her husband in an absolute deed designed as a mortgage, held a real party in interest. Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638.

A consignee may sue a carrier as the real party in interest. Sleepy Eye Milling Co. v. Chicago etc. Ry. Co., 119 Minn. 199, 137 N. W. 813; McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 141 N. W. 164.

The payee in an order on a stakeholder held the real party in interest. Vollmer v. Big Stone County Bank, 127 Minn. 340, 149 N. W. 545.

An assignee of a contract to repurchase corporate stock held entitled to continue an action thereon though the debt to secure which the assignment was made was paid after the action was brought, he having obtained possession of the stock and the agreement to repurchase. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

(50) Horgan v. Duluth Log Co., 120 Minn. 244, 139 N. W. 491 (assignee of a log lien).

(52, 53) See Peters v. Cannon River Electric Power Co., 110 Minn. 121, 124 N. W. 826.

(57, 61) Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

See Dunnell, Minn. Pl. 2 ed. § 33.

7316. In equity—A court of equity will not proceed in an action until it has before it all parties necessary for the full protection of each. P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 411; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

(68) Disbrow Mfg. Co. v. Creamery Package Mfg. Co., 115 Minn. 434, 132 N. W. 913; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097; Potter v. Engler, 131 Minn. ——, 153 N. W. 1088.

See Dunnell, Minn. Pl. 2 ed. §§ 115–119.

7317. Persons jointly interested—(73) Knight v. Leighton, 110 Minn. 254, 124 N. W. 1090 (action for fraud in exchange of lands—joint owner who received a stipulated share in cash held a proper party plaintiff).

(01) Carlton County Farmers Mutual Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727. See Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041.

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partition; but such right is not suspended by t
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tinue and be given effect notwithstanding the
pursuant to a contract made at the time of the co
ing in controversy, plaintiff is in possession of th
and defendant of the first floor thereof. Held,
rights of occupancy under this contract may ex
same as before, and that plaintiff may compel a p
partition will be subject to such rights of occupa
County Abstract & Loan Co., 128 Minn. 207, 150

7342. Costs, charges and disbursements—Attorn action to determine whether plaintiff had the right of real estate are not expenses of making the meaning of G. S. 1913, § 8037. Hunt v. Meeker Co Co., 128 Minn. 539, 151 N. W. 1102.

7343. Sale—A decree for sale is not subject t cause liens on the land exceeded in amount its va nis, 118 Minn. 117, 136 N. W. 575, 1026.

The existence of liens probably does not ren Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

PARTNERSHIP

IN GENERAL

7346. What constitutes—An agreement betwe an option to further develop a mine, and subseq poration and issue stock, to be equally divided am adventure or partnership. Kent v. Costin, 130 874.

(51) Jansen v. Jacobson, 112 Minn. 520, 128 Ostrom, 113 Minn. 111, 129 N. W. 142; Jacobs Minn. 332, 129 N. W. 759; Jarecki Mfg. Co. v. R N. W. 1055, 130 N. W. 948; T. R. Foley Co. v. 271, 131 N. W. 316; Bennett v. Harrison, 115 W. 309; Meagher v. Fogarty, 129 Minn. 417, 152 ment of land brokers to "go into business togeth and losses, followed by transaction of joint busine

to constitute the formation of a partnership—finding of a partnership sustained); First International Bank v. Brown, 130 Minn. 210, 153 N. W. 522 (finding that parties were not partners sustained). See Russo v. Alberto, 129 Minn. 437, 152 N. W. 833 (evidence held insufficient to justify a finding of partnership).

See Note, 115 Am. St. Rep. 400; 18 L. R. A. (N. S.) 963.

7347. Not a person or entity at common law—Rule in bankruptcy— Whether or not a partnership is an entity distinct from the members, firm debts are debts of the members of the firm. The bankruptcy act recognizes the firm as an entity for certain purposes, but does not alter the pre-existing rule that the partnership can be in bankruptcy and the partners not. Francis v. McNeal, 228 U. S. 695. See § 742.

(60) Noyes v. Ostrom, 113 Minn. 111, 115, 129 N. W. 142. The common-law rule is a survival of the Roman law. 24 Harv. L. Rev. 603. See 8 Col. L. Rev. 391; 13 Id. 143; 28 Harv. L. Rev. 762; 29 Id. 158.

7348. Partnership by estoppel or holding out—(61) Jansen v. Jacobson, 112 Minn. 520, 128 N. W. 824. See Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20 (application of doctrine to torts).

(64) See Russo v. Alberto, 129 Minn. 437, 152 N. W. 833; First International Bank v. Brown, 130 Minn. 210, 153 N. W. 522.

7349. Evidence—Admissibility—The existence of an actual partnership may be proved by the admissions of the parties and their conduct toward each other in relation to the business. Foot, Schulze & Co. v. Porter, 131 Minn. —, 154 N. W. 1078.

A self-serving declaration made by one of the parties in a disclaimer filed in bankruptcy proceedings long after the date of the adjudication of bankruptcy, held inadmissible. Foot, Schulze & Co. v. Porter, 131 Minn. —, 154 N. W. 1078.

7349a. Evidence—Sufficiency—Evidence held to justify a finding of a partnership. Foot, Schulze & Co. v. Porter, 131 Minn. —, 154 N. W. 1078. See § 7346.

7349b. Law and fact—Whether there was a partnership is a question for the jury, unless the evidence is conclusive. Foot, Schulze & Co. v. Porter, 131 Minn. —, 154 N. W. 1078. See § 7346.

THE CONTRACT

7357. Particular contracts construed—(81) Ames v. Ames, 113 Minn. 137, 129 N. W. 156 (partnership for operation of a flour mill—modification of contract by correspondence—stipulations as to renovations of mill and ownership at termination of contract); Fritz v. Johnson, 114 Minn. 316, 131 N. W. 337 (share of partners in assets and profits);

Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538 (partnership to exploit mineral land—royalty agreement).

POWER OF PARTNER TO BIND FIRM

7360. Matters foreign to firm business—(87) See Lawrence v. Streeter, 130 Minn. 64, 153 N. W. 126.

7363. To borrow money and execute negotiable paper—A trading partnership is liable on a note made in its name by one of its members, though he made it without actual authority and misappropriated the proceeds thereof to his own use, the payee being without notice and acting in good faith. Evidence held to show as a matter of law that the makers of a note were a trading partnership and that the payee of the note was without notice and acted in good faith, within the above rule. First Nat. Bank v. Webster, 130 Minn. 277, 153 N. W. 736.

(90) Note, 48 Am. St. Rep. 438.

7370. Torts—The fact that two defendants are sued as partners does not make a recovery necessarily depend on proof of a partnership. A partner who had sold out, but allowed his name to remain in the firm sign over the place of business of the firm, held liable to a person injured, while on the premises by invitation, by a servant of the remaining partner. Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20. See 20 Col. L. Rev. 80; 28 Harv. L. Rev. 331.

(14) McGray v. Cobb, 130 Minn. 434, 152 N. W. 262 (malpractice).

7371. Ratification—A deed made by one partner in behalf of the firm may be ratified by the other partner by parol. National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879.

(15) National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879.

7373. Liability of new firm—(18) American Seeding Machine Co. v. Holzbauer, 117 Minn. 278, 135 N. W. 807 (held a question for the jury whether a new firm assumed certain contract obligations of the old firm).

RIGHTS AND LIABILITIES INTER SE

7377. Right to share profits—The profits of a partnership are to be divided equally between the partners, however unequal may be their contributions of capital or of services, in the absence of an agreement express or implied to the contrary, or unless some fact or circumstance exists from which it may be inferred that the partners intended that the profits should be divided in unequal proportions. Tuller v. Swift, 113 Minn. 263, 129 N. W. 572, 130 N. W. 848; Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759.

7378. Obligation to share losses—(27) See Albrecht v. Latzke, 120 Minn. 181, 139 N. W. 158.

FIRM PROPERTY

7381. Partner's interest—(30) See Treacy v. Power, 112 Minn. 226, 127 N. W. 936.

7382. Realty as a firm asset—A deed in writing and under seal made by one partner in behalf of the firm may be ratified by the other partner by parol. A prior assignment by one partner of his individual interest in partnership property could not prejudice the rights of a mortgagee in a partnership mortgage, since the individual partner had nothing to assign except his interest in the surplus, if any, existing after payment of all partnership debts. National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879.

(34) Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

(35) Bruner v. Jacobson, 115 Minn. 425, 132 N. W. 995 (finding that certain land was not firm property sustained). See 9 Col. L. Rev. 197; Note, 48 Am. St. Rep. 62; 37 L. R. A. (N. S.) 889.

(37) See 8 Col. L. Rev. 208.

7384. Application to payment of firm debts—(46) See 5 Mich. L. Rev. 139; Note, 43 Am. St. Rep. 364; 28 Harv. L. Rev. 762.

DISSOLUTION

7388. What effects—Physical or mental incapacity of a partner as a dissolution or ground for dissolution. Note, 47 L. R. A. (N. S.) 839.

(53) Mogren v. Finley, 112 Minn. 453, 128 N. W. 828.

7389. Contracts for dissolution—Construction—(56) McInnis v. National Casualty Co., 113 Minn. 156, 129 N. W. 125, 388 (action for recovery of damages for breach of contract whereby defendant agreed to pay plaintiff a consideration for his retiring from a firm which was state manager of its casualty business); Bouck v. Shere, 125 Minn. 122, 145 N. W. 808 (evidence held to support verdict finding a sale by plaintiff to defendant of his interest in the business of a partnership in which they were the sole members and defendant's agreement to pay plaintiff therefor the value thereof to be ascertained from an inventory of the firm assets); Meagher v. Fogarty, 129 Minn. 417, 152 N. W. 833 (finding of a settlement and agreement by defendant to pay a certain amount sustained); Gerde v. Jones, 129 Minn. 525, 152 N. W. 1101 (assumption of debts by plaintiff—property turned over to him—controversy as to ownership of an automobile). See Note, 48 L. R. A. (N. S.) 547 (assumption of firm debts on dissolution).

7390. Voluntary—Partnership at will—(57) First International Bank v. Brown, 130 Minn. 210, 153 N. W. 522.

7392. Liability of retiring partner—The mere fact that differences between partners are not settled at the time of a dissolution will not render a retiring partner liable for an indebtedness incurred after the dissolution. First International Bank v. Brown, 130 Minn. 210, 153 N. W. 522.

(60) Assumption of debts. Note, 9 L. R. A. (N. S.) 49; 48 Id., 547.

7395. Notice of dissolution—(64) See Fitzpatrick Building Co. v. Healy, 120 Minn. 237, 139 N. W. 495; 13 Col. L. Rev. 423.

(65) First International Bank v. Brown, 130 Minn. 210, 153 N. W. 522.

7396. Powers and duties of surviving partners—Compensation—A surviving partner is not ordinarily entitled to compensation for closing up the business. Consaul v. Cummings, 222 U. S. 262. See Note, 112 Am. St. Rep. 843.

7403. Actions for dissolution—Accounting—Interest—Where, on dissolution of a partnership, a partner takes possession of a firm asset, treats it as his own, and carries on the business thereafter in his own name, and on his own account, the excluded partner has a right at his election to demand either the actual profits made by the partner continuing the business or his share of the capital thus employed with interest, so that, where at the time of the accounting the amount due the retiring partner is less than the value of the firm assets at the dissolution, the continuing partner is chargeable with the larger amount. Treacy v. Power, 112 Minn. 226, 127 N. W. 936.

In the absence of express agreement partners are not ordinarily entitled to interest as against each other. Ames v. Ames, 113 Minn. 137, 129 N. W. 156.

In an action to dissolve an alleged partnership, and for an accounting and other relief, held, that the evidence supports the verdict of the jury and findings of the trial court to the effect that the alleged partnership was entered into, and that it included the royalty agreement involved in the action, all substantially as set forth in the complaint. Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538.

(82) Meskal v. Soulek, 111 Minn. 541, 126 N. W. 1134 (findings on an accounting sustained); Treacy v. Power, 112 Minn. 226, 127 N. W. 936 (account stated—tracing firm asset in hands of partner—use of firm asset by one partner—right of excluded partner—mingling trust fund); Ames v. Ames, 113 Minn. 137, 129 N. W. 156 (interest not ordinarily allowable—money advanced by partner in improvement of a mill—query whether it should be repaid from the firm assets or be considered a personal debt due from the owner of the real estate); Fritz v. Johnson, 114 Minn. 316, 131 N. W. 337 (share of partners in assets and profits—findings sustained).

(83) Treacy v. Power, 112 Minn. 226, 127 N. W. 936.

(86) Bruner v. Jacobson, 115 Minn. 425, 132 N. W. 995 (the plaintiff having failed to establish the cause of action alleged in the complaint, and the evidence not disclosing the relief, if any, to which he was entitled as agent for defendant, it was not error to order the entry of a judgment for defendant).

7404. Receiver—In an action for the dissolution of a partnership and for the appointment of a receiver to wind up the firm affairs, the only questions necessary to be determined preceding the appointment of a receiver are: (1) The existence of the alleged partnership; and (2) the facts necessary to vest in the court jurisdiction of the controversy. The appointment of a receiver in such an action in no way determines the rights of the partners, but is merely preliminary to a full hearing and adjustment of all differences, upon which the partners may be heard in the due course of subsequent proceedings. Norton v. Sperry, 113 Minn. 447, 129 N. W. 843. See § 8248.

A receiver should not be appointed unless it is necessary to protect the property or the interests of the parties. Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101.

It has been held proper to deny an application for a receiver pendente lite of property involved in a replevin action between partners, no claim being made that the property belong to the firm. Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537.

7404a. Jurisdiction—Accounting—Non-residents—The courts of this state may, by constructive service, acquire jurisdiction in an action against a non-resident partner to determine the plaintiff's interest in real estate of the partnership, even though a partnership accounting may be necessary to determine that interest. Smith v. Smith, 123 Minn. 431, 144 N. W. 138.

ACTIONS

7405. Between firms with common member—When two partnerships have a common member, neither firm may sue the other in an action at law, but may maintain an equitable action, in which the individual rights of all the members of both firms may be adjusted. Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142.

7406. Between partners—Where a firm has been dissolved and the partners have accounted with each other as to everything but one item an action at law will lie for a proper share of such item. Treacy v. Power, 112 Minn. 226, 127 N. W. 936.

Partners may sue one another on a contract of settlement. See Meagher v. Fogarty, 129 Minn. 417, 152 N. W. 833.

(89) See Smith v. Armstrong, 125 Minn. 59, 145 N. W. 617 (action for contribution against organizers of a de facto corporation held not to violate general rule).

7408. Pleading—Where a complaint alleged a promise by defendant to pay the plaintiff the value of his interest in the firm at the time of an agreement for dissolution, and also alleged an account stated for the same amount, there being no election on the trial, it was held that the plaintiff might recover on either theory. Bouck v. Shere, 125 Minn. 122, 145 N. W. 808.

(93) Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871. See Dunnell, Minn. Pl. 2 ed. § 829.

PARTY WALLS

7412. In general—(10) 8 Col. L. Rev. 121; 10 Mich. L. Rev. 189. See 9 Col. L. Rev. 74.

7416. Particular contracts construed—(16) Fire Proof Storage Co. v. St. Paul Bethel Assn., 118 Minn. 47, 136 N. W. 407.

PATENTS

7417. Nature—The owner of a patent has a personal privilege which, while assignable and protected as a property right, has no situs separate from the person holding it. P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

7418. Control of Congress exclusive—The patentee of an article of commerce receives from the federal government a grant of an absolute monopoly of the article patented. Query as to effect of patent as a protection against a prosecution under a state statute against combinations in restraint of trade. State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623.

7419. Jurisdiction—In the absence of service of summons personally in this state upon the owner of letters patent, or the voluntary appearance of such owner, a court has no power to determine the validity of a prior transfer of the patent. P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

7419a. Presumption of validity—Burden of proof—A patent is presumed valid until the contrary is proved beyond a reasonable doubt, and its issuance, when fairly procured, justifies suit by the patentee for infringement against one using the same device; but when it is proved that an invention was in use prior to the issuance of the patent, the bur-

den of proof is on the patentee to establish its validity. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

7422. Licenses and other contracts—A corporation was organized to manufacture and sell certain farm implements covered by patents obtained by plaintiff and to be obtained by him at the expense of the corporation. Plaintiff was the manager, and a stockholder and officer, of the corporation. For the right to use such patents in the manufacture of such implements, plaintiff was monthly paid a certain sum in the nature of a royalty. Held, that the right to sell the articles so manufactured under plaintiff's patents was incident to the right to manufacture, and therefore all articles manufactured while that right existed may, after such right ceased, be sold by the corporation or its successor in interest without let or hindrance from plaintiff. Poirier v. Bradford, 119 Minn. 475, 138 N. W. 687.

(26) Blocher v. Mayer Bros. Co., 127 Minn. 241, 149 N. W. 285 (contract for payment of royalty).

7422a. Warning against infringement—The owner of a patent may, in good faith, warn against infringement and give notice of intention to enforce his rights; but if his patent is void he may not make representations of infringement or threats of prosecution to the injury of another. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

7423. Implied contract to pay for use—(27) See National Wire Bound Box Co. v. Healy, 189 Fed. 49.

7425. Fraud—Action for damages for fraudulently withholding from the market a machine involving a patented device and thereby depriving the owners of the beneficial use of the device. Evidence held not to show fraud or commercial value of device. Virtue v. Creamery Package Mfg. Co., 114 Minn. 167, 130 N. W. 996.

PAUPERS

7426. Liability of relatives—Contribution—Under the statute charging certain relatives with the support of their pauper relatives, a relative, equally liable with another for the support of a pauper relative, who furnishes such support, not as a voluntary matter, may recover of the other by way of contribution. Manthey v. Schueler, 126 Minn. 87, 147 N. W. 824.

In an action for the reasonable value of medical and hospital care, treatment, and services rendered to a dependent relative in an emergency case, where there is an urgent requirement for both physician's services and hospital care, imperative and admitting of no delay, held, that plaintiffs may recover from a relative upon whom rests the statutory duty to support such dependent relative compensation for the reasonable value of such services, even though such services were rendered without the knowledge of the relative sought to be charged. Benson Hospital Assn. v. Dornfeld, 130 Minn. 198, 153 N. W. 307.

7429. Actions between municipalities—(36) Redwood County v. Minneapolis, 126 Minn. 512, 148 N. W. 469; Id., 131 Minn. ——, 154 N. W. 660 (decision on first appeal held law of case on second appeal).

7430. Settlement—The place of a person's settlement, as that term is used in the poor laws of this state, is the place where he has a legal right to support if he becomes a public charge. It is not necessary that a person be poor or dependent in order to have a settlement. Every person, with certain defined exceptions, has a settlement upon residence for a given length of time. In this case plaintiff county furnished support and relief to a person who all her life, and up to a little more than two months before an injury, had been a legal resident of the city of Minneapolis. Held, under G. S. 1913, § 3071, she had a settlement in Minneapolis, and under G. S. 1913, § 3083, plaintiff has a claim against said city for all proper expenses in furnishing support and relief. Defendant was not, under the evidence in the case, entitled to judgment because of irregularities of procedure. All obligatory requirements of the statute appear to have been complied with. The statute does not require that the medical relief given in a case of this kind must be furnished by a county physician. Redwood County v. Minneapolis, 126 Minn. 512, 148 N. W. 469; Id., 131 Minn. ——, 154 N. W. 660.

The question of settlement is for the jury, unless the evidence is conclusive. Erdahl v. Sanford, 127 Minn. 527, 149 N. W. 1070.

If a woman who is a pauper marries she acquires the legal settlement of her husband. Willmar v. Spicer, 129 Minn. 395, 152 N. W. 767.

7433. Employment of physicians—(49) See Kerns v. Granite Falls, 129 Minn. 534, 152 N. W. 1102; Benson Hospital Assn. v. Dornfeld, 130 Minn. 198, 153 N. W. 307.

PAYMENT

IN GENERAL

7439a. To whom—Authority to receive—Payment to one not authorized to receive it does not discharge the debt. Apparent authority, attributed to a party to whom is intrusted an instrument to secure the payment of money, permits payment to be made only according to the terms of the instrument. McMahon v. German-American Nat. Bank, 111 Minn. 313, 127 N. W. 7; Devaney v. Ancient Order etc. Fund, 122 Minn. 221, 142 N. W. 316. See Digest, §§ 161, 6262.

MEDIUM OF PAYMENT

7444. By promissory note—A note taken in renewal of a former note is presumed to have been accepted as conditional payment only, and the burden is upon one who claims that it discharged and extinguished the original note, to prove an express or implied agreement to that effect. If such agreement be not proved and the renewal note be not paid, the holder may surrender it and sue upon the original. State Bank v. Mutual Telephone Co., 123 Minn. 314, 143 N. W. 912.

(68) State Bank v. Mutual Telephone Co., 123 Minn. 314, 143 N. W. 912. See Note, 35 L. R. A. (N. S.) 1.

7445. By check—A check given by a debtor to pay an account and wrongfully indorsed by an agent authorized to receive it, discharges the liability on the original account, if paid by the bank. McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542.

(77) McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542; Isackson v. Lovell, 115 Minn. 481, 132 N. W. 918. See Zuel v. McCollum, 111 Minn. 485, 127 N. W. 178 (facts held not to bring case within the general rule).

(78) McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542.

See Note, 35 L. R. A. (N. S.) 1; 37 Id. 201.

TIME OF PAYMENT

7448. Extension—Consideration—Consideration for a subsequent agreement extending time of payment. Note, 52 L. R. A. (N. S.) 331.

7449. Presumption of payment when due—(87) Note, 18 Am. St. Rep. 879.

PLACE OF PAYMENT

7452. In general—(91, 92) Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820.

APPLICATION OF PAYMENTS

7457. By the parties—(6) See Kees v. Christensen, 124 Minn. 230, 144 N. W. 766 (doctrine of application of payments held inapplicable to a payment of rent by a tenant).

(7) Wilson v. Blackwood, 120 Minn. 227, 139 N. W. 151. See Digest, § 5635.

7458. By the court—The general rule as to the application of payments, there being no special facts to interfere, is that the first payments go to the oldest debts. The first money in is the first money out. First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139.

(13) American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014; First Nat. Bank v. McNairy, 122 Minn. 215, 142 N. W. 139; Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226.

RECOVERY OF PAYMENTS

7461. Voluntary payments—(24) See State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286.

7462. Involuntary payments—Duress—An applicant for a liquor license who, under protest, pays the amount exacted in excess of the established fee, may recover the excess in an action against the city as for money had and received. Gillen v. South St. Paul, 111 Minn. 172, 126 N. W. 624.

A judgment debtor may pay the judgment and after having it set aside on appeal recover the amount paid. See State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286.

(29) See Woodward, Quasi Contracts, §§ 211–227.

(32) See Cowley v. Fabien, 204 N. Y. 566, 97 N. E. 458.

(33) See State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286.

7463. Payments induced by fraud—(45) McBrady v. Monarch Elevator Co., 113 Minn. 104, 109, 129 N. W. 163. See Digest, § 6129; Dunnell, Minn. Pl. 2 ed. § 762.

7464. Payments under mistake of fact—Where money was paid an expert accountant in reliance upon his report that he had made a complete and correct audit, it was held that it might be recovered back on proof that through his negligence the audit was substantially false. East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181.

(46) Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955 (the plaintiff insurance company, having paid the full amount of the judgment against the defendant, the insured, in favor of the latter's injured employee, in the mistaken belief that such amount was fully covered by the policy, was entitled to recover from the defendant the excess so paid over and above the amount of indemnity called for by the policy). See Ball v. Shepard, 202 N. Y. 247, 95 N. E. 719 (limitations of general rule—change of position by defendant—receipt of money in due course of business); Dunnell, Minn. Pl. 2 ed. § 777; Woodward, Quasi Contracts, §§ 10–34.

7465. Payments under mistake of law—(50) See Woodward, Quasi Contracts, §§ 35–44; 7 Mich. L. Rev. 1.

7467. Pleading—A complaint to recover an excess exacted for a liquor license sustained. Gillen v. South St. Paul, 111 Minn. 172, 126 N. W. 624.

See Dunnell, Minn. Pl. 2 ed. §§ 762, 832.

PLEADING

7468. In general—Allegations of payment held to take a case out of the statute of limitations. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395, 923.

Allegations that payments were made "at various times during the construction of said building" construed. Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426.

A general allegation of payment, without specifying the time, place, amount, or other details, is good as against a general demurrer, but it may be subject to a motion to make more definite and certain. Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748.

A defendant who omits to plead and prove a partial payment of an account when sued is concluded by the judgment and cannot thereafter maintain an action to recover such payment. Harbek v. Carpenter-Robinson Co., 123 Minn. 389, 143 N. W. 916.

It is proper to allow an amendment of a complaint so as to permit an application of payments in the interest of justice. Finch, Van Slyck & McConville v. Le Sueur County Cooperative Co., 128 Minn. 73, 150 N. W. 226.

(55) Bennett v. Rainy Lake River Boom Corp., 115 Minn. 96, 131 N. W. 1059.

See Dunnell, Minn. Pl. 2 ed. § 831.

PENALTIES

7469. Definition—The word "penalty" is sometimes used in the sense of a tax. State v. Ryder, 126 Minn. 95, 147 N. W. 953. See § 9114.

The term "penalty" involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. O'Sullivan v. Felix, 233 U. S. 318.

PENSIONS—See Constitutional Law, 1619; Infants, 4466b; Municipal Corporations, 6605a.

PERJURY

7474. What constitutes—On a prosecution for a crime, evidence tending to prove an attempt to commit such crime is admissible, and may, if false, constitute the predicate for a subsequent charge of perjury. The fact, therefore, that the corpus delicti of the crime charged is not established will not preclude a subsequent prosecution for perjury predicated upon false denials of a prior confession or admission of the crime charged. An acquittal upon a prosecution for a crime is not a bar to a subsequent prosecution for perjury predicated upon testimony given upon such former prosecution, unless a conviction of the charge of perjury would necessarily import a contradiction of the jury's verdict upon the former trial. State v. Smith, 119 Minn. 107, 137 N. W. 295.

7475. Indictment—An indictment for perjury on the trial of an indictment for arson held sufficiently definite. State v. Smith, 119 Minn. 107, 137 N. W. 295.

See Note, 124 Am. St. Rep. 654.

PERPETUITIES

7480. In general—A devise of an estate for life with the remainder to the children of the life tenant, with a condition that if the life tenant sells his estate the remainder shall vest immediately, held valid. Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398.

The common law as to perpetuities has been superseded by our statute, which requires, not that the absolute fee shall vest, as did the common law, within the time limited, but that there shall be no interest in land inalienable beyond the limitation of two lives in being at the creation of the estate. Certain mineral reservations in a deed held not to create a perpetuity. Buck v. Walker, 115 Minn. 239, 132 N. W. 205.

Certain provisions in a will designed to establish and maintain a home for aged persons held invalid as in violation of the statute against perpetuities. Bemis v. N. W. Trust Co., 117 Minn. 409, 135 N. W. 1124.

Under R. L. 1905, § 3249, subd. 5 (G. S. 1913, § 6710), a perpetual trust in personalty may be created for the purposes therein designated, subject to the control of the district court as thereby specified. A conveyance of land in trust "to convert the same into personalty at the earliest practicable moment when such conversion can be had without a sacrifice of the value" thereof, the rents, and, after such sale, the income from the proceeds, to be held in trust for a lawful purpose in perpetuity, held valid. Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805.

See Note, 49 Am. St. Rep. 117.

PERSONAL PRONOUNS—See Contracts, 1825.

PHYSICIANS AND SURGEONS

REGULAR PHYSICIANS AND SURGEONS

7482. Definition—(98) See 4 Mich. L. Rev. 373.

7483. License—The action of the State Board of Medical Examiners in refusing to grant a license to a physician from another state, applied for under Laws 1905, c. 236, is not appealable. Williams v. Minn. State Board, Medical Examiners, 120 Minn. 313, 139 N. W. 500.

The license of a physician may be revoked for acts constituting a criminal offence for which he has been tried in a court and acquitted. Miller v. Hennepin County Medical Society, 124 Minn. 314, 144 N. W. 1091.

(1) State v. Fullerton, 124 Minn. 151, 144 N. W. 755 (license fees may be retained by state board).

7483a. Medical societies — Expulsion of members — The Hennepin County Medical Society, a voluntary association of physicians and surgeons, the by-laws of which provide for the trial of a member for a criminal offence or for misconduct, and provide a penalty by discipline or expulsion, may try a member for acts which were necessarily involved in a criminal charge, tried in the district court, and of which the member was acquitted. Miller v. Hennepin County Medical Society, 124 Minn. 314, 144 N. W. 1091.

7484. Surgical operation—Consent of patient—(8) See 4 Mich. L. Rev. 49; Note, 1 L. R. A. (N. S.) 439.

7485. Actions for services—The law raises an implied promise to pay for services rendered by request. Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793; Bigelow v. Hill, 129 Minn. 399, 152 N. W. 763.

(9) Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444 (complaint construed as one authorizing a recovery on proof of either an express or implied contract); Bigelow v. Hill, 129 Minn. 399, 152 N. W. 763 (evidence held sufficient to justify a finding of an implied promise to pay for services).

MALPRACTICE

7488. Standard of conduct—The duty of a physician to exercise due care and skill is not dependent on the existence of an express contract of employment. The duty exists though the services are gratuitous. Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793.

A physician is required to exercise reasonable care, and this varies with the circumstances, sometimes calling for the highest degree of care. Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305.

(17) McGray v. Cobb, 130 Minn. 434, 152 N. W. 262.

(20) Frisk v. Cannon, 110 Minn. 438, 126 N. W. 67.

7489. Various forms of malpractice considered—Treating a fractured wrist. Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120.

Treating a felon. Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793.

Performing an operation on a nose when the patient had a severe cold and performing a mastoid operation. Swadner v. Schefcik, 124 Minn. 269, 144 N. W. 958.

Treating a case of mastoiditis. McGray v. Cobb, 130 Minn. 434, 152 N. W. 262.

(27) See Jones v. Tri-State Tel. & Tel. Co., 118 Minn. 217, 136 N. W. 741; Note, 28 L. R. A. (N. S.) 262.

(30) Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305 (leaving a piece of gauze in the wound).

(31) Frisk v. Cannon, 110 Minn. 438, 126 N. W. 67.

7490a. Defences—Judgment—A judgment by default in favor of a physician for professional services is not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such services. Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10.

7491. Burden of proof—Rule of res ipsa loquitur held applicable to an injury from X-rays. Jones v. Tri-State Tel. & Tel. Co., 118 Minn. 217, 136 N. W. 741.

7492. Law and fact—Where defendant assisted a surgeon it was held proper to submit to the jury the question whether he was employed by the plaintiff. Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305.

(35) Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120; Swadner v. Schefcik, 124 Minn. 269, 144 N. W. 958; McGray v. Cobb, 130 Minn. 434, 152 N. W. 262; Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305.

7493. Damages—(39) Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120.

7494. Evidence—Admissibility—(40) Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120 (expert may give his opinion, based upon the result, that the treatment must have been improper); Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793 (where it is alleged that defendant did not use skill and care in diagnosing and treating a felon on plaintiff's finger, and that he did not make the necessary and proper incision in the finger, it is not error to admit testimony of the actual treatment given, including the pricking of the finger with a needle); McGray v. Cobb, 130 Minn. 434, 152 N. W. 262 (error, if any, in permitting plaintiff to state the pain or tenderness experienced in the affected parts of his body, held harmless, as he had already testified that, while being treated, he described to the physician as well as he could his condition in that respect); Walker v. Holbrook, 130 Minn. 106, 153 N. W. 305 (practice of surgeons to leave care of sponges to nurses held admissible but not conclusive).

7495. Expert testimony—(41) McGray v. Cobb, 130 Minn. 434, 152 N. W. 262.

7496. Evidence—Sufficiency—(43) Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120; Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793; McGray v. Cobb, 130 Minn. 434, 152 N. W. 262.

(44) McGray v. Cobb, 131 Minn. ——, 153 N. W. 736 (held error to submit one claim of improper treatment, the evidence being insufficient to justify a recovery thereon).

7496a. Pleading—A complaint for malpractice construed as to the damages alleged. Jacobs v. Cross, 19 Minn. 523 (454).

A complaint for negligence in setting and caring for a dislocated hip joint held sufficient on demurrer. Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143.

PLEADING

IN GENERAL

7498. Object of pleadings—(48) Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4; Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105.

7499a. In legal and equitable actions—So far as possible the rules of pleading should be the same in legal and equitable actions. Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

7499b. Time to plead—Extension—The court has discretionary power to allow a party to plead after the time limited by statute. Roesler v. Union Hay Co., 131 Minn. ——, 154 N. W. 789.

JOINDER OF CAUSES OF ACTION

7499c. In general—Test of single cause of action—The question whether a complaint states more than one cause of action is to be determined, not by its form, nor by the numbering and labeling of its different paragraphs by the pleader, but by the facts alleged therein. Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051. See King v. Chicago etc. Ry. Co., 80 Minn. 83, 82 N. W. 113; Venner v. Great Northern Ry. Co., 117 Minn. 447, 136 N. W. 271; John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180; Liimatainen v. St. Louis River Dam & Improvement Co., 119 Minn. 238, 137 N. W. 1099.

The mere fact that relief may be partly legal and partly equitable is not decisive as to whether there is one or more causes of action alleged. Gilbert v. Boak Fish Co., 86 Minn. 365, 368, 90 N. W. 767.

Claiming alternative relief does not in itself constitute setting up two causes of action. Howard v. Erbes, 112 Minn. 479, 128 N. W. 674.

A complaint alleging that three defendants contracted to pay a debt of plaintiff to a third party, which also alleges that one of the defendants had previously contracted to make such payment and had failed to do so, does not improperly unite two causes of action. Klemik v. Henriksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

7500. Arising out of the same transaction—Two causes of action ex contractu for money had and received held properly joined. Benson v. United States Invest. Realty Co., 113 Minn. 346, 129 N. W. 594.

An action to recover an assessment on the capital stock of an insolvent corporation may be joined with an action to recover the amount

remaining unpaid on the stock when issued. Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

A complaint by a minority stockholder to compel the restoration of corporate property acquired through investments beyond the charter powers of the corporation, and subsequently unlawfully disposed of without consideration, and for the sale thereof under decree of the court for the benefit of all the stockholders, held not to state two causes of action improperly united. Venner v. Great Northern Ry. Co., 117 Minn. 447, 136 N. W. 271.

Two causes of action, each for malicious prosecution, held to arise out of transactions connected with the subject of action, and to each affect all the parties to the action, and therefore to be properly united in one complaint. Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532.

A count for the conversion of money may be joined with one for money had and received for the same money. Brown v. Sallinger, 214 Mass. 245, 101 N. E. 382.

(61) Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

7501. Legal and equitable causes—(64) Fish v. Chase, 114 Minn. 460, 131 N. W. 631.

7502. Must affect all the parties—(66) Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166; Fish v. Chase, 114 Minn. 460, 131 N. W. 631; Venner v. Great Northern Ry. Co., 117 Minn. 447, 136 N. W. 271; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532.

(01) Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727. See Digest, § 7274.

7503. Must be consistent—A cause of action on express contract for services and one on implied contract for the same services, are not inconsistent and may be joined. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124.

7507. Complaint insufficient in part—(73) See John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180.

7508. Remedy for misjoinder—(75) Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124. See John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180; Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. 176, 148 N. W. 43 (action involving breach of contract—held discretionary with trial court to require plaintiff to proceed either for rescission or for damages for the breach).

See § 7554.

sought to be charged of what the pleader relies on and intends to prove. Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4; Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105; Dechter v. National Council, 130 Minn. 329, 153 N. W. 742. See also, Scofield v. National Elevator Co., 64 Minn. 527, 67 N. W. 645.

7527. Separate statement of causes of action—Where a complaint states two causes of action and there is no election between them the plaintiff may recover on either. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Bouck v. Shere, 125 Minn. 122, 145 N. W. 808. See § 10377.

See Dunnell, Minn. Pl. 2 ed. § 242.

7527a. Cause of action—What constitutes—An action to recover damages arising from the negligence of an expert employed to audit certain accounts is founded on breach of contract, and not in tort. The cause of action is the breach of the contract, and the different items of damage resulting therefrom do not constitute separate causes of action. East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181.

In an action for negligence the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury. McKnight v. Minneapolis St. Ry. Co., 127 Minn. 207, 149 N. W. 131. See § 6973.

See Dunnell, Minn. Pl. 2 ed. § 248.

7528. Paragraphing—(42) Dewing v. Dewing, 112 Minn. 316, 127 N. W. 1051.

7528a. Theory of case—Good practice requires that a complaint should be drawn in accordance with a definite theory as to the nature of the cause of action and the relief to which the plaintiff is entitled. Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105. See Cressy v. Republic Creosoting Co., 108 Minn. 349, 353, 122 N. W. 484.

The absence of a definite theory is a defect of form merely and not a ground for demurrer, the remedy being a motion to make more definite and certain or to compel an election. A party may have any relief to which the facts proved within the allegations of his pleading entitle him, regardless of his theory of the case. Farmer v. Crosby, 43 Minn. 459, 462, 45 N. W. 866; Cock v. Van Etten, 12 Minn. 522 (431, 436); Washburn v. Mendenhall, 21 Minn. 332; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Finch v. Moore, 50 Minn. 116, 52 N. W. 384; Wilson v. Fuller, 58 Minn. 149, 59 N. W. 988; Rule v. Omega Stove & Grate Co., 64 Minn. 326, 329, 67 N. W. 60; Brown v. Doyle, 69 Minn. 543, 72 N. W. 814; Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122; Pendergast v. Searle, 74 Minn. 333, 77 N. W. 231; Palmer v. Yorks, 77 Minn. 20, 79 N. W. 587; Heinze v. Heinze, 107 Minn. 43,

119 N. W. 489; Freeman v. Paulson, 107 Minn. 64, 119 N. W. 651; Wickstrom v. Swanson, 107 Minn. 482, 120 N. W. 1090; Cressy v. Republic Creosoting Co., 108 Minn. 349, 122 N. W. 484; Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922; Foster v. Clifford, 110 Minn. 79, 124 N. W. 632; Zimmerman v. Burchard etc. Co., 111 Minn. 17, 126 N. W. 282; Bark v. Dixson, 115 Minn. 172, 131 N. W. 1078; National Citizens' Bank v. McKinley, 115 Minn. 378, 132 N. W. 290; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; McDonald v. Railway Transfer Co., 121 Minn. 273, 141 N. W. 177; Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297. See Barton v. St. Paul etc. Ry., 33 Minn. 189, 193, 22 N. W. 300; Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67.

The plaintiff may allege all the facts giving rise to his cause of action and recover the relief to which the facts proved entitle him. Tuder v. Oregon Short Line R. Co., 131 Minn. ——, 155 N. W. 200.

A party is entitled to definite information as to the theory upon which it is claimed he is liable, but if the complaint does not disclose a definite theory, but does disclose facts entitling the plaintiff to some form of judicial relief, the remedy of the defendant is a motion and not a demurrer. Bjelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 922.

On appeal the theory of the case adopted at the trial will be followed. First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198; Ogren v. Minneapolis, 121 Minn. 243, 141 N. W. 120; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156. See Digest, §§ 406–409.

See Dunnell, Minn. Pl. 2 ed. § 244.

7529. Every essential fact must be alleged—(43) Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

7530. Prima facie case sufficient—A complaint need not contain more than the statute requires. Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175.

(44) Comstock v. Baldwin, 125 Minn. 357, 147 N. W. 278.

7531. Surplusage—(46) Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156; Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128; Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226.

See Dunnell, Minn. Pl. 2 ed. § 255.

7532. Allegations on information and belief—(47) Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

7533. Conditions precedent—(50) Hobart v. Kehoe, 110 Minn. 490, 126 N. W. 66 (condition as to obtaining a license from a probate court to sell land); Vachon v. Nichols-Chisholm Lumber Co., 111 Minn. 45,

126 N. W. 278 (condition as to issuance and delivery of a patent); Manter v. Petrie, 123 Minn. 333, 143 N. W. 907 (complaint on bond of sheriff—seizure of goods under a search warrant issued under the statute relating to intoxicating liquors—necessity of alleging an order of court for a return of the goods to plaintiff); State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458 (action for contract price of town ditch—necessary to allege official inspection and issue of certificate on completion).

See Dunnell, Minn. Pl. 2 ed. §§ 257–259.

7534. Conditions subsequent—(59) Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472.

7535. Anticipating defences—(60) Bennett v. Rainy Lake River Boom Corp., 115 Minn. 96, 131 N. W. 1059 (unnecessary to negative payment in action for official fees of surveyor general); Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253 (sale of lumber with privilege of reserving a certain quantity for a certain purpose—unnecessary for plaintiff to negative reservation); Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315 (action by receiver of a foreign corporation to recover on a stock subscription—existence of domestic creditors who would be prejudiced by the action defensive matter); Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983 (action by broker for commission—unnecessary to anticipate and negative defence of a termination of the agency by a sale by the principal); Penhall v. Minn. State Medical Assn., 126 Minn. 323, 148 N. W. 472 (action by member of medical association for expenses of action which member claimed association should have defended—unnecessary to negative that claim was not one upon which member was not entitled to aid of association).

See Dunnell, Minn. Pl. 2 ed. § 256.

7536. Duplicity—Election between causes of action—Allegations suggestive of a breach of warranty of personal property sold, but which, standing alone, were insufficient to state a cause of action therefor, held not to require the plaintiff to elect whether to rely upon a breach of warranty or upon a mutual rescission and promise to repay the purchase price paid; a cause of action predicated upon the latter being sufficiently alleged. John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180.

In an action for negligence the plaintiff is not required to elect between several grounds of negligence. He may allege all the grounds giving rise to his cause of action and recover on all or any of them either under the common law or a statute. Tuder v. Oregon Short Line R. Co., 131 Minn. —, 155 N. W. 200.

A plaintiff may be required to elect whether to proceed on the theory that a contract was rescinded for fraud, or for damages for the fraud. Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

Where a complaint states two causes of action and there is no election the plaintiff may recover on either. Laird Norton Yards v. Rochester, 117 Minn. 114, 134 N. W. 644; Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Bouck v. Shere, 125 Minn. 122, 145 N. W. 808; Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444. See § 10377.

A plaintiff may be required to elect to proceed either for rescission or for damages. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 126 Minn. 176, 148 N. W. 43.

The refusal to require plaintiff to elect between different causes of action which in fact were tried as one, even if error, was without prejudice to defendant. Johnson v. Wild Rice Boom Co., 127 Minn. 490, 150 N. W. 218.

(62) Ingle v. Angell, 111 Minn. 63, 126 N. W. 400; O'Brien v. N. W. Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399; Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481; Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104; Bouck v. Shere, 125 Minn. 458, 147 N. W. 444; Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901. See Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173.

7537. Demand for relief—If there is an appearance by the defendant the plaintiff is entitled to such relief, either legal or equitable, as the facts proved justify, and he is not limited by his prayer for relief. Hoffman Motor Truck Co. v. Erickson, 124 Minn. 279, 144 N. W. 952.

If double costs under G. S. 1913, § 7975, are sought, they should be demanded. Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

(66) See Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715 (reduction of verdict to amount demanded in complaint —new trial).

(69) Howard v. Erbes, 112 Minn. 479, 128 N. W. 674.

(71) Upton v. Merriman, 122 Minn. 158, 142 N. W. 150; Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

See Dunnell, Minn. Pl. 2 ed. § 261.

CROSS-COMPLAINT

7538. In general—(74) See Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566 (application to interpose denied).

DEMURRER

7541. Defect must appear on face of pleading—(79) Peterson v. Steenerson, 113 Minn. 87, 129 N. W. 147; Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

7542. Admits facts well pleaded—(80) Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333; Hawkins v. Langum, 115 Minn. 100, 131 N. W. 1014; Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

(81) Croff v. Great Northern Ry. Co., 112 Minn. 14, 127 N. W. 490; Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

See Dunnell, Minn. Pl. 2 ed. § 271.

7543. To whole of pleading—(84) Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1.

7544a. To amended complaint—A defendant may demur, and allege that an amended complaint states no cause of action, though that ground was not assigned upon demurrer to the original complaint. Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

See Dunnell, Minn. Pl. 2 ed. § 274.

7545. Joint—(87) Howley v. Scott, 123 Minn. 159, 143 N. W. 257; State v. Brooks-Scanlon Lumber Co., 128 Minn. 300, 150 N. W. 912.

7547. Reaches first defective pleading—(89) Keith v. Keith, 112 Minn. 183, 127 N. W. 567; Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777; Hirsch v. St. Paul, 117 Minn. 476, 136 N. W. 269; Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

(90) Downer v. Union Land Co., 113 Minn. 410, 129 N. W. 777.

See Dunnell, Minn. Pl. 2 ed. § 276.

7548. Grounds must be specified—(94) Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

7549. For insufficiency of the facts—General demurrer—However well the allegations of a complaint may be stated a general demurrer to the complaint raises the question whether the facts alleged entitle plaintiff to the relief demanded, or any relief. Basting v. Minneapolis, 112 Minn. 306, 127 N. W. 1131.

Where the facts from which assumption of risk arises appear on the face of the complaint that defence may be invoked by a general demurrer. Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713.

(97) Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748; Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669.

See Dunnell, Minn. Pl. 2 ed. § 278.

7550. For want of jurisdiction—(17) Sullivan v. Minneapolis etc. Ry. Co., 121 Minn. 488, 142 N. W. 3 (jurisdiction of state court—interstate commerce).

See Digest, § 10104.

7554. For misjoinder of causes of action—A complaint containing a statement of facts showing plaintiff entitled to some relief is not demur-

rable, as improperly joining two causes of action, because alternative relief is demanded. Howard v. Erbes, 112 Minn. 479, 128 N. W. 674.

Where the fact of misjoinder appears upon the face of the complaint, the objection must be taken by demurrer, or it is waived. Stolorow v. National Council, 131 Minn. ——, 155 N. W. 756.

7555. Defects for which demurrer will not lie—In an action against a judgment debtor and his grantee to set aside a conveyance, the invalidity of the judgment is matter of defence to be raised by answer and not by demurrer. Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

A demurrer will not lie to a general denial. Henry v. White, 121 Minn. 527, 140 N. W. 1034.

(30) Mogren v. Finley, 112 Minn. 453, 128 N. W. 828.

(33) Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182; Urbas v. Duluth, M. & N. Ry. Co., 113 Minn. 309, 129 N. W. 513; Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716.

(34) Urbas v. Duluth, M. & N. Ry. Co., 113 Minn. 309, 129 N. W. 513.

7556. To answer—Counterclaims—(49) See Henry v. White, 121 Minn. 527, 140 N. W. 1034.

7559. Effect of sustaining a demurrer—An order sustaining a demurrer to a complaint is of no effect as determining the law of the case after the service of an amended complaint. First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

7560. Amendment after demurrer is sustained—An application to be allowed to amend after an order sustaining a demurrer is not a waiver of objection to the order, the application being denied. Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

(53) Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

(55) Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 244, 125 N. W. 115.

(56) Martin v. Great Northern Ry. Co., 110 Minn. 118, 124 N. W. 825; Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450. See Foster v. Wagener, 129 Minn. 11, 151 N. W. 407.

7561. Effect of overruling demurrer—Judgment—(58) State v. Jack, 126 Minn. 367, 148 N. W. 306.

7562. Pleading over—(61) See Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115.

See Dunnell, Minn. Pl. 2 ed. § 290.

ANSWER

7563a. Separate answers—Where there are several defendants they may answer separately. Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461.

Where several defendants answer separately, a defence interposed by one is not available to a codefendant, where his separate answer does not present it. Skow v. Dahl Punctureless Tire Co., 129 Minn. 324, 152 N. W. 755.

7566. Denial of knowledge or information—(68) Note, 30 L. R. A. (N. S.) 771.

(69, 70) Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

See Dunnell, Minn. Pl. 2 ed. § 320.

7567. Denial upon information and belief—A denial upon information and belief of matters of public record easily accessible to the defendant is improper, but it raises an issue if not stricken out. Doherty v. Ryan, 123 Minn. 471, 144 N. W. 140.

See Dunnell, Minn. Pl. 2 ed. § 321.

7573. Qualified general denial—A general denial is qualified or limited by a special defence of new matter in justification. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

7574. Evidence admissible under a general denial—(95) Martinsburg v. Butler, 112 Minn. 1, 127 N. W. 420 (complaint alleged an unlawful appropriation of public funds, specifying particular items so paid—evidence to show that such appropriations were lawful held admissible); Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831 (action for negligence—if complaint negatives plaintiff's negligence contributory negligence of plaintiff is admissible under a general denial, otherwise not); Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750 (unlawful detainer proceedings—that defendant was entitled to compensation for plowing before surrendering possession of a farm held admissible); Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861 (action to enforce a trust—evidence as to ownership of property held admissible); Dodge v. Gilman, 122 Minn. 177, 142 N. W. 147 (action for libel or slander—bad reputation of plaintiff admissible); Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359 (allegation of assignment of wages—issue as to notice of assignment under statute raised by general denial); Peterson v. Chicago etc. Ry. Co., 131 Minn. ——, 154 N. W. 1093 (action for negligence—any material evidence that tends to overcome plaintiff's theory of the cause of the accident is admissible).

7576a. Effect of denials to preclude defendant—If the defendant denies the allegations of the complaint he cannot have the benefit of them as substantive evidence of a defence. Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

NEW MATTER CONSTITUTING A DEFENCE

7579. Matters in abatement—A court should be very liberal in allowing an amendment to let in evidence in rebuttal of a plea in abatement. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305.

(12) Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

7580. Several defences must be consistent—Defendant held not restricted by the old common-law rule as to inconsistency of defences. Peters v. Cannon River Electric Power Co., 110 Minn. 121, 124 N. W. 826.

(14) Minneapolis Threshing Machine Co. v. Peters, 112 Minn. 429, 128 N. W. 578.

(18) Minneapolis Threshing Machine Co. v. Peters, 112 Minn. 429, 128 N. W. 578 (breach of warranty and fraud); Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118 (action for conversion of grain—claim of thresher's lien and delivery to plaintiff of a share of the grain on condition that defendant had a lien on the amount kept).

7584. Hypothetical admissions—(24) See Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404.

7585. **Must be specially pleaded**—(25) Bank of Commerce v. Selden, 1 Minn. 340 (251) (action on check of firm—fact that check was for the individual benefit of partner who drew it, that he applied the money raised by it to his own use, and that such facts were known to plaintiff held new matter); American Button-Hole etc. Co. v. Thornton, 28 Minn. 418, 10 N. W. 421 (in an action to recover in several counts the price of goods sold at various times, an answer, admitting the several sales and the prices, but pleading in bar of a recovery that the sales were made under such an agreement, and the circumstances such, as to merge all the items in a general running account and one entire demand, and pleading a former recovery as to one of such sales, is a pleading in the nature of a confession and avoidance, and the burden of proving such facts is upon the defendant); Livingston v. Ives, 35 Minn. 55, 27 N. W. 74 (action to redeem from absolute deed given to secure a debt—fact that deed was given to hinder and delay creditors held new matter); MacFee v. Horan, 40 Minn. 30, 41 N. W. 239 (action by real estate broker for commission—fact that he was acting as agent of buyer held new matter); Kennedy v. McQuaid, 56 Minn. 450, 58 N. W. 35 (when plaintiff pleads title in himself by alleging the source of his title, the fact that after he acquired the title he conveyed it to a third party is new matter); Netzer v. Crookston, 59 Minn. 244, 61 N. W. 21 (if want of funds is a defence to an action against a municipality for defective sewers, etc. it

is new matter); Anderson v. Rockwood, 62 Minn. 1, 63 N. W. 1023 (action to recover money collected under a judgment assigned to defendant in trust for plaintiff—that assignment was designed to defraud creditors held new matter); O'Gorman v. Sabin, 62 Minn. 46, 59, 64 N. W. 84 (action on undertaking—that defendant's undertaking was merely as security for another held new matter); Iselin v. Simon, 62 Minn. 128, 64 N. W. 143 (action for price of goods sold—that goods were sold on credit the term whereof has not expired held new matter); Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429 (where the issue made by the pleadings is whether an alleged contract was actually made evidence to show the invalidity of the contract or that it was not fairly made is new matter); McClellan v. Louis F. Dow Co., 114 Minn. 418, 131 N. W. 485 (action by parent for loss of services of child—emancipation of child and a former recovery by the parent held new matter); Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422 (waiver of written notice of breach of warranty held possibly new matter); Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315 (action by foreign receivers—existence of domestic creditors who would be prejudiced by the suit held new matter); Marshall & Wells Hardware Co. v. Emde, 121 Minn. 524, 140 N. W. 1027 (fraud held new matter); Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983 (action by broker for commissions—termination of agency by sale by principal held new matter); Evertson v. McKay, 124 Minn. 260, 144 N. W. 950 (action for assault and battery—justification held new matter); A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113 (failure and want of consideration held new matter); Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566 (illegality in a lease held new matter—violation of liquor laws). See § 7060 (contributory negligence); § 6024 (assumption of risk).

See Dunnell, Minn. Pl. 2 ed. § 339.

EQUITIES

7587. Nature—(29) Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142.

See Dunnell, Minn. Pl. 2 ed. § 340.

7589. Affirmative relief need not be sought—(34) See Koch v. Fischer, 122 Minn. 123, 142 N. W. 18.

RECOUPMENT

7594. Effect of statute of limitations—(40) See General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404.

7595. When allowable—(45) General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404 (action for price of goods sold—recoupment of damages from fraud in obtaining contract sued upon); Huntoon v.

Brendemuehl, 124 Minn. 54, 144 N. W. 426 (action on note secured by mortgage on chattel in possession of a bailee—bankruptcy of bailee—recoupment allowed for damages from breach of contract of bailment whether they accrued while the property was in the hands of the bailee or trustee in bankruptcy). See Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993 (building contract—sale of stone—recoupment for defects in stone disallowed because there was no severance of the items of damages in the pleading or proof).

7596. **Pleading**—(46) Blakely v. J. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179.

(47) General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404. See Dunnell, Minn. Pl. 2 ed. § 351.

COUNTERCLAIM

7598. **Nature**—(49) Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530; Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

(50) Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

7598a. **Jurisdiction—Waiver of excess**—A counterclaim cannot exceed in amount the jurisdiction of the court, but the defendant may waive the excess and demand judgment for an amount within the jurisdiction of the court. Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530. See Note, 37 L. R. A. (N. S.) 606.

7599. **May be used defensively**—(53) See Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530; General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404.

7601. **Must be an independent cause of action**—(57) Gordon v. New England Furniture & Carpet Co., 117 Minn. 525, 135 N. W. 1135 (matter held not a counterclaim but merely a justification for an alleged conversion).

7602. **Must exist against a plaintiff and in favor of a defendant**—(60) Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142 (a claim against an individual member of a firm cannot be counterclaimed against a debt due the firm).

(63) See Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

7605. **Must exist in defendant at commencement of action**—(73) Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128 (action for alleged wrongful acts of a tenant in attempting to retain possession of leased premises after abandoning them—counterclaim for wrongful acts of plaintiff in entering premises and excluding defendant, held to exist in defendant at commencement of action).

(76) See 8 Col. L. Rev. 591.

7608. Claims connected with the subject of the action—(81) Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1; W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307.

(84) Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1 (action to restrain destruction of logging road—counterclaim for damages from the negligent operation of plaintiff's locomotive); Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128 (action by landlord against tenant for attempting to retain possession of the leased premises after abandoning them—counterclaim for wrongful acts of plaintiff in entering premises and evicting defendant); W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307 (replevin—conditional sale of a piano—breach of warranty of quality—rescission for breach and counterclaim for instalments of purchase price paid). See Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

(85) Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1. See Dunnell, Minn. Pl. 2 ed. § 364.

7609. Claims arising out of the "transaction" alleged—(90) Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128 (action by landlord against tenant for attempting to retain possession of the leased premises after abandoning them—counterclaim for wrongful acts of plaintiff in entering premises and evicting defendant). See Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250; Gasner v. Stapf, 130 Minn. 50, 152 N. W. 865.

See Dunnell, Minn. Pl. 2 ed. § 365.

7610. Claims "arising out of the contract" alleged—(92) See Gasner v. Stapf, 130 Minn. 50, 152 N. W. 865.

7611. Claims ex contractu in actions ex contractu—In an action on a note given by a warehouseman to a bailor held proper to allow a counterclaim for damages for injury to goods stored. Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

7612. Claims ex contractu in actions ex delicto—(3) Gasner v. Stapf, 130 Minn. 50, 152 N. W. 865 (claim for damages for breach of an entire contract of employment may be counterclaimed in an action for services under the contract and for conversion connected therewith).

7618. Pleading several counterclaims—Where two counterclaims are pleaded, one proper and the other not, a demurrer to the whole pleading is properly overruled. Wild Rice Lumber Co. v. Benson, 114 Minn. 92, 130 N. W. 1.

7620. Failure to plead counterclaim—Effect—(22) Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530; Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

7622. Relief awarded—Default—When a defendant does not appear at the trial he is deemed to have waived his counterclaim and the court is not required to make any order in relation thereto. H. W. Johns-Manville Co. v. Great Northern Hotel Co., 128 Minn. 311, 150 N. W. 907.

SETOFF

7624. In equity—(29) Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142.

(30) See Platts v. Metropolitan Nat. Bank, 130 Minn. 219, 153 N. W. 514; Note, 47 Am. St. Rep. 578.

See §§ 748a, 787.

7624a. Burden of pleading and proving—In an action on a contract it is ordinarily for the defendant to plead and prove any setoff which he may have. It is not necessary for the plaintiff to prosecute an equitable accounting to ascertain whether defendant has a setoff. Barnum v. White, 128 Minn. 58, 150 N. W. 227.

REPLY

7627. Departure—(41) Johnson v. Fehsefeldt, 113 Minn. 118, 129 N. W. 146; Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850; Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297; Rosenthal v. Supreme Ruling, 129 Minn. 214, 152 N. W. 404 (action on benefit certificate—no departure).

7629. Fortifying complaint by reply—New assignment—(52) Johnson v. Fehsefeldt, 113 Minn. 118, 129 N. W. 146; Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850; International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 80, 137 N. W. 395.

7632. Necessity—Admission by failure to reply—(01) McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

(55) Geib v. Morrison County, 119 Minn. 261, 138 N. W. 24 (action to set aside ditch proceedings—allegations of answer admitted by a failure to reply); Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 N. W. 112 (action for the breach of a compromise contract—plea of want of consideration and that contract was made by agent without authority—reply unnecessary).

7633. Admission by failure to reply—Judgment—Vacation of order—The application for judgment on the pleadings having been based solely upon the plaintiff's failure to reply, the fact that the complaint was insufficient to state a cause of action, in that it failed to allege the facts concerning service of a notice of claim upon the defendant city as prescribed by R. L. 1905, § 768 (G. S. 1913, § 1786), was unavailable to the defendant upon the plaintiff's motion to vacate the former order and

judgment and for leave to reply; it being sufficient upon the latter motion that the complaint showed a meritorious cause of action, though defectively alleged. The affidavits upon which the plaintiff's second motion was based, averring a meritorious cause of action, and that the plaintiff's failure to reply properly and in due time was caused by his unfamiliarity with court practice and his attorney's neglect, were sufficient to warrant the relief granted, and the court did not abuse its discretion in the premises. McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

SUPPLEMENTAL PLEADINGS

7634. Distinguished from amended pleadings—(60) Hansen v. N. W. Telephone Exchange Co., 127 Minn. 522, 149 N. W. 131.

7635. A matter of right—Diligence—(62) Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

7637. Supplemental answer—(69) Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644.

VERIFICATION

7641. In general—It is not essential that a verification should directly allege that the affiant knows the contents of the pleading, if it alleges that he has read it and that it is true of his own knowledge. Lyons v. Westerdahl, 128 Minn. 288, 150 N. W. 1083.

(72) See Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

BILL OF PARTICULARS

7645. Remedy for defects or failure to furnish—Objection that a bill of particulars is verified by an attorney instead of a party cannot be made on the trial by objecting to evidence. The remedy is a motion before trial. McCaughey v. Wilson, 130 Minn. 196, 153 N. W. 310.

(86) McCaughey v. Wilson, 130 Minn. 196, 153 N. W. 310. See Behrens v. Kruse, 121 Minn. 90, 140 N. W. 339; Ewing v. Kirkland, 131 Minn. ——, 155 N. W. 617.

INDEFINITE PLEADINGS

7647. Discretion of trial court—(92) Young v. Lindquist, 126 Minn. 414, 148 N. W. 455.

7648. Remedy by motion before trial exclusive—(93) Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182; Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

(98) Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

(99) Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892.

IRRELEVANT PLEADINGS

7654. What constitutes—(9) Lydiard v. Daily News Co., 110 Minn. 140, 124 N. W. 985 (action for libel—allegations in answer held irrelevant); Young v. Lindquist, 126 Minn. 414, 148 N. W. 455 (action to set aside a judgment for fraud—allegations of contradiction between witnesses and of perjury and fraudulent practices).

REDUNDANT PLEADINGS

7655. What constitutes—(10) Young v. Lindquist, 126 Minn. 414, 148 N. W. 455 (action to set aside a judgment for fraud—allegations of contradiction between witnesses and of perjury and fraudulent practices).

SHAM PLEADINGS

7657. Definition and nature—A sham reply is one sufficient on its face, but so indisputably false that it presents no real issue to be litigated. Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

See Dunnell, Minn. Pl. 2 ed. § 424.

7658. Remedy—Striking out—A motion to strike a complaint and a reply from the files on the ground that the plaintiff corporation had been dissolved held equivalent to a motion to strike out as sham. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 118 Minn. 273, 136 N. W. 738.

A sham reply may be stricken out on motion. Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

7660. Verified pleading may be stricken out—(19) Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

7661. Denials may be stricken out—(20) Towne v. Dunn, 118 Minn. 143, 136 N. W. 562; Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

7664. Affidavits on motion—(24) Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

(25, 26) Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

7666. Amendment discretionary—(28) Towne v. Dunn, 118 Minn. 143, 136 N. W. 562.

7667. Pleadings held sham or the reverse—(29) Swedish-American Nat. Bank v. Lindquist, 110 Minn. 533, 126 N. W. 1134; Dennis v. Firth, 113 Minn. 235, 129 N. W. 387; Pothen v. Pothen, 116 Minn. 32, 133 N. W. 72; Towne v. Dunn, 118 Minn. 143, 136 N. W. 562; Orr v.

Sutton, 119 Minn. 193, 137 N. W. 973; Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

(30) Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 118 Minn. 273, 136 N. W. 738.

FRIVOLOUS PLEADINGS

7668. Definition—Answer—Reply—Striking out—A frivolous reply is one that does not in any view of the facts pleaded present a defence to the matter pleaded in the answer. A frivolous reply may be stricken out on motion. Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.

(31) Pothen v. Pothen, 116 Minn. 32, 133 N. W. 72; Orr v. Sutton, 119 Minn. 193, 137 N. W. 973 (allegation that a statute was not legally enacted held properly stricken out as frivolous).

7669. Frivolous demurrers—Striking out—Action against a judgment debtor and his grantee to set aside a conveyance. The defendant grantee interposed a general demurrer to the complaint, and plaintiff moved for an order overruling the demurrer as frivolous, basing his motion on the pleadings and all the files and proceedings in the action. The court was not required, in passing on such motion, to consider the files in the action in which the former judgment was rendered, but only the files in the pending action. Krause v. Hoeffken, 117 Minn. 523, 135 N. W. 979.

VARIANCE

7671. General rule—(35) Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4. See Dunnell, Minn. Pl. 2 ed. § 441.

7672. Immaterial variance—Effect—Where the facts litigated were known to the defendant before trial a variance, if any, between the plaintiff's complaint and his proofs, is harmless. Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703.

(37) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410; Snyder v. Crescent Creamery Milling Co., 111 Minn. 234, 126 N. W. 822; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472; O'Brien v. Northwestern Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399; Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Johnson v. Scott, 119 Minn. 470, 138 N. W. 694; Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703; Dechter v. National Council, 130 Minn. 329, 153 N. W. 742; Derham v. Donohue, 155 Fed. 385 (rule of text stated and applied). See Dunnell, Minn. Pl. 2 ed. § 443.

7673. Material variance—Effect—(38) Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901 (variance between quantum meruit and express contract for services).

7674. Fatal variance—Failure of proof—Effect—(39) Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4.

(40) Minneapolis Harvester Works v. Smith, 30 Minn. 399, 16 N. W. 462 (where a complaint states a cause of action ex delicto a recovery cannot be had upon a cause of action ex contractu not embraced in such statement).

(43) Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203.

7675. Waiver—Trial of issues by consent—Presumption—(44) James v. Merchants Life & Casualty Co., 118 Minn. 146, 136 N. W. 582; Johnson v. Scott, 119 Minn. 470, 138 N. W. 694; Wright v. Waite, 126 Minn. 115, 148 N. W. 50; Shama v. Chicago etc. Ry. Co., 128 Minn. 522, 151 N. W. 406.

(46) McCauley v. Wuest, 110 Minn. 529, 125 N. W. 1021.

(49) Creteau v. Chicago & N. W. Ry. Co., 113 Minn. 418, 129 N. W. 855; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566; Skow v. Dahl Punctureless Tire Co., 129 Minn. 324, 152 N. W. 755.

See Digest, § 372.

7676. Objections—How and when made—A party is not bound to object by moving to make a pleading more definite and certain. Objection can be raised by requests for instructions. Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4.

(50) O'Brien v. Northwestern Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399; Seewald v. Schmidt, 127 Minn. 375, 149 N. W. 655; Klink v. Val Blatz Brewing Co., 128 Minn. 144, 150 N. W. 398.

(51) Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4.

IMMATERIAL DEFECTS DISREGARDED

7677. Statute—(56) Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142; Dechter v. National Council, 130 Minn. 329, 153 N. W. 742.

WAIVER OF OBJECTIONS

7678. By failure to demur or answer—(57, 60) Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170; Stolorow v. National Council, 131 Minn. —, 155 N. W. 756.

7681. Objections that are never waived—(71) Milton Dairy Co. v. Great Northern Ry. Co., 124 Minn. 239, 144 N. W. 764.

DISMISSAL FOR INSUFFICIENCY OF PLEADINGS

7684. Construction of complaint—(83, 84) Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

OBJECTION TO EVIDENCE UNDER DEFECTIVE PLEADINGS

7687. By defendant—Insufficient complaint—(90) Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748 (ruling on objection need not be followed by an offer of evidence in support of the pleading); Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

(93) Batcher v. Staples, 120 Minn. 86, 139 N. W. 140; Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Dechter v. National Council, 130 Minn. 329, 153 N. W. 742; Eppley v. Kennedy, 198 N. Y. 348, 91 N. E. 797.

7688. By plaintiff—Insufficient answer—(94) Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748 (ruling on objection need not be followed by an offer of evidence in support of the pleading).

JUDGMENT ON THE PLEADINGS

7691. Motion by plaintiff—Partial relief—A motion by plaintiff is properly denied where he is entitled to only partial relief, if he does not limit his motion accordingly. Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25.

7692. Must be on pleadings alone—Findings improper—Findings of fact are improper. The decision is based on the pleadings alone. State v. Barlow, 129 Minn. 181, 151 N. W. 970.

7693. Motion admits facts—Whether the party has competent evidence to prove his allegations is not before the court on a motion for judgment on the pleadings. Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785.

(7) Schommer v. Flour City Ornamental Iron Works, 129 Minn. 244, 152 N. W. 535.

7694. Construction of pleadings—A motion for judgment on the pleadings ought not to be encouraged so as to be a substitute for a demurrer. McLaughlin v. Breckenridge, 122 Minn. 154, 141 N. W. 1134, 142 N. W. 134.

(8) Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193; Ames v. Brandvold, 119 Minn. 521, 138 N. W. 786; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812; Dechter v. National Council, 130 Minn. 329, 153 N. W. 742.

AMENDMENT

7695. As of right—Obviating defects—A party whose complaint has been demurred to may obviate the defect and avoid costs by serving an amended complaint. Ferrier v. McCabe, 129 Minn. 342, 152 N. W. 734.

See Dunnell, Minn. Pl. 2 ed. §§ 485–492.

7696. Discretion of trial court—(11) Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387.

(13) Kulberg v. Supreme Ruling, 126 Minn. 494, 148 N. W. 299.

7697. To be allowed liberally—A court should be very liberal in allowing an amendment to let in evidence in rebuttal of a plea in abatement. Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305.

7699. Meritoriousness of defence—A discharge in bankruptcy is a meritorious defence. Northwest Thresher Co. v. Herding, 126 Minn. 184, 148 N. W. 57.

See § 5019.

7701. As to parties—Where an action brought by a guardian in behalf of his ward is entitled as brought by the guardian the error may be corrected by an amendment. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

(20) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987.

See Dunnell, Minn. Pl. 2 ed. § 477.

7706. Effect—Limitations—(31) First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

(32) Gilbert v. Gilbert, 120 Minn. 45, 138 N. W. 943. See Note, 47 L. R. A. (N. S.) 932.

See Dunnell, Minn. Pl. 2 ed. § 482.

7708. On the trial—Discretion—An order allowing the amendment of a reply sustained. Atherton v. Barber, 112 Minn. 523, 128 N. W. 827.

(39) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987 (action brought against partnership—amendment adding name of another partner); Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693 (amendment inserting claim for damages for loss of time); Wilson v. Blackwood, 120 Minn. 227, 139 N. W. 151 (action for goods sold and delivered); Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703 (action on a bailment); Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1 (action on a benefit certificate); Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267 (action for negligence—pedestrian struck by automobile).

(40) G. L. Bradley Co. v. Little, 131 Minn. ——, 154 N. W. 948.

(41) Tew v. Webster, 118 Minn. 375, 136 N. W. 1098; Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

(42) Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081; Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387; A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113; Klaus v. A. C. Thompson Auto & Buggy Co., 131 Minn. ——, 154 N. W. 508.

See Dunnell, Minn. Pl. 2 ed. § 494.

7709. Scope of amendment on the trial—A complaint on an implied or quasi contract may be converted into one on an express contract by an amendment on the trial. Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137.

A complaint in the alternative, alleging a cause of action against either one or the other of two defendants, may be amended on the trial so as to allege a cause of action against both defendants. Casey Pure Milk Co. v. Booth Fisheries Co., 124 Minn. 117, 144 N. W. 450.

It is proper to allow an amendment to a complaint for goods sold and delivered so as to include other sales, in order to avoid injustice in the allowance of credits. Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226.

(45) See Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137; Dunnell Minn. Pl. 2 ed. § 495.

7713. Conforming pleadings to the proof—Variance—(52) Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275; O'Brien v. Northwestern Consolidated Milling Co., 119 Minn. 4, 137 N. W. 399; Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137; Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

7713a. After trial—In an action for specific performance there was no abuse of discretion in refusing defendant leave, after the case was tried and decided, to amend his answer so as to plead mistake and ask a reformation of the contract. Leslie v. Mathwig, 131 Minn. ——, 154 N. W. 951.

7716. After appeal and remand—(65) See 6 Mich. L. Rev. 353.

CONSTRUCTION

7718. As affected by time—The degree of strictness with which pleadings are to be construed depends upon the time and mode of objection to their sufficiency. A pleading which would be good on demurrer may be bad on a motion to make more definite and certain, and a pleading which would be bad on demurrer may be good on motion for dismissal, in arrest of judgment, or on appeal. Barnsback v. Reiner, 8 Minn. 59 (37, 44); Smith v. Dennett, 15 Minn. 81 (59, 63); Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 39, 51, 59 N. W. 822.

7719. Liberal construction—In general—Rules of pleading are mere means to an end and do not themselves constitute the end sought to be obtained by a judicial determination, their purpose in all cases being to facilitate and insure the administration of justice; and in no case should they, by blind and unreasoning application, be allowed to defeat the

very purpose for which they were adopted. Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142.

(68) Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4. See Dunnell, Minn. Pl. 2 ed. § 506.

7722. Specific allegations prevail over general—Where general allegations of negligence are followed by specific allegations the former are restricted and qualified by the latter. Willison v. Northern Pacific Ry. Co., 111 Minn. 370, 127 N. W. 4.

A general denial is qualified or limited by a special defence of new matter in justification. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

7723. In favor of pleader—Pleadings are to be construed liberally in favor of the pleader and not against him as at common law. Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623; Branton v. McLaughlin, 109 Minn. 244, 123 N. W. 808; Martin v. Great Northern Ry. Co., 110 Minn. 118, 124 N. W. 825; Allen v. Eneroth, 111 Minn. 395, 398, 127 N. W. 426. See Dunnell, Minn. Pl. 2 ed. § 507.

7724. On demurrer—A complaint, to be bad on general demurrer, must be wholly insufficient; if to any extent, on any reasonable theory, it presents facts sufficient to justify a recovery, it will be sustained, however inartificially the facts may be stated. Casey v. American Bridge Co., 95 Minn. 11, 103 N. W. 623, 624; Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

A court will not resort to conjecture in order to sustain a demurrer. Kuhl v. United States Health & Accident Ins. Co., 112 Minn. 197, 127 N. W. 628.

A demurrer should be given a uniform effect as a pleading. Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067.

The rule guiding the supreme court is that a general demurrer will be overruled if, on any view of the facts pleaded, a cause of action is stated. It will not ordinarily go beyond this inquiry, or attempt to pass on the question whether recovery may or may not be had upon all the different theories to which the facts pleaded may be susceptible. It limits its inquiry to the question whether, upon any particular theory, a cause of action is stated. First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296; Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

(80) Martin v. Great Northern Ry. Co., 110 Minn. 118, 124 N. W. 825; Allen v. Eneroth, 111 Minn. 395, 398, 127 N. W. 426; Gulledge etc. Co. v. Wenatchee Land Co., 111 Minn. 418, 127 N. W. 395; Rasmussen v. Hutchinson, 111 Minn. 457, 127 N. W. 182; Croff v. Great Northern Ry. Co., 112 Minn. 14, 127 N. W. 490; Kuhl v. U. S. etc. Ins. Co., 112 Minn. 197, 127 N. W. 628; McElrath v. Electric Investment Co., 114

Minn. 358, 131 N. W. 380; Venner v. Great Northern Ry. Co., 117 Minn. 447, 136 N. W. 271; Jacobson v. Lac Qui Parle County, 119 Minn. 14, 17, 137 N. W. 419; First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296; Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748; Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315; State v. St. Paul City Ry. Co., 122 Minn. 163, 170, 142 N. W. 136; Klemik v. Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871; Preiss v. Zins, 122 Minn. 441, 142 N. W. 822; Fairmont Cement Stone Mfg. Co. v. Davison, 122 Minn. 504, 142 N. W. 899.

See Dunnell, Minn. Pl. 2 ed. § 517.

7726. **On appeal**—(86) McCauley v. Wuest, 110 Minn. 529, 125 N. W. 1021; Collins v. School District, 114 Minn. 307, 131 N. W. 322; International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395; Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703; McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

7727. **Aider by answer**—(90) Goldman v. Weisman, 123 Minn. 370, 143 N. W. 983.

7729. **Aider by verdict**—(93) Baker v. Warner, 231 U. S. 588.

OBJECTIONS ON APPEAL

7732. **Failure to state cause of action**—(1) Getty v. Alpha, 115 Minn. 500, 133 N. W. 159; Wood v. Johnson, 117 Minn. 267, 271, 135 N. W. 746; Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703. See Grant Bros. Const. Co. v. United States, 232 U. S. 647.

PLEDGE

7734. **Definition**—(11) Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

7736. **What constitutes**—In case of reasonable doubt a transaction will be deemed a pledge rather than a chattel mortgage. A delivery of an insurance policy to the insurer as security for the payment of a loan held a pledge. Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

See Note, 32 Am. St. Rep. 711 (collateral securities).

7738. **Consideration**—(21) West Coast Co. v. Bradley, 111 Minn. 343, 127 N. W. 6.

7742. **Negotiable paper—Bona fide purchaser**—The transfer of negotiable paper for value and in the usual course of business, as collateral

security, vests in the holder a valid title, similar in all respects to that held by an unconditional indorsee. Roach v. Halvorson, 127 Minn. 113, 148 N. W. 1080.

(37) See Digest, § 952.

7743. Tender—Discharge of lien—In replevin for the thing pledged a tender of the debt may be necessary. Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 7, 130 N. W. 250.

See 10 Col. L. Rev. 252.

7745. Pledge of corporate stock—Conversion—Rights of third parties—A pledge of corporate stock by delivery, without indorsement, is subject to the equities of third persons and as against the true owner it is incumbent on the pledgee to prove that the advances claimed were made on the faith of the security. Barnes v. Davis, 113 Minn. 132, 128 N. W. 1118 (pledge of stock by person not the owner—action to enforce lien—findings and conclusions of law sustained).

When a stock certificate is pledged with a bank, the act of an officer thereof in wrongfully appropriating the same for his own purposes is not the misappropriation of the bank to whose custody it was intrusted, even though the bank may be liable to the pledgor. The owner of a stock certificate indorsed in blank, who in pledging the same to a reputable going bank is free from negligence, is not estopped from asserting title thereto as against an innocent good-faith purchaser for value, who derives title through one who stole such certificate from the bank while it was pledged, even though the thief be the cashier of the bank. A custom prevailing among brokers and bankers to pass stock certificates indorsed in blank from hand to hand without inquiry as to source of title, the same as negotiable paper, does not override the established law that stock certificates have not all the attributes of negotiable instruments; nor does such custom warrant the court in changing the law to conform to the custom. Schumacher v. Greene Cananea Copper Co., 117 Minn. 124, 134 N. W. 510.

Conversion may be established by proof of actual misappropriation, or, where plaintiff is entitled to possession, by demand and refusal. A showing that a pledgee of stock "turned it over" to a third party is not proof of misappropriation, without further proof as to the manner of its turning over. The proof must show that there was a repudiation of the pledgor's rights. Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

A demand and refusal is evidence of conversion only when the person making the demand is entitled to possession. One to whom stock is pledged as collateral security for money advanced, to be repaid in breaking, is entitled to hold the stock until the breaking is done or the money

repaid, and refusal of a demand prior thereto does not constitute conversion. Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029.

(43) Note, 68 Am. St. Rep. 542.

See Note, 121 Am. St. Rep. 194.

7748. Conversion by pledgee—(55) Stebbins v. Martin, 121 Minn. 154, 140 N. W. 1029. See 29 Harv. L. Rev. 107 (exchange of securities by pledgee).

7750. Action by pledgee—As a general rule the pledgor cannot sue on the collateral so long as the debt secured thereby is unpaid, the pledgee being the real party in interest. Facts held not to bring case within the general rule. Peters v. Cannon River Electric Power Co., 110 Minn. 121, 124 N. W. 826.

7751. Sale of property to satisfy debt—Notice—The parties to a contract of pledge may agree upon the method of its enforcement, provided that such method is not contrary to law. Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

Where the pledge agreement does not provide for a forfeiture of the pledge, the pledgor's title cannot be divested without giving him reasonable notice of the forfeiture proceeding. Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

(59, 61) Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250.

(62) Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250. See Small v. Housman, 208 N. Y. 115, 101 N. E. 700.

See 29 Harv. L. Rev. 277 (drastic pledge agreements).

POWERS

7761. Powers in trust—Powers in trust and gifts implied in default of appointment. 25 Harv. L. Rev. 1.

PREFERENTIAL VOTING—See Elections, 2934a, 2938.

PRINCIPAL AND AGENT—See Agency.

PRINCIPAL AND SURETY—See Suretyship.

PRISONERS—See Counties, 2292.

PROBATE COURT

JURISDICTION

7770. In general—The jurisdiction of probate courts includes every matter necessarily connected with the administration of estates, as well as the conduct and duties of executors and administrators. The duties imposed upon probate courts in relation to inheritance taxes, under Laws 1905, c. 288, are not in violation of the constitution. State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

The district court may, in the exercise of an ancillary jurisdiction, aid the probate court in the performance of its proper functions. When a situation presents itself to which by its nature the probate court is not equal, a court of equity may step in and see that justice is done. Brown v. Strom, 113 Minn. 1, 129 N. W. 136.

While probate courts have no general equity powers, yet as respects the subjects committed by the constitution to their exclusive jurisdiction they have the plenary powers, legal and equitable, that any court has. Brown v. Strom, 113 Minn. 1, 11, 129 N. W. 136; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

There is a marked distinction between the jurisdiction and powers of our probate courts under the constitutional provision giving them jurisdiction over estates of deceased persons, and probate, surrogate's, or ordinary's courts of other states, which derive all their jurisdiction and powers from statute. Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

The power and duty to determine to whom property passes by will or descends by inheritance is vested in the probate court. Odenbreit v. Utheim, 131 Minn. ——, 154 N. W. 741.

Whether a probate court has jurisdiction of a Chippewa Indian allottee residing upon the White Earth Indian Reservation and maintaining tribal relations is an open question. Beaulieu v. Ain-E-Waush, 126 Minn. 321, 148 N. W. 282.

The district court cannot indirectly exercise original jurisdiction over a matter within the exclusive jurisdiction of the probate court, by allowing a judgment or order of the latter court to be attacked collaterally in the district court for error or irregularity. Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302. See Digest, §§ 5145, 7774, 7782.

Jurisdiction of a court of equity to construe a will. Note, 129 Am. St. Rep. 78.

(5) Brown v. Strom, 113 Minn. 1, 129 N. W. 136; State v. Probate Court, 130 Minn. 269, 153 N. W. 520.

(7) See Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871.

(10–12) Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

7773. County in which administration should be had—Where the probate court of the county of a resident decedent's domicil has first acquired jurisdiction over the estate, the probate court of the county wherein was the temporary abode at the time of death is not thereafter entitled to take jurisdiction of the same estate. The "residence" referred to in G. S. 1913, § 7205, means the true home, the place which at decedent's death was the legal residence, and not the temporary abiding place occupied without an intention to abandon the fixed domicil. State v. Probate Court, 130 Minn. 269, 153 N. W. 520.

7774. Presumption of jurisdiction—Collateral attack on orders and judgments—If it appears on the face of the record, or is conceded, that there was no petition invoking the jurisdiction of the court over the estate, all subsequent proceedings are void and subject to collateral attack. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

The judgments and orders of the probate courts cannot be attacked collaterally, either by parties or strangers, for errors or irregularities. See Digest, §§ 5145, 7782.

(26) Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362; Wilkowske v. Lynch, 124 Minn. 492, 145 N. W. 378. See Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871.

(27) Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

7776. No general equity jurisdiction—(29, 30) Brown v. Strom, 113 Minn. 1, 129 N. W. 136; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455. See Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871.

7777. When jurisdiction attaches—Petition—Unless the jurisdiction is duly invoked by a proper petition all proceedings are void and subject to collateral attack. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

(31) Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

7778. Held to have jurisdiction—To determine the amount of an inheritance tax. State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

To determine who are the persons beneficially entitled to an estate. Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

To determine to whom an estate reduced to personalty should be apportioned, including the rights of a child adopted by the decedent by an agreement valid under the laws of the state where made. Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

To determine whether a pretermitted child is entitled to inherit under G. S. 1913, § 7260. Odenbreit v. Utheim, 131 Minn. ——, 154 N. W. 741.

7779. Held not to have jurisdiction—To determine what taxes will accrue in the future, in assigning an estate to trustees for the beneficial use of another. State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

To determine the rights of parties growing out of a conveyance of land with a condition for the support of the grantor for life. Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871.

(39) Odenbreit v. Utheim, 131 Minn. —, 154 N. W. 741.

(42) See Order of St. Benedict v. Steinhauser, 179 Fed. 137.

RECORDS

7782. Import verity—Collateral attack—(65) Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

PRACTICE

7783. Petition—The petition is jurisdictional. If jurisdiction is not acquired by petition subsequent proceedings are void and subject to collateral attack. Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

7784. Vacation of orders and judgments—Amendment—A probate court may open a default to allow a contest on the probate of a will. Where an application to open a default is denied by the trial court, such action will not be disturbed on appeal, unless the record discloses an abuse of discretion in passing upon, not only the excuse for the default, but also upon the good faith and merit in the claim sought to be asserted by the applicant. Southern Minn. Invest. & Loan Co. v. Livingston, 117 Minn. 421, 136 N. W. 8. See Digest, § 10253.

A surety on a representative's bond may be heard on an application to correct an order settling the account of the representative or to set it aside for fraud. Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

(70) Knutsen v. Krook, 111 Minn. 352, 358, 127 N. W. 11.

APPEAL TO DISTRICT COURT

7785. Who may appeal—An executor propounding a will by which he is nominated may appeal as an "aggrieved party" from an order denying its probate. Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

An executor may appeal from a judgment of the probate court, construing the will and assigning the property to a devisee. Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110.

A foreign consul may appeal from an order appointing an administrator of the estate of one of his nationals. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

Whether a surety on a representative's bond may appeal is an open question. Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302.

Under G. S. 1913, § 7491, a party entitled to appear in the probate court and object to the probate of a will, but who does not so appear, may appeal to the district court from an order admitting the will to probate and may there contest the will. Schleiderer v. Gergen, 129 Minn. 248, 152 N. W. 541.

(01) Casey v. Brabec, 111 Minn. 43, 126 N. W. 401.

See Note, 119 Am. St. Rep. 740.

7786. What orders, judgments and decrees appealable—No appeal lies from the appointment of a special administrator. Castigliano v. Great Northern Ry. Co., 129 Minn. 279, 152 N. W. 413.

7788. Time—The thirty days within which an appeal may be taken from an order, judgment, or decree of a probate court, under section 3874, R. L. 1905 (G. S. 1913, § 7492), commences to run from the time of notice of the order or judgment appealed from. When no notice is given or shown to have come to a person entitled to appeal, an appeal may be taken at any time within six months from the entry of the order or decree. The burden is upon the party moving to dismiss an appeal, which it is claimed should have been taken within thirty days, to show notice of some kind to the appealing party of the entry of the order or judgment by the probate court. Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

7794. Trial in district court—(14, 21) First National Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

7795. Judgment in district court—Costs—(26) Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

(28) Casey v. Brabec, 111 Minn. 43, 126 N. W. 401.

7795a. Scope of review—Claim to estate—(01) Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11.

PROCESS

IN GENERAL

7798. Formal requisites—Writs of habeas corpus should be attested in the name of the presiding judge though granted by a court commissioner. But an attestation in the name of the commissioner is not fatal. State v. Haugen, 124 Minn. 456, 145 N. W. 167.

(35) State v. Haugen, 124 Minn. 456, 145 N. W. 167.

7800. When deemed issued—(44) See Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

SUMMONS—IN GENERAL

7802. Nature—A mere notice—Legislative discretion—(46) Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398.

7805. Defects—Waiver—Amendment—A summons in a civil action may be amended upon proper application, to make the time, as therein stated, for answering the complaint, conform to the statute. Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398.

The use of a wrong initial in the name of a defendant is not fatal where the summons is in fact served on the right party. The rule is otherwise where service is by publication. Willard v. Marr, 121 Minn. 23, 139 N. W. 1066. See Digest, § 6921.

Confused as to the true first names of a father and son, the attorney who prepared the complaint and issued the summons inserted the initials of the son, instead of the first name or initial of the father in the papers. The attorney intended to make the father a party defendant and not the son. He served the summons upon the father personally. It is held, that, before the trial, upon proper notice the court had power to amend the summons and files by striking therefrom the initials of the son wherever the same occurred and inserting in lieu thereof the initial or first name of the father. Morrison County Lumber Co. v. Duclos, 131 Minn. ——, 154 N. W. 952.

SERVICE OF SUMMONS

7807. Proper service essential—Notice of action insufficient—(55) Edwards v. Hennepin County, 116 Minn. 101, 133 N. W. 469.

(56) Note, 61 Am. St. Rep. 485.

7809. Persons exempt from service—See Note, 76 Am. St. Rep. 534.

7810. Personal service—It is provided by statute that service by leaving the summons at the defendant's usual place of abode, with a person

of suitable age and discretion then residing therein, shall be deemed a personal service. G. S. 1913, § 7732; Willard v. Marr, 121 Minn. 23, 139 N. W. 1066.

(65) See McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708 (handing summons to defendant in a plain, sealed and unaddressed envelope).

7812. What constitutes "house of usual abode"—Where a defendant has a store, shop, or office on the first floor of a building, and lives with his family in rooms adjoining or on the floor above, and a copy of a summons is left in such store, shop, or office, with a person of suitable age and discretion then residing in the rooms in which defendant lives, such summons is left at the house of usual abode of defendant and the service is valid. Lovin v. Hicks, 116 Minn. 179, 133 N. W. 575.

Whether defendant's house of usual abode was in a particular city and in a particular building, held questions of fact, and the findings thereon sustained. Lovin v. Hicks, 116 Minn. 179, 133 N. W. 575.

(70, 73) Lovin v. Hicks, 116 Minn. 179, 133 N. W. 575; Willard v. Marr, 121 Minn. 23, 139 N. W. 1066 (defendant temporarily absent in another state to seek a location).

7813. On domestic private corporations—(76) Schlesinger v. Modern Samaritans, 121 Minn. 145, 140 N. W. 1027 (benefit society—service set aside because not made on an officer of the society specified in the statute).

7814. On foreign corporations—In general—Query whether the statute authorizes only such actions as originate in this state, or are based on contracts entered into in this state, or with reference to a subject-matter within this state, or upon contracts to be performed here. Banks v. Penn. Railroad Co., 111 Minn. 48, 53, 126 N. W. 410.

Several foreign railroad corporations, having no lines in this state, entered into an arrangement by which they adopted the name "Blue Ridge Despatch," and under that name established an agency in the city of Minneapolis, and appointed an agent with authority to solicit business for shipment over its lines. In pursuance of such authority, the agent received money from shippers, in payment for transporting goods over its lines, issued bills of lading, and designated the point of delivery to the initial carrier in Minneapolis. In an action to recover damages, brought by a shipper whose goods were received by the Blue Ridge Despatch at Minneapolis for through shipment, held, that service of process upon the agent at Minneapolis was service upon the constituent railroad corporations. Archer-Daniels Linseed Co. v. Blue Ridge Despatch, 113 Minn. 367, 129 N. W. 765.

While R. L. 1905, § 4109, does not in terms require that a foreign corporation must be doing business in the state in order that process may be served upon it by service on its officers or agents in the state, yet it is

the settled rule of construction placed thereon by this court that in order to meet the requirements of due process of law such a corporation must be doing business in the state in order to be so served. In determining whether a corporation is "doing business" in the state within the purview of this statute, as construed by the court, each case must depend upon its own facts and circumstances; but it must at least appear that the transactions of the foreign corporation are such that, through the representative character of its agents operating in the state, it may be said that the corporation itself is in the state. The question as to whether a foreign corporation is "doing business" in the state so as to be subject to service of process under R. L. 1905, § 4109, is entirely distinct from the question as to whether such a corporation is "doing business" in the state within the purview of the Somerville Law (R. L. 1905, §§ 2888–2890), relative to the conditions upon which a foreign corporation may be allowed to do business in the state; and it does not follow that business which, by reason of the Interstate Commerce Law, does not bring the corporation within the Somerville Law, may not nevertheless bring it within R. L. 1905, § 4109. Evidence examined, and held to show that the defendant, a foreign corporation, was "doing business" in the state to such an extent that service on its president, while temporarily in the state on the business of such corporation, was sufficient, under R. L. § 4109, to confer jurisdiction upon the trial court. Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291.

Summons was served on a foreign railroad corporation by leaving a copy with a soliciting freight agent employed by defendant and other corporations operating connecting lines and associated under the name of New York Central Fast Freight Lines. Under that name defendant and its connecting lines solicit freight systematically throughout the state of Minnesota for transportation out of the state. They transport freight solicited under a single through tariff. They maintain offices in the state for the purpose of such solicitation. This cause of action arose out of a shipment of freight from a point in Minnesota to New York City which was solicitated in this manner. The statutes of the state authorize service of a summons on a foreign corporation by service upon an agent in the state for the solicitation of freight traffic over its lines outside the state. The statute authorized service of summons upon the agent who was in fact served. The agent of the associated corporations was the agent of each of them. W. J. Armstrong Co. v. New York etc. R. Co., 129 Minn. 104, 151 N. W. 917.

Three conditions are necessary to give a court jurisdiction in personam over a foreign corporation: First, it must appear that the corporation was carrying on business in the state; second, that the business was transacted by some agent of the corporation in

the state; third, the existence of some local law making such corporation amenable to suit. Where a state by statute designates an agent of a particular character as an agent upon whom process may be served, the corporation by sending such an agent into the state assents to the statute and clothes the agent with authority to receive service in its behalf. Without invoking this principle, the state may designate the agent upon whom service of summons may be made, but the agent must be one sustaining such relation to the corporation that such service constitutes due process of law. A foreign corporation keeping and maintaining agents in this state for procuring business for its benefit and profit may be required to answer in this state to a citizen thereof for a breach of contract or duty arising out of business so procured, and an agent engaged in procuring such business may be declared the representative of the corporation for the purpose of bringing it into court. W. J. Armstrong Co. v. New York etc. R. Co., 129 Minn. 104, 151 N. W. 917; Lagergren v. Penn. Railroad Co., 130 Minn. 35, 152 N. W. 1102; Lattu v. Rainy River Improvement Co., 131 Minn. ——, 154 N. W. 950. See 28 Harv. L. Rev. 804.

Defendant, a Maine corporation with its place of business in Illinois, sent agents into Minnesota to sell its own corporate stock. One of these agents sold stock to plaintiff in Minnesota, and in the course of the negotiations made representations out of which this cause of action arose. Defendant's principal executive officer came several times to Minnesota for the purpose of adjusting this and other claims, and did adjust some claims here. The president of the corporation resided in Minnesota and occasionally performed official acts in the state. Summons in this action was served upon the president in this state. Held, the corporation had brought itself within the state and the court acquired jurisdiction by the service. Atkinson v. United States Operating Co., 129 Minn. 232, 152 N. W. 410.

That the foreign corporation must be doing business in this state in order that a service upon an agent here will constitute due process of law is plain. But if the corporation transacts business within the state of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the state where the service is made, such a service constitutes due process of law. Lattu v. Rainy River Improvement Co., 131 Minn. ——, 154 N. W. 950.

Appellant, a foreign corporation, was engaged in an advertising and selling campaign in Minnesota. One C, its agent in this state, who had charge of its business, had an office and place of business in this state. He employed agents and solicitors who advertised and sold and delivered defendant's products to customers in this state. A stock of defendant's goods was kept on hand at C's place of business, and most of the goods sold and delivered in this state by such solicitors and agents were

procured from the stock in C's charge. The summons and complaint in this action were served on C. Held, that the corporation was doing business in this state, and that the court acquired jurisdiction by such service. Jenks v. Royal Baking Powder Co., 131 Minn. ——, 155 N. W. 103.

(79) Fawkes v. American M. C. S. Co., 176 Fed. 1010.

(80) Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291. See Kulberg v. Fraternal Union, 131 Minn. ——, 154 N. W. 748; St. Louis S. W. Ry. Co. v. Alexander, 227 U. S. 218.

(81) Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291; W. J. Armstrong Co. v. New York etc. Ry. Co., 129 Minn. 104, 151 N. W. 917.

(82) State v. Queen City Fire Ins. Co., 114 Minn. 471, 474, 131 N. W. 628.

(85) Archer v. Blue Ridge Despatch, 113 Minn. 367, 129 N. W. 765.

7814a. On foreign benefit societies—Special provision is made by statute for service on foreign fraternal beneficiary associations, and the method thereby prescribed is exclusive. The statute is not unconstitutional because it gives thirty days in which to answer, while all other corporations are given but twenty days. G. S. 1913, § 3555; Spencer v. Court of Honor, 120 Minn. 422, 139 N. W. 815; Oxmon v. Modern Woodmen, 124 Minn. 390, 145 N. W. 171; Kulberg v. Fraternal Union, 131 Minn. ——, 154 N. W. 748. See Loeway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398 (amendment of summons as to time for answering).

Section 3555, G. S. 1913, authorizing service of process upon a foreign beneficiary association by serving the same upon the insurance commissioner provides, "that no such service shall be valid or binding against any such association when it is required thereunder to file its answer, pleading or defence in less than thirty days after the date of such service." The summons in question required defendant to answer within twenty days from service thereof, and judgment by default was entered twenty-two days after such service. Held, that such service and judgment are not binding upon defendant and must be set aside. Oxmon v. Modern Woodmen, 124 Minn. 390, 145 N. W. 171.

Defendant, a beneficiary association organized under the laws of the state of Colorado, consolidated with a like association of the state of Nebraska, which had previously assumed a certain policy of insurance issued to a resident of this state by a prior association organized under the laws of Iowa, at a time when such prior association was authorized to transact its business in this state. Defendant by the consolidation agreement assumed liability under that policy and other like policies issued by the older association to members residing in this state, and

continued thereafter to collect and receive premiums due thereon. Defendant never complied with section 3555, G. S. 1913, by the appointment of the state insurance commissioner for the service of process upon it in actions brought in this state. Held, that defendant is estopped to set up its failure to comply with the statute, or to assert that the service of the summons upon the insurance commissioner in this action was insufficient to confer jurisdiction upon the court to hear and determine the action. The assumption of liability, in the form of reinsuring existing insurance contracts and the collection of premiums due thereon from members residing in the state, and to thus keep and maintain the contracts in force, constituted the "transaction of business" in this state. Kulberg v. Fraternal Union, 131 Minn. ——, 154 N. W. 748.

See § 4725.

PROOF OF SERVICE

7818. Return of sheriff—(92) Note, 124 Am. St. Rep. 756.

(93) Oertel v. Pierce, 116 Minn. 266, 133 N. W. 797; Lunschen v. Peterson, 120 Minn. 288, 139 N. W. 506; Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534.

7820. Supplying or amending proof nunc pro tunc—(5) Lovin v. Hicks, 116 Minn. 179, 133 N. W. 575 (it is the fact of service that controls on the question of whether the court has acquired jurisdiction, and not the proof of such fact as made or filed).

PUBLICATION OF SUMMONS

7821. In what cases authorized—Publication of summons is authorized when the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action. He may have property in the state within the meaning of the statute though he has conveyed it in fraud of creditors. Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915.

Publication of summons is authorized in an action against a nonresident partner to determine the plaintiff's interest in real estate of the partnership, even though a partnership accounting may be necessary to determine that interest. Smith v. Smith, 123 Minn. 431, 144 N. W. 138.

Where the defendant in an action to determine adverse claims is a resident of the state, and has a record title in which his surname appears somewhat different from his true name, but such that from it he could be found and served within the state, jurisdiction cannot be acquired of him by publication. Arnold v. Visenaux, 129 Minn. 270, 152 N. W. 640.

(9) Smith v. Smith, 123 Minn. 431, 144 N. W. 138 (action to dissolve a partnership, for an accounting, and to determine plaintiff's interest in real estate of the firm).

7823. Affidavit to authorize publication—Where an affidavit is defective, not in omitting to state a material fact, but in the mode of stating it or in the degree of proof, the resulting judgment, even though erroneous and voidable by direct attack, is not void on its face and subject to collateral attack. Thompson v. Thompson, 226 U. S. 551.

(18) See Note, 47 L. R. A. (N. S.) 499.

7829. Affidavit of publication—(30) See Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517.

7830. Form of summons—Defects—Misnomer—The general rule in cases of constructive service of process by publication tends to strictness, but even in names due process of law does not require ideal accuracy. Where there is a misnomer, neither the test of idem sonans nor that of substantial similarity in appearance in print is the test. Grannis v. Ordean, 234 U. S. 385.

(35) See Willard v. Marr, 121 Minn. 23, 139 N. W. 1066; Arnold v. Smith, 121 Minn. 116, 140 N. W. 748 (designating a married woman by her maiden surname).

(36) See Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

(37) Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575, 1026, affirmed, 234 U. S. 385.

7831. Personal service out of state—(38) See Smith v. Smith, 123 Minn. 431, 144 N. W. 138.

(39) Wheaton Flour Mills Co. v. Welch, 122 Minn. 396, 142 N. W. 714.

7832. Statute to be followed and construed strictly—(40) Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575, 1026; Arnold v. Smith, 121 Minn. 116, 140 N. W. 748; Jenson v. Anderson, 123 Minn. 199, 143 N. W. 361. See Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517.

7833. When and how jurisdiction acquired—(42) Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

7834. Presumption of jurisdiction—The rule that upon constructive service of process the record must affirmatively show compliance with the statutory requirements applies only on a direct attack on the judgment. The usual presumption of jurisdiction applies upon a collateral attack. Turrell v. Warren, 25 Minn. 9. See Digest, §§ 2347, 5141. There is no good reason for the distinction. See 25 Harv. L. Rev. 566.

7835. Constitutionality of statutes—The power of a state over property within its limits is supreme. Under proper legislative authority

almost any kind of an action may be instituted and maintained against nonresidents to the extent of any interest in property they may have within the state, and the court may make any form of decree known to the law which can be enforced through its control of property within the state, if the property is brought within its grasp, either by seizure or by specifically making it the subject of the action, and jurisdiction in this kind of cases may be obtained by publication. This power to render judgment affecting title to property in such cases must be conferred by statute. The statutes of this state confer power to pass title to land by a judgment in all cases in which such relief is appropriate to carry the judgment of the court into effect and in which the court has jurisdiction over the land, even though it has not jurisdiction over the person. The courts of this state may, by constructive service, acquire jurisdiction in an action against a non-resident partner to determine the plaintiff's interest in real estate of the partnership, even though a partnership accounting may be necessary to determine that interest. Smith v. Smith, 123 Minn. 431, 144 N. W. 138.

The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem. Broderick's Will, 21 Wall. (U. S.) 503; Tilt v. Kelsey, 207 U. S. 43.

(44) See Riley v. Pearson, 120 Minn. 210, 139 N. W. 361.

(46) Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121; P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417.

(47) See Riley v. Pearson, 120 Minn. 210, 139 N. W. 361; 24 Harv. L. Rev. 486.

(48) See Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534; 24 Harv. L. Rev. 486.

7836. Extent of jurisdiction acquired over non-residents—(50) P. H. & F. M. Roots Co. v. Decker, 111 Minn. 458, 127 N. W. 417; Spokane Merchants Assn. v. Coffey, 123 Minn. 364, 143 N. W. 915; Smith v. Smith, 123 Minn. 431, 144 N. W. 138.

ABUSE OF PROCESS

7837. What constitutes—(51) See Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Carel v. Haedecke, 123 Minn. 435, 143 N. W. 1124 (action for maliciously suing out a writ of attachment and levying upon exempt property—record in a subsequent suit between plaintiff and one of the defendants held inadmissible); Digest, §§ 3551–3553.

PROPERTY

IN GENERAL

7850. What constitutes—A membership in the Duluth Board of Trade is property. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

7851a. Distinctions between personalty and realty—The disposition of the later cases has been to dispense with all fictitious distinctions between transfers of real and personal property and to apply the same rules to both, except where distinctions are founded upon some substantial principle of law or are required by some statutory enactment. Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

7852. Above and below surface—The owner of land may convey any part of it. He may convey some particular deposit or stratum and retain the surface, or he may convey a part or all of the mineral strata or deposits and retain the surface. Such strata or deposits are land. Carlson v. Minn. Land & Colonization Co., 113 Minn. 361, 129 N. W. 768.

7853a. Expectant interests in personalty—In this state expectant interests in personalty are recognized. State v. Probate Court, 102 Minn. 268, 291, 113 N. W. 888; Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

TITLE

7854. Definition—Title by operation of law is one acquired by a person, not by his own act or agreement, but by a single operation of law, as in the case of the devolution of title upon an administrator, or where the estate of an intestate is cast upon the heir. Burke v. Backus, 51 Minn. 174, 178, 53 N. W. 458.

An equitable title is a right in a person to have the legal title to property transferred to him upon the performance of specified conditions. Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440.

OWNERSHIP

7855. Definition—(96) Nature of ownership. Ames, Lectures on Legal History, 192.

POSSESSION

7856. Definition—Actual possession and occupancy are facts and not conclusions of law. The right to such possession is one thing and may be dependent upon various facts. Steele v. Fish, 2 Minn. 153 (129).

Possession is use, generally, but there may be possession or occupancy without use. Simons v. Munch, 115 Minn. 360, 372, 132 N. W. 321.

(9) See National Safe Deposit Co. v. Illinois, 232 U. S. 58 (commenting on the ambiguity of the word); Pollock, Genius of the Common Law, 119.

(14, 16) Note, 46 L. R. A. (N. S.) 487.

PUBLIC GRANTS—See Statutes, 8990.

PROSTITUTION

7860a. Houses of prostitution—See § 2752b.

7860b. Indictment—An indictment for inducing, enticing and procuring a female in this state to enter a house of prostitution in another state, held sufficient. State v. Stickney, 118 Minn. 64, 136 N. W. 419.

PUBLIC LANDS

IN GENERAL

7861. Definition—(28) Union Pacific R. Co. v. Harris, 215 U. S. 386.

7863. Federal ownership and control—State courts—The state courts have no jurisdiction over the proprietary title of the United States to land within the state. Shevlin-Mathieu Lumber Co. v. Fogarty, 130 Minn. 456, 153 N. W. 871.

An action involving the validity of a timber contract between the United States and an individual for the removal of timber from lands owned by the United States, cannot be entertained in the state courts unless the United States becomes a party. See Potter v. Engler, 130 Minn. 510, 153 N. W. 1088.

7865a. Duty of settlers to mark boundaries—G. S. 1894, § 6130, requiring settlers to mark out the boundaries on their claims, is practically superseded by R. L. 1905, § 4453. It has been held not to defeat an action by a settler for conversion of timber. Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474.

LAND DEPARTMENT

7877. Negligence and mistakes—Effect on rights of entryman—The rights of an entryman held unaffected by the mistake of the land officers. Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474.

RAILROAD LAND GRANTS

7888. Indemnity lands—Selection—Withdrawal—(73) Northern Pacific Ry. Co. v. Wass, 104 Minn. 411, 116 N. W. 937, reversed, 219 U. S. 426; Osborn v. Froyseth, 105 Minn. 16, 116 N. W. 1113; Id., 107 Minn. 568, 119 N. W. 1135, affirmed, 216 U. S. 571; Houston v. Northern Pacific Ry. Co., 109 Minn. 273, 123 N. W. 922, reversed, 231 U. S. 181; Morris v. Svor, 114 Minn. 303, 131 N. W. 324; Id., 118 Minn. 344, 136 N. W. 852, reversed, 227 U. S. 524; Kinyon v. Christianson, 120 Minn. 335, 139 N. W. 597; Slocum v. Christianson, 120 Minn. 528, 139 N. W. 599; Weyerhauser v. Hoyt, 219 U. S. 380.

7891. Transfer of indemnity lands—A deed by a railway corporation, made within three years next after it had been dissolved by the judgment of this court, in trust for the benefit of its stockholders, vested in the trustee the right to make selections of indemnity lands as fully as the corporation could have done, if it had not been dissolved. The findings of fact sustain the conclusion of law and judgment of the trial court to the effect that the plaintiff is the owner of the land here in question and entitled to its possession by virtue of a selection thereof by such trustee as indemnity land, the approval of the federal Land Department, and a conveyance by the trustee to the plaintiff. Morris v. Svor, 118 Minn. 344, 136 N. W. 852, reversed, 227 U. S. 524.

7894. Rights of settlers—(81) Northern Pacific Ry. Co. v. Wass, 104 Minn. 411, 116 N. W. 937, reversed, 219 U. S. 426; Osborn v. Froyseth, 105 Minn. 16, 116 N. W. 1113; Id., 107 Minn. 568, 119 N. W. 1135, affirmed, 216 U. S. 571; Houston v. Northern Pacific Ry. Co., 109 Minn. 273, 123 N. W. 922, reversed, 231 U. S. 181; Morris v. Svor, 114 Minn. 303, 131 N. W. 324; Id., 118 Minn. 344, 136 N. W. 852, reversed, 227 U. S. 524; Kinyon v. Christianson, 120 Minn. 335, 139 N. W. 597; Slocum v. Christianson, 120 Minn. 528, 139 N. W. 599.

DEEDS, MORTGAGES AND CONTRACTS BEFORE PATENT

7898. Contracts of pre-emptor to convey—(86) See Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

7899. Contracts of homesteader to convey—(92) Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

7900. Mortgages prior to patent—(93) Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

7903. Conveyance by entryman under Chippewa treaty—The right and privilege given to certain persons under the Chippewa treaty of February 22, 1855 (10 Stat. 1165), to locate and enter 160 acres of land in the ceded territory, was assignable, and an irrevocable power of at-

torney, executed by the one entitled to this right for a valuable consideration, which released to the donee of the power all of the donor's beneficial interests to be derived from the exercise of such right, passed the legal title to the donee to land subsequently located, entered, and patented thereunder, although, according to the prevailing practice of the United States land office, the entry was made and the patent issued in the name of the donor of the power. The finding that the actual location and entry was made by the donee in the power of attorney is sustained by the evidence, and the finding that the prevailing practice of the United States land office required patents to issue in the name of the person given the right of entry by the treaty, although such right had been assigned, is considered not material, even if it should not be held that such practice prevailed to such an extent that courts are charged with judicial knowledge thereof. Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

PATENT

7910. Issuance to purchaser from entryman—(5) See Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

PRE-EMPTION

7923. Inchoate rights of entryman—(29) See Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

7924. Under treaty of 1855 with Chippewa Indians—(30) See Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

HOMESTEADS

7928. Entry—Filing application—A finding that a party filed a homestead entry on certain land on a certain day held not justified by the evidence. Morris v. Svor, 114 Minn. 303, 131 N. W. 324.

7929. Inchoate rights of entryman—When an entry, under the homestead laws, is made upon a portion of the public domain, the tract so entered remains the property of the United States until final proof is made and the entryman is entitled to a patent without the performance of any further act upon his part. When he has performed all the conditions necessary in order to acquire title, he then becomes the equitable owner of the land, and it is subject to taxation under the laws of the state. Prior to the act of Congress of May 20, 1908, land of the United States entered as a homestead, but not finally proved as such, was not subject to the lien of a drainage assessment. State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

Inchoate rights under a commuted homestead entry certificate held lost by a failure to make further proof within the time allowed after a

suspension of the certificate for non-compliance with the homestead laws. Lenz v. Hobart, 112 Minn. 8, 127 N. W. 494.

The possession of an entryman entitles him to sue for a conversion of timber growing on the land. Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 131 N. W. 474.

A homestead entryman, in possession of his claim under a valid entry, is, except as between himself and the United States, the owner of all timber cut by him on the claim, and need not, in an action for the destruction by fire of such timber, allege and prove that it was cut in good faith for the purpose of preparing the land for tillage. Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275.

A person who has complied with all the requirements necessary to entitle him to a patent of land from the United States government is regarded as the equitable owner thereof. In the event of his death, the land will form part of his estate and will descend in accordance with state laws. This applies to a homestead entryman who has commuted to a cash purchase and has made final proof and payment. Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

7932. Abandonment—The fact that, after a homesteader had settled on public land within the indemnity limits of a railroad land grant and tendered a filing upon a quarter section, he again tendered a homestead application limited to three 40-acre tracts of the quarter section, is not a waiver or abandonment of his rights under the former application so far as concerns the 40-acre tract not included in the second application. Slocum v. Christianson, 120 Minn. 528, 139 N. W. 599.

7934. Soldier's additional homestead—(42) See Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

7935. Exemption from liability for debts—A judgment against the patentee is not a lien upon land acquired under the homestead laws, if the debt for which the judgment is rendered was contracted prior to the issuing of a patent for such land. The time when a debt was contracted, within the meaning of this statute, is the time when the consideration was received, and the obligation to pay was assumed by the patentee, even though thereafter renewal notes were given and by assignments and distribution of the debt the creditor changed. Ash v. Eriksson, 115 Minn. 478, 132 N. W. 997.

A person who has complied with all the requirements necessary to entitle him to a patent of land from the United States government is regarded as the equitable owner thereof. In the event of his death, the land will form part of his estate and will descend in accordance with state laws. This applies to a homestead entryman who has commuted to a cash purchase and has made final proof and payment. The probate court has jurisdiction over such land. It may rightfully order it sold to

PUBLIC OFFICERS

IN GENERAL

7984. Definitions—(40) Note, 63 Am. St. Rep. 181.

7988. Term—An interregnum should not be permitted in the transition of forms of government or change of officers. Woodbridge v. Duluth, 121 Minn. 99, 140 N. W. 182.

(53) State v. Billberg, 131 Minn. —, 154 N. W. 442.

(59) Woodbridge v. Duluth, 121 Minn. 99, 140 N. W. 182. See State v. Windom, 131 Minn. —, 155 N. W. 629; Note, 50 L. R. A. (N. S.) 365, 374.

(60) See State v. Windom, 131 Minn. —, 155 N. W. 629.

(62) Prenevost v. Delorme, 129 Minn. 359, 152 N. W. 758. See Note 50 L. R. A. (N. S.) 336, 359.

7989. Resignation—(63) Note, 36 Am. St. Rep. 523.

(65) Note, 113 Am. St. Rep. 516.

7990. Vacancies—A person was duly declared elected to the office of county superintendent of schools. The opposing candidate, being the incumbent of the office, instituted a contest on the ground that the successful candidate had violated the corrupt practices act. The contestant made no claim of having been elected. Judgment was for contestee in the district court. The contestant surrendered the office, the contestee qualified and assumed its duties. Upon the contestant's appeal judgment of ouster was directed to be entered against contestee. He thereupon resigned, and respondent was appointed to fill the vacancy. Held, that a vacancy existed which authorized the appointment of respondent. State v. Billberg, 131 Minn. —, 154 N. W. 442. See State v. Windom, 131 Minn. —, 155 N. W. 629.

(66) See State v. Windom, 131 Minn. —, 155 N. W. 629.

ELIGIBILITY

7992. In general—Constitutional provision—(72) State v. Schmahl, 125 Minn. 104, 145 N. W. 794. See Digest, § 8836.

7993. Women—The constitutional eligibility of women to hold any office "pertaining to the management of schools or libraries," may be restricted or indirectly nullified by the adoption of a home rule charter. State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

7995. Incompatible offices—(78) See 10 Col. L. Rev. 67; Note, 86 Am. St. Rep. 578.

7997. Legislative control—(80) See State v. St. Paul, 128 Minn. 82, 150 N. W. 389; 10 Col. L. Rev. 350.

POWERS, DUTIES AND LIABILITIES

7998. Functions of office—The duties imposed by law upon public officers are functions and attributes of the office, to be performed by the incumbent, though they may have been left undone by a predecessor. State v. Brooks-Scanlon Lumber Co., 123 Minn. 400, 142 N. W. 717.

(01) State v. Johnson, 111 Minn. 10, 126 N. W. 479.

7998a. Delegation of powers—A public officer, charged with the performance of official duties, cannot delegate his authority to a person not authorized by law to act, nor can he bind the public by any such authorization, or by any attempt at ratification. Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452.

7999. Liability on contracts—If the members of a state commission contracted debts in behalf of the commission, in excess of their appropriation, without disclosing its condition, they are personally liable; but if they disclosed the condition of the appropriation, so that the plaintiffs, who contracted to do work for them, knew that the fund would be insufficient to pay for the work for which they contracted, and they dealt with them as a commission, without stipulating for personal liability, they cannot recover of them personally. With the ground of liability as stated there was no variance between the complaint alleging a contract with the defendants and proof that the defendants did not disclose the condition of the fund; nor did the fact that the plaintiffs obtained knowledge of the condition of the fund, after the performance of a substantial portion of the work, prevent a recovery. Wilkinson v. Mercer, 125 Minn. 201, 146 N. W. 362.

(83) Wilkinson v. Mercer, 125 Minn. 201, 146 N. W. 362.

8000. Liability for money received—(86) Loss from failure of bank. Note, 36 L. R. A. (N. S.) 285.

8001. Liability for torts—Negligence—Immunity from suit is a high attribute of sovereignty and a prerogative of the state itself which cannot be invoked by public agents when sued for their own torts. Hopkins v. Clemson Agricultural College, 221 U. S. 636.

A public officer who neglects to perform, or performs negligently, a ministerial duty imposed upon him by statute is liable to one who is within the protection of the statute, for any damages proximately resulting to him from such neglect. Howley v. Scott, 123 Minn. 159, 143 N. W. 257 (county auditor held liable to owner of property for failure to place on the tax lists opposite such property the words, "Sold for taxes"); Tholkes v. Decock, 125 Minn. 507, 147 N. W. 648 (rule applies to township highway officers—leaving excavations without guards, lights or other warnings at night); State v. Duluth, 125 Minn. 425, 428, 147 N.

W. 820. See Foster v. Malberg, 119 Minn. 168, 137 N. W. 816; Digest, § 6976; Note, 52 L. R. A. (N. S.) 142.

Mere neglect of official duty cannot give rise to a cause of action where injury may or may not result, depending upon the conjectural and undeterminable action of some third person. In such case, the injury being dependent upon whether the third person, had he been moved to action, would have refrained from doing a particular thing, the burden is upon the complaining party affirmatively to show that the thing would have been left undone, in consequence of which injury resulted from the official neglect. Foster v. Wagener, 129 Minn. 11, 151 N. W. 407.

The doctrine of contributory negligence applies, or at least the doctrine of proximate cause, to the extent that where one, knowing of an officer's default, or charged with notice thereof, nevertheless goes ahead and changes his position to his injury, he cannot recover. Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

The officers of a school district held liable for discharging a school teacher maliciously for the purpose of injuring her professional reputation, and not in the proper performance of their official duties. Christensen v. Plummer, 130 Minn. 440, 153 N. W. 862.

8002a. Liability for unlawful disbursements—A town treasurer, who pays out the money of his town upon orders issued in payment of illegal claims, presented to and allowed by the town board, knowing all the facts disclosing the illegality of the claims, is liable in an action by the town for a return of the money, notwithstanding the fact that the orders may have been fair on their face. Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452.

8002b. Not liable for authorized acts—Public officers who perform the physical acts required to make a public improvement which, though irregularly made, is performed pursuant to the direction of the municipality, and is one which is within the authority of the municipality to order, are not trespassers or personal wrongdoers. Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856.

8002c. Disability to contract with public—Secret profits—Public, including municipal, office or agency, entails a natural disability on the part of the officer, reinforced by gravest considerations of public policy, to contract or deal personally, either directly or indirectly, with his principal, concerning matters within his province as such officer or agent, without regard either to the fairness or unfairness of the transaction, or to whether the principal is or is not benefited thereby. This rule exists independently of statute, and its force is not lessened nor its scope restricted by statutory or ordinance declarations thereof. The proscribed transaction cannot be ratified except by the most unqualified acceptance by the duly constituted authorities, with full knowledge, and then only

to the extent of rendering the principal liable, as upon implied contract, for the reasonable value of the services or property received by it, which does not include profits made by the officer. Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812. See § 6712.

COMPENSATION

8008. None except as prescribed by law—(3) Vistaunet v. Thief River Falls, 111 Minn. 537, 126 N. W. 1134. See Digest, § 2293.

REMOVAL AND SUSPENSION

8010. In general—Proceedings for the removal of public officers are not governed by the strict rules which prevail in trials in courts of law. State v. Common Council, 53 Minn. 238, 243, 55 N. W. 118; State v. Eberhart, 116 Minn. 313, 133 N. W. 857; State v. Mayor, 125 Minn. 425, 430, 147 N. W. 820.

When the appointive power is authorized to remove at pleasure, it may do so even if the officer has a fixed tenure. Elective municipal officers cannot be removed except for malfeasance or nonfeasance in office. Sykes v. Minneapolis, 124 Minn. 73, 144 N. W. 453.

Chapter 263, Laws of 1907, known as the "Old Soldier's Law," does not apply to the position of deputy inspector of oils, as chapter 502, Laws of 1909, expressly empowers the chief inspector to remove such deputies at pleasure. State v. Rush, 131 Minn. ——, 154 N. W. 947.

Removal for "cause." Note, 135 Am. St. Rep. 250.

(5) Sykes v. Minneapolis, 124 Minn. 73, 144 N. W. 453; State v. McColl, 127 Minn. 155, 149 N. W. 11.

(6) Sykes v. Minneapolis, 124 Minn. 73, 144 N. W. 453.

See § 6564.

8011. By governor—Statute—(7) State v. Eberhart, 116 Minn. 313, 133 N. W. 857 (removal of county attorney—grounds—general incompetency and neglect of duty are sufficient grounds for removal—conviction of a crime is not essential—the terms "malfeasance" and "nonfeasance" have no strict technical meaning in this connection—failure to prosecute violations of the liquor laws—specification of charges held sufficient —strict rules of pleading inapplicable—decision of governor reviewable by certiorari—evidence held to justify removal).

DE FACTO OFFICES AND OFFICERS

8012. Definition of de facto officer—(13, 14) State v. McIlraith, 113 Minn. 237, 129 N. W. 377. See Note, 140 Am. St. Rep. 164.

8013. Basis of rule—(15) See 24 Harv. L. Rev. 658.

8017. Validity of acts of de facto officer—Emoluments of office—(20) State v. McIlraith, 113 Minn. 237, 129 N. W. 377.

(22) 24 Harv. L. Rev. 658; 26 Id., 555; 10 Mich. L. Rev. 178; Note, 32 L. R. A. (N. S.) 949; 140 Am. St. Rep. 164. Recovery of emoluments by de jure officer. Albright v. Sandoval, 216 U. S. 331.

OFFICIAL BONDS

8019. Construction—Whatever may be the extent of the liability of an officer, personally or otherwise, outside of his bond, so far as his liability on the bond is concerned, it is no greater nor less than that of his sureties on the instrument. The liability of both is measured by the terms of the bond, reasonably, but strictly, construed. Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

8020. Successive terms—Liability—(26) Note, 103 Am. St. Rep. 932.

8021. Officer holding over—(28) Note, 103 Am. St. Rep. 932.

8022. Acts rendering sureties liable—(29) Note, 91 Am. St. Rep. 497.

8026. Who may sue—Leave of court—The statute provides that an official bond shall be security to all persons severally for the official delinquencies against which it is intended to provide, and that any person injured thereby, or who is by law entitled to the benefit thereof, may sue thereon in his own name. G. S. 1913, § 8243; Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

8027. Pleading—A complaint held to show sufficiently that there was a successor in office. Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907.

Under a denial of an appointment the validity of a pretended appointment may possibly be questioned. See Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

QUIETING TITLE

ACTION TO REMOVE A CLOUD

8030. Name and nature of action—Effect of adequate remedy at law. Note, 12 L. R. A. (N. S.) 49.

8031. Who may maintain action—Possession—(44) See Graves v. Achburn, 215 U. S. 331 (necessity of possession by plaintiff).

(46) See Cushing v. Hurley, 112 Minn. 83, 89, 127 N. W. 441.

See Note, 45 Am. St. Rep. 373.

8033. What constitutes a cloud—(54) See Lindberg v. Morrison County, 116 Minn. 504, 134 N. W. 126 (lien of ditch assessment).

8036. Laches—Limitation of actions—(65) See Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

STATUTORY ACTION TO DETERMINE ADVERSE CLAIMS

8039a. What constitutes—A complaint held to authorize an action either to quiet a tax title or to determine adverse claims. Foster v. Clifford, 110 Minn. 79, 124 N. W. 632.

A complaint held sufficient to clear the record of obstructions on a title, regardless of whether the action be called one to determine adverse claims, to remove a cloud, or to quiet title. Cushing v. Hurly, 112 Minn. 83, 127 N. W. 441.

An action held an action to determine adverse claims and not an action for specific performance. Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

8040. Nature and object of action—Legal or equitable—Where both parties rely solely on the legal title claimed respectively by each equitable relief is improper. Roy v. Harrison Iron Mining Co., 113 Minn. 143, 148, 129 N. W. 154.

An action to determine adverse claims may be either legal or equitable, according to the facts and the relief sought; and hence, where the plaintiff sought to have a deed and contract of sale declared to constitute a mortgage, and to have the same adjudged inoperative because of violation of the mortgage tax law, the action was of equitable cognizance, and as such was subject in its determination to the rules that equity will not enforce a forfeiture or grant relief to one who has neither done equity in the premises nor indicated his willingness to do it. Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

(76) Roy v. Harrison Mining Co., 113 Minn. 143, 148, 129 N. W. 154; Macomber v. Kinney, 114 Minn. 146, 161, 128 N. W. 1001, 130 N. W. 851; Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

(77) Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

8042. What claims determinable—The plaintiff, in an action to determine adverse claims, held entitled to show that a warranty deed executed by him to the defendant, and an executory contract of sale back to him, of even date therewith, constituted a mortgage. Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

(82) Axdell v. Tonnesson, 111 Minn. 541, 126 N. W. 1134; Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

8043. Who may maintain action—(87) Hivanen v. Duluth & Iron Range R. Co., 113 Minn. 282, 129 N. W. 510.

8045. Parties defendant—Wife—If a wife is made a party defendant she may assert and defend her inchoate statutory interest in her husband's land. Minneapolis & St. L. R. Co. v. Lund, 91 Minn. 45, 97 N. W. 452.

8046. Unknown defendants—(1) Jenson v. Anderson, 123 Minn. 199, 143 N. W. 361 (failure to publish notice of lis pendens fatal to jurisdiction).

(2) See State v. Westphal, 85 Minn. 437, 89 N. W. 175; American Land Co. v. Zeiss, 219 U. S. 47.

(3) Arnold v. Visenaux, 129 Minn. 270, 152 N. W. 640. See Riley v. Pearson, 120 Minn. 210, 139 N. W. 361.

See Digest, § 7821.

8047. Limitation of actions—Laches—An action to determine adverse claims to unoccupied land is not barred solely because the holder of the title does not commence his action until more than fifteen years after he might have done so. Where the defendant has not been prejudiced by the delay the doctrine of laches cannot be successfully invoked. Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

8048. Complaint—A complaint held sufficient either under R. L. 1905, § 972, to quiet a tax title, or under R. L. 1905, § 4424, to determine adverse claims. Foster v. Clifford, 110 Minn. 79, 124 N. W. 632.

A complaint by Osman Axdell to determine an adverse claim of defendant under a docketed judgment against Osman Axtell, which alleged that the claim was "unfounded both in fact and in law," held sufficient on demurrer. Axdell v. Tonnesson, 111 Minn. 541, 126 N. W. 1134.

A complaint held sufficient to clear the record of obstructions on a title regardless of whether the action be called one to determine adverse claims, to remove a cloud, or to quiet title. Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441.

A complaint alleging title in plaintiff and possession in defendant, and demanding that plaintiff be adjudged entitled to possession, does not state a cause of action to determine adverse claims under the statute. Howard v. Erbes, 112 Minn. 479, 128 N. W. 674.

(14) Major v. Owen, 126 Minn. 1, 147 N. W. 662.

See Dunnell, Minn. Pl. 2 ed. § 840.

8049. Answer—In an action to quiet title to land where the complaint discloses the source of plaintiff's title, plaintiff may perhaps insist that any adverse title relied upon by defendant be specifically set out in his answer. But a general allegation of ownership is sufficient as against an objection made for the first time on the trial of the action. Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

The defendant may plead facts giving rise to an implied or constructive trust for his benefit. Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

See Dunnell, Minn. Pl. 2 ed. § 841.

8049a. Defences—A defence based on a claim that a contract was inequitable and the action speculative held to be without merit. Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

8051. Claims not asserted waived—All claims not asserted by a defendant are waived, if they might have been asserted. Weide v. Gehl, 21 Minn. 449. See Major v. Owen, 126 Minn. 1, 147 N. W. 662.

8052. Reply—(32) See Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896.

(37) Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

See Dunnell, Minn. Pl. 2 ed. § 843.

8056. Burden of proof when land vacant—In an action by the grantee, in a deed containing exceptions and reservations as to minerals, against the grantor to determine adverse claims to the lands, the burden is not on the grantor to prove the existence of minerals in the lands. Buck v. Walker, 115 Minn. 239, 132 N. W. 205.

The plaintiff must stand or fall on the strength of his own title. The defendant may attack the plaintiff's title though he does not show title in himself. Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534.

(51) De Laurier v. Stilson, 121 Minn. 339, 141 N. W. 293.

8057a. Findings—Findings of fact should be made on all the material issues as in an ordinary action. Good practice requires that only the ultimate facts be found. Hall v. Sauntry, 72 Minn. 420, 75 N. W. 420; Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066.

A finding that one of the parties is owner of the land is sufficient. Luck Land Co. v. Dixon, 155 N. W. 1038.

8058. Judgment—Relief allowable—Trusts—Res judicata—When a tax title is found invalid it is the duty of the court to find the amount and validity of the party's lien for taxes paid by him, and adjudge him a lien therefor, if he is so entitled. G. S. 1913, § 2165; Foster v. Clifford, 110 Minn. 79, 124 N. W. 632; Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273; Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

Where both parties rely solely on the legal title claimed respectively by each equitable relief is improper. Roy v. Harrison, 113 Minn. 143, 148, 129 N. W. 154.

A plaintiff seeking to have a trust impressed upon land in his favor held not estopped, as against the defendant, from asserting his title to the land, by a judgment quieting title thereto in third parties, from whom the defendant subsequently acquired the title sought to be impressed with the trust. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

The judgment may impress the land with an implied or constructive trust in favor of the defendant. Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

Where the parties asserted only legal titles and judgment was rendered for the defendant, it was held that it did not bar a subsequent action wherein the plaintiff asserted an equitable title. Major v. Owen, 126 Minn. 1, 147 N. W. 662.

A judgment in an action to determine the title to real property is conclusive of the rights of all parties to the action and those in privity with them, and includes all rights or interests in the property which were or could have been litigated therein. Intervener in this action, claiming certain rights and interests in the land in controversy, conveyed the same to a third person to enable such third person to perfect the title; such third person thereupon brought an action to quiet title to the land, making defendants Stubler, under whom intervener now claims, parties defendant; judgment was rendered to the effect that defendants were the owners of the land free and clear of all claims on the part of plaintiff in the action, who was prosecuting the same in the interests of intervener. Held, that the judgment forever barred and extinguished all rights intervener may have had in or to the land, including the right to terminate the Stubler title by redemption as their mortgagor. Telford v. McGillis, 130 Minn. 397, 153 N. W. 758. See Gibbs v. Alger, Smith & Co., 201 Fed. 47 (conclusiveness of judgment—collateral attack).

(62) Northwestern Trust Co. v. Ryan, 115 Minn. 143, 132 N. W. 202; Powers v. Sherry, 115 Minn. 290, 296, 132 N. W. 210.

(67) Note, 8 L. R. A. (N. S.) 49.

QUO WARRANTO

WHEN LIES

8065. Private corporations—(86) State v. Creamery Package Mfg. Co., 115 Minn. 207, 132 N. W. 268.

PROCEDURE

8068. Governed by common-law rules—(99) State v. Dover, 113 Minn. 452, 457, 130 N. W. 74, 539.

8070. Leave to file information—Discretion—Private relator—(5) Note, 125 Am. St. Rep. 633.

8071a. Pleading—Answer—Demurrer—In a proceeding to test the validity of the incorporation of a village, allegations of the answer held not so clearly insufficient as to justify a judgment of ouster upon a demurrer thereto. State v. Alice, 112 Minn. 330, 127 N. W. 1118.

8073a. Judgment—There can be no doubt that in quo warranto proceedings, or proceedings in the nature of quo warranto, to forfeit the franchise of a corporation for exercising rights which it does not possess under its charter, or for entering into an illegal contract, where the statute does not provide that the penalty of forfeiture shall follow, the punishment rests in the discretion of the court. The judgment may be a general judgment of ouster, or it may be an ouster of the right to do the particular act complained of, or it may be a suspensive judgment of ouster, with a fine accompanying it, or it may be a simple fine. Under R. L. 1905, §§ 5168, 5169 (G. S. 1913, §§ 8973, 8974), providing that every foreign corporation admitted to transact business in this state, that is guilty of entering into any pool, trust agreement, combination, or understanding in restraint of trade, within this state, shall thereafter be prohibited from continuing its business therein, the court has no discretion, after the corporation is found guilty in an action begun and conducted under said sections, to grant any other or different judgment than one prohibiting the corporation from continuing its business within the state. State v. Creamery Package Mfg. Co., 115 Minn. 207, 132 N. W. 268.

RAILROAD AND WAREHOUSE COMMISSION

8075. General supervision of railroads—The provisions of the statutes concerning the powers and duties of the commission and the general right of industries to railroad side-track facilities were enacted for the purpose of controlling railroads and were not intended to hamper cities in the matter of regulations adopted in the exercise of their police power. Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193.

8077. Power to fix railroad rates—Judicial review—(28) State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320. See State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247; § 2182.

(29) See State v. Great Northern Ry. Co., 123 Minn. 463, 144 N. W. 155.

8078. Miscellaneous powers—The commission may require railroad companies to construct bridges or instal safety devices at public crossings. State v. Great Northern Ry. Co., 114 Minn. 293, 131 N. W. 330.

The commission may require railroad companies to construct side tracks to industrial plants. State v. Chicago etc. Ry. Co., 115 Minn. 51, 131 N. W. 859. See Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 492, 137 N. W. 193; § 8125a.

The commission may require a railroad company to instal stock scales at its stations. State v. Great Northern Ry. Co., 122 Minn. 55, 141 N. W. 1102, reversed, 238 U. S. 340.

The commission may require a railroad company to furnish equal transportation facilities at different stations where the conditions are substantially the same. State v. Great Northern Ry. Co., 122 Minn. 55, 141 N. W. 1102.

An order of the commission, requiring a railway company to provide a small station building and custodian service at a flag station, is presumed to be valid until it be shown affirmatively that such order is unlawful or unreasonable. Where the nearest station in either direction is seven miles from such flag station, and the country tributary thereto is a prosperous farming community, and the annual revenue derived by the company from the business of such station exceeds $7,000, and the probable expense of providing the facilities required by the commission is not shown, the presumption in favor of the reasonableness and validity of the order of the commission is not overcome. State v. Great Northern Ry. Co., 123 Minn. 463, 144 N. W. 155.

The commission may require a railroad company to stop its trains at a railroad junction not provided with an interlocking device. Railroad

& Warehouse Commission v. Great Northern Ry. Co., 124 Minn. 533, 144 N. W. 771.

The commission may require a railroad company to move its station building closer to the village it serves. Railroad & Warehouse Commission v. Great Northern Ry. Co., 124 Minn. 533, 144 N. W. 771. See Note, 34 L. R. A. (N. S.) 412.

The commission has no authority to punish witnesses before it for contempt. State v. Fitzgerald, 131 Minn. ——, 154 N. W. 750.

(35) State v. Great Northern Ry. Co., 123 Minn. 463, 144 N. W. 155; Railroad & Warehouse Commission v. Great Northern Ry. Co., 124 Minn. 533, 144 N. W. 771. See Digest, § 8124; Note, 17 L. R. A. (N. S.) 821; 26 Id. 444; 34 Id. 412.

8078a. Administrative questions—Control of courts—The question as to what accommodations are reasonably necessary to afford proper transportation facilities to the public is legislative or administrative, and not judicial, in its nature; and the courts can interfere with the action of the body intrusted with the power and duty to determine such questions only when such action oversteps the limitations, constitutional or otherwise, placed upon the exercise of such power. State v. Great Northern Ry. Co., 123 Minn. 463, 144 N. W. 155; Railroad & Warehouse Commission v. Great Northern Ry. Co., 124 Minn. 533, 144 N. W. 771.

8078b. Regulations must be reasonable—Sunday trains—The question whether an order of the commission is reasonable is a judicial question. There is no test of reasonableness that will fit all cases, but an order is unreasonable if contrary to federal or state constitution or laws, or if beyond the power of the commission, or if based on mistake of law, or if without evidence to support it, or if so arbitrary as to be beyond the exercise of reasonable discretion and judgment. Pecuniary loss or profit to the carrier is important, but not the only criterion. The question of reasonableness is to be determined by a consideration of the interests both of the carrier and of the public. Orders of the commission are prima facie reasonable. An order of the commission compelling the operation of a Sunday local day passenger train has been held unreasonable and set aside. State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247.

8082. Appeal to district court—Burden of proof—Presumption—Scope of review—The statute regulating appeals to the courts from decisions of the commission and defining the effect that shall be given by the courts to the findings and order of the commission 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." G. S. 1913, § 4192; Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 72 N. W. 713; Jacobson v. Wisconsin, Minn. etc. R. Co., 71 Minn. 519, 74 N. W. 893; State v. Minneapolis & St. L. R. Co., 80 Minn. 191, 83 N. W. 60; State v. Great Northern Ry. Co., 123 Minn. 463, 144 N. W. 155.

Under the statute the district court on appeal from an order of the commission does not put itself in the place of the commission and substitute its findings for those of the commission, nor does it set aside such an order on its own conception of its wisdom. The court reviews the order only so far as to determine whether or not it is unlawful and unreasonable. State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247.

RAILROAD RATES—See Carriers, 1205–1205d; Constitutional Law, 1589.

RAILROADS

IN GENERAL

8083. Definitions—(42) State v. Minneapolis etc. Ry. Co., 114 Minn. 70, 130 N. W. 71.

8088a. Relief department—Plaintiff's deceased husband held a membership certificate in the relief department of defendant, under which, in the event of his death, defendant agreed to pay a certain sum to plaintiff. The husband was injured while in defendant's employ as engineer, running a train engaged in interstate commerce between a point in Wisconsin and a point in Illinois. He received his injuries in Illinois and died there. The certificate provided that no money thereunder should become due till all claims against defendant arising out of his death should be released. Held, that plaintiff is entitled to recover, without furnishing defendant with release from the personal representative of her deceased husband, since under the act of Congress known as the "Employer's Liability Act," approved April 22, 1908, the terms of the membership certificate to the extent that the same provided for releases from all claims on account of wrongful death are void. Rodell v. Relief Department, 118 Minn. 449, 137 N. W. 174.

8095. Liability of lessor for negligence of lessee—(62, 63) See 25 Harv. L. Rev. 726.

SALE, LEASE AND CONSOLIDATION

8097. Construction of particular contracts of sale, lease, etc.—A contract between two railroad companies for the joint use of a bridge over the St. Louis river construed and held not contrary to the acts of Congress. Northern Pacific Ry. Co. v. Wisconsin Central Ry. Co., 117 Minn. 217, 135 N. W. 984.

OFFICERS AND EMPLOYEES

8099a. Brakeman—Authority to remove trespassers—Brakemen have implied authority to remove trespassers from trains and to use reasonable force to do so when necessary. Brevig v. Chicago etc. Ry. Co., 64 Minn. 168, 66 N. W. 401; Barrett v. Minneapolis etc. Ry. Co., 106 Minn. 51, 117 N. W. 1047; Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 127 N. W. 926; Gee v. Great Northern Ry. Co., 119 Minn. 438, 138 N. W. 684. See Note, 45 L. R. A. (N. S.) 813.

The rule of implied authority does not apply where the brakeman receives a bribe from the trespasser to allow him to ride on the train. Brevig v. Chicago etc. Ry. Co., 64 Minn. 168, 66 N. W. 401.

LOCATION OF ROAD

8102. Engineering problems—(70) Gibson v. Chicago, G. W. R. Co., 117 Minn. 143, 134 N. W. 516.

RIGHT OF WAY

8104. Over public lands—School lands—The statute giving railroads a right of way over school lands is constitutional. It does not constitute a grant in praesenti to any railroad company. A right of way can only be acquired as provided by statute. A railroad company, taking possession of a right of way over school lands held by the state, acquires no right or interest therein against the state until performance of the required conditions. A purchaser of the land from the state succeeds to all the rights of the state and may maintain ejectment for the land against the railroad company. Lawver v. Great Northern Ry. Co., 112 Minn. 46, 127 N. W. 431.

8106. Across or along streets, etc.—The legislature has power to grant authority to a railroad company to cross public highways and streets, and authority to construct a railroad between designated points implies authority to cross highways and streets which the railroad intersects. The legislature may require that a franchise be obtained from a city or village before a railroad company is permitted to cross streets in such city or village; but, in the absence of such requirement, a fran-

chise from the city or its consent is not necessary. R. L. 1905, § 2841 (G. S. 1913, § 6136), does not require a franchise to be obtained from a city or village before a railroad company constructs its tracks across streets in such city or village. R. L. 1905, § 2916 (G. S. 1913, § 6236), does not require such a franchise, or that there be an agreement between the city or village and the railway company as to the manner, terms, and conditions upon which a street may be crossed by the railroad. Conceding that under section 2916 a railroad company may and must acquire the right to cross a street in a city or village by condemnation proceedings, equity will not enjoin such crossing before such proceedings are begun; it appearing conclusively that the necessity exists, and that such city or village has at all times an absolute right to compel the railroad company to make the crossing safe for public use. A city or village has no proprietary rights in its streets. Whatever rights it has are held merely in trust for the public use. It is not entitled to compensation when a railway company crosses its streets, and the constitutional provision that private property shall not be taken for public use without just compensation first paid or secured does not apply. International Falls v. Minn. D. & N. Ry. Co., 117 Minn. 14, 134 N. W. 302.

A commercial railroad cannot construct its road along the streets of a city without the consent of the city. It cannot acquire such right even by condemnation proceedings. Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18; Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609; Larson v. Minnesota N. W. Electric Ry. Co., 131 Minn. ——, 154 N W. 948.

A franchise from the city council is a necessary prerequisite to the institution by such railroad of condemnation proceedings to acquire the right to maintain its track along a public street in a city. And such franchise must be obtained in accordance with the provisions of section 6136, G. S. 1913, and in the manner specified by the city charter. Larson v. Minnesota N. W. Electric Ry. Co., 131 Minn. ——, 154 N. W. 948.

(77) See Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609 (contract between municipality and railroad company for use by the latter of a municipal bridge held ultra vires).

8107. Right-of-way deeds—Construction—(81) Chicago etc. Ry. Co. v. Rehnke, 113 Minn. 390, 129 N. W. 771 (stipulation releasing company from all claims for damages to the balance of the land occasioned by locating and constructing the road over the strip conveyed); Evans v. Northern Pacific Ry. Co., 117 Minn. 4, 134 N. W. 294 (parol evidence held inadmissible to vary terms of deed); Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W. 907 (held to convey an

easement only); Grimes v. Minneapolis etc. Traction Co., 130 Minn. 285, 153 N. W. 596 (issue as to whether the railroad company agreed to construct a station or a loading platform on the land). See Digest, § 10164; Note, 48 L. R. A. (N. S.) 378 (effect of provision as to crossing).

8109. Misuser and abandonment—Evidence held to justify a finding of an intentional abandonment of a right of way. Chambers v. Great Northern Power Co., 100 Minn. 214, 110 N. W. 1128. Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N. W 907.

Uses to which right of way may be put as against the owner of the fee. Note, 36 L. R. A. (N. S.) 512.

8110. Title—Control—Power to lease or sell—(01) Delisha v. Minneapolis etc. Co., 110 Minn. 518, 126 N. W. 276.

(85) See Note, 36 L. R. A. (N. S.) 512.

IN STREETS

8111. An additional servitude—Owners of lots abutting a public street in a city, upon and along which a commercial railroad maintains a track and operates cars, whose rights the railroad has not acquired by condemnation proceedings, or otherwise, are entitled to enjoin the maintenance and operation of such railroad. Larson v. Minnesota N. W. Electric Ry. Co., 131 Minn. ——, 154 N. W. 948.

(87) Note, 36 L. R. A. (N. S.) 673.

8116. Authority from municipality—(96) See Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609; Digest, § 8106.

8117. Liability for noise, smoke, etc.—(97) Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353. See § 8153.

MORTGAGES, TRUST DEEDS AND BONDS

8118. In general—(99) See Clearwater State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 8, 133 N. W. 91 (strict foreclosure of railroad mortgages).

DUTY TO BUILD AND MAINTAIN HIGHWAY CROSSINGS

8119. Statutory duty—Chapter 280, Laws 1905, as amended by chapter 396, Laws 1907, does not vest in the board of railroad commissioners exclusive authority and jurisdiction to order and require the construction by railroad companies of bridges, or the instalation of safety devices at highway crossings. State v. Great Northern Ry. Co., 114 Minn. 293, 131 N. W. 330.

Plaintiff's foot was caught and held in the space between the planking and a rail of defendant's tracks at a street crossing, and was run over by an engine. Whether defendant should have filled or blocked the space underneath the ball of the rail was not primarily a problem in engineering for the solution of defendant's officers and engineers; but whether defendant was negligent in this respect was, on the evidence, a question of fact for the jury. Gibson v. Chicago, G. W. R. Co., 117 Minn. 143, 134 N. W. 516.

The legislature may require a railroad company to make the street crossings over its right of way reasonably safe and convenient for pedestrians. State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879.

(1) Belshan v. Illinois Central R. Co., 117 Minn. 110, 134 N. W. 507 (rails not level with planking at crossing); Gibson v. Chicago, G. W. R. Co., 117 Minn. 143, 134 N. W. 516 (space underneath the ball of rail not blocked).

(6) Chicago etc. Ry. Co. v. Le Roy, 124 Minn. 107, 144 N. W. 464 (the entire cost of extending a new street across a right of way, including necessary planking over the tracks, may be imposed on a railroad company); State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879.

See Digest, § 8123.

8120. Common-law duty to restore highway—(7) State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879. See Chicago etc. Ry. Co. v. Le Roy, 124 Minn. 107, 144 N. W. 464; Minneapolis etc. Co. v. Minneapolis, 124 Minn 351, 145 N. W. 609.

8121. Bridges or viaducts over tracks at crossings—The rule that a railroad company may be required to erect and maintain a bridge to carry its tracks over a street crossing extends to all cases where the public safety, convenience, or welfare require such bridge. A waterway, with walks on each side, duly established by public authority for public use, connecting navigable lakes and public grounds, as to the principles applicable thereto, is not distinguishable, either by the fact that it is artificial or by the fact that it is in part a waterway, from a natural waterway or from a landway. The rule applicable to crossings of streets and railroads applies to the crossing of a public canal and a railroad, and in proceedings to condemn a right of way for a public canal across a railway right of way, through an embankment, the company is not entitled to be awarded, as damages, the necessary expense of building a bridge to carry its tracks over the canal. Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169, affirmed, 232 U. S. 430. See 27 Harv. L. Rev. 664.

The power to require a railroad company to bridge or viaduct its streets is a police power resting in the legislature. A city has no such power except by delegation. Under its charter the city of St. Paul has such power by delegation. State v. Chicago etc. Ry. Co., 122 Minn. 280, 142 N. W. 312.

(8) Chicago etc. Ry. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169; Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514, 133 N. W. 80; Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193; State v. Chicago etc. Ry. Co., 122 Minn. 280, 142 N. W. 312; State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879. See Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609; Missouri Pac. Ry. Co. v. Omaha, 235 U. S. 121; Note, L. R. A. 1915E, 751.

8121a. Depression of tracks at crossings—Under the police power a railroad company may be compelled to depress its tracks where they traverse populous municipalities; and in determining the necessity of such depression the convenience and general welfare of the public is to be considered, as well as its safety. Where the proprietors of business plants having side-track connections with the main track of a railroad seek to enjoin the depression of such main track on the ground that their sidings will necessarily be destroyed thereby, but the real purpose of the action is to enjoin any depression at all, and not to compel the depression of the side tracks, as well as the main track, such proprietors are in no position to contend that the railroad company is not acting pursuant to the mandate of a track depression ordinance, on the ground that such ordinance uses the plural, "tracks," instead of the singular, "track," and thus requires the depression of the side tracks as well as the main track. The right of private enterprises to railroad side-track facilities, whether based upon contract, prescription, or estoppel, as against the railroad company, is subject to a city's police power to order a separation of railroad and street grades, where public necessity so requires. Where a city ordinance provides generally for the depression of a certain line of railroad "tracks," without specific mention of side tracks, the proprietors of business plants served by side tracks are not entitled to an injunction restraining the railroad company from depressing its main line, consisting of a single track, on the ground that such depression involves an abandonment of the side tracks without application to and order from the Railroad and Warehouse Commission; the remedy of such proprietors being by way of direct proceedings to enforce whatever right, if any, they may have to side-track facilities after, or in view of, the depression of the main track. R. L. 1905, § 2006 (G. S. 1913, § 4284), giving certain industries the right to railroad side-track facilities, does not operate to cramp or curtail the

police power of the state, or the right, in the exercise of such power, to order track depression. Twin City Separator Co. v. Chicago etc. Ry. Co., 118 Minn. 491, 137 N. W. 193.

8121b. Sidewalks at crossings—Chapter 78, Laws of 1913 (G. S. 1913, § 4256), making it a duty of every railroad company, wherever its right of way crosses a public street in a municipality, to construct a suitable sidewalk to connect with and correspond to the walks constructed and installed by the municipality or by the owners of abutting property, is a valid exercise of the police power of the state, and is not to be construed as a disguised attempt to levy a local assessment or tax. State v. Great Northern Ry. Co., 130 Minn. 480, 153 N. W. 879.

8123. Liability for defective crossings—To justify a recovery for a defective crossing it must be the proximate cause of the injury. Contributory negligence is a defence. Kemp v. Northern Pacific Ry. Co., 89 Minn. 139, 94 N. W. 439 (grade crossing—plaintiff failed to look or listen for approaching trains—held guilty of contributory negligence as a matter of law). See Note, L. R. A. 1915C, 813 (contributory negligence in using crossing known to be defective).

Defendant, to facilitate public travel upon a highway over and across which it was constructing its railroad grade, in which work it completely obstructed the highway, voluntarily acquired from an adjoining landowner the right of passage over his land, and impliedly, if not expressly, invited the public to make use of the substituted way. Held, that defendant was under legal obligation to keep and maintain the way so provided in reasonably safe condition for public use. McCoy v. Minneapolis etc. Traction Co., 117 Minn. 38, 134 N. W. 293.

(15) Belshan v. Illinois Central R. Co., 117 Minn. 110, 134 N. W. 507 (rails not level with planking at crossing); Gibson v. Chicago, G. W. R. Co., 117 Minn. 143, 134 N. W. 516 (space underneath ball of rail not blocked).

MISCELLANEOUS DUTIES

8124. To maintain stations and depots—(19) State v. Great Northern Ry. Co., 123 Minn. 463, 144 N. W. 155; Railroad & Warehouse Commission v. Great Northern Ry. Co., 124 Minn. 533, 144 N. W. 771. See § 8078.

8124a. To instal stock scales—A railroad company may be required to instal stock scales at its stations. State v. Great Northern Ry. Co., 122 Minn. 55, 141 N. W. 1102, reversed, 238 U. S. 340.

8125. To provide transfer facilities at crossings—(20) See State v. Chicago etc. Ry. Co., 115 Minn. 51, 131 N. W. 859.

8125a. To construct side tracks to industrial plants—The appellant was by the order of the Railroad and Warehouse Commission, pursuant

to sections 1983 and 2006, R. L. 1905 (G. S. 1913, §§ 4231, 4284), directed to construct a side track from its main line to a stone quarry and crushing plant near Mendota. This is an appeal from a judgment of the district court affirming the order. Held, the statute does not require railroads to construct and operate side tracks to industries, where the conditions are such that so to do would necessarily affect in an unreasonable degree the safe operation of trains on the main line. The order of the commission did not place upon the appellant a burden so unreasonable as to deprive it of its property without due process of law, in violation of either the state or federal constitution. The taking of land upon which to lay the side track would be for a public use. The evidence sustains the finding that the operation of the side track and switch connecting it with the main line would not in any unreasonable degree affect the operation or safety of trains on the main line. State v. Chicago etc. Ry. Co., 115 Minn. 51, 131 N. W. 859.

8127. To stop at railroad crossings—The Railroad and Warehouse Commission may compel compliance with the statute by appropriate orders. Railroad & Warehouse Commission v. Great Northern Ry. Co., 124 Minn. 533, 144 N. W. 771.

DUTY TO FENCE

8131. Sufficiency of fence—(38) Jeanette v. Minneapolis etc. Ry. Co., 130 Minn. 513, 153 N. W. 1086.

8133. Implied exceptions—Streets—Station grounds, etc.—(42) Note, 7 L. R. A. (N. S.) 203.

8134. Within municipal limits—The exception as to municipal limits inserted in the revision of 1905 was repealed by Laws 1911, c. 309.

(51) See Yates v. Chicago etc. Ry. Co., 115 Minn. 496, 132 N. W. 994.

8135. Cattle guards—(52) G. S. 1913, § 4263.

(56) Yates v. Chicago etc. Ry. Co., 115 Minn. 496, 132 N. W. 994. Since the amendment of 1911 railroad companies are bound to exercise ordinary care and diligence to keep cattle guards free from ice and snow. See Note, 36 L. R. A. (N. S.) 997.

8139. Liability for failure to fence — In general — Proximate cause — (66) Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713; Jeanette v. Minneapolis etc. Ry. Co., 130 Minn. 513, 153 N. W. 1086.

8140. Failure to fence negligence per se—Failure to fence as required by the present statute may be negligence per se and not merely evidence of negligence. See § 6976.

(67) Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713. In this case the change in the statute was apparently overlooked.

8141. Injury to railroad employee—Assumption of risk—(68) Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713.

8143. Liability for death or injury of children—Where a boy nine years old was killed while stealing a ride on a freight train, it was held, as a matter of law, that the failure of the railroad company to fence its right of way near the accident was not the proximate cause of the accident. Jeanette v. Minneapolis etc. Ry. Co., 130 Minn. 513, 153 N. W. 1086.

(71) Jeanette v. Minneapolis etc. Ry. Co., 130 Minn. 513, 153 N. W. 1086 (evidence held conclusive that a statutory fence would not have kept a boy nine years old from the tracks).

8145. Liability for animals killed or injured—(78) Raski v. Great Northern Ry. Co., 128 Minn. 129, 150 N. W. 618.

8146. Double costs—(89) See Kansas City Southern Ry. Co. v. Anderson, 233 U. S. 325.

8147. Pleading—(90) Kommerstad v. Great Northern Ry. Co., 120 Minn. 376, 139 N. W. 713 (complaint held to show assumption of risk on the part of a servant of the defendant—the complaint contained the further allegations that defendant negligently operated its trains at an excessive rate of speed and negligently failed to give proper warnings and signals, and that by reason of such negligent operation the train struck a horse upon the track and threw it against plaintiff while plaintiff was engaged in his usual work of cutting grass upon the right of way—held to state a cause of action); Daly v. Chicago etc. Ry. Co., 121 Minn. 523, 140 N. W. 1034 (complaint for loss of colts sustained as against objection on appeal).

LIABILITY FOR NEGLIGENCE—MISCELLANEOUS CASES

8153. Liability for noise, smoke, etc.—Private nuisance—Compensation—The smoke, noise, and disturbance which ordinarily attend the proper operation of a railroad at and between stations should not be held a private nuisance to adjacent property affected thereby. But as to such incidental railroad facilities as shops, roundhouses, and switchyards, of the character here involved, the location and operation of which is not determined by public convenience or necessity, the railroad company is liable if thereby a nuisance is imposed upon an adjacent landowner, even though the location of the facility be proper and the operation thereof duly careful. If the ordinary careful location and operation of such railroad facility as the one here in question creates a private nuisance upon adjacent property, such property is thereby damaged within the purview of the constitution entitling the owner to compensation. Under the evidence, the question whether the operation of defendant's

switchyard imposed a private nuisance upon plaintiff was for the jury. Matthias v. Minneapolis etc. Ry. Co., 125 Minn. 224, 146 N. W. 353. See Richards v. Washington Terminal Co., 233 U. S. 546; 14 Col. L. Rev. 590.

8155. Injuries to trespassers on trains—(2) Berg v. Duluth etc. Ry. Co., 111 Minn. 305, 126 N. W. 1093 (boy eleven years old injured while stealing a ride on a freight train—evidence held to show that he was a trespasser on the train and that he had not been invited to ride on it—doctrine of the turntable cases held inapplicable—order directing a verdict for the defendant sustained); Demerany v. Great Northern Ry. Co., 114 Minn. 496, 131 N. W. 634 (plaintiff climbed upon freight car to assist in stopping it opposite an elevator—complaint for wilful negligence sustained); Gee v. Great Northern Ry. Co., 119 Minn. 438, 138 N. W. 684 (trespasser ordered off freight train by brakeman—returned, as he claimed, to recover his hat—brakeman and trespasser grappled and fell from the train—recovery against company sustained); Demeray v. Great Northern Ry. Co., 121 Minn. 516, 141 N. W. 804 (plaintiff, a mere licensee at best, boarded a moving train engaged in switching operations, and took a position on the running board of a box car about six feet from the end of the car, after the cars next to that end had been uncoupled and were being "kicked" back; the engine was suddenly slowed down in response to the signal of the brakeman in charge, and this threw plaintiff forward and off the car, injuring him—held, that the evidence failed to show that the brakeman knew that plaintiff was in a perilous position when the signal was given); Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250 (boy about five years old stealing a ride on an engine—no evidence to justify submitting an issue of wilful negligence—contributory negligence of boy submitted to jury—verdict for defendant sustained). See Jeanette v. Minneapolis etc. Ry. Co., 130 Minn. 513, 153 N. W. 1086 (boy nine years old stealing a ride on a freight train—failure of company to fence not proximate cause of injury).

See § 8099a.

8156. Frightening horses by emission of steam—Running over and cutting fire hose—A railroad company held liable for negligence in running over and cutting a hose and thereby preventing the extinguishment of a fire. Erickson v. Great Northern Ry. Co., 117 Minn. 348, 135 N. W. 1129 (duty of railroad company to exercise ordinary care—unnecessary to prove wilful injury); Bodkin v. Great Northern Ry. Co., 124 Minn. 219, 144 N. W. 937 (evidence held to justify a finding of negligence on the part of the railroad company—damages for property in building consumed by fire held not excessive—evidence held not to show that

plaintiff would have suffered any loss from smoke had the hose not been cut).

Frightening horses by the emission of steam from locomotives. Note, 133 Am. St. Rep. 862.

8157. Injuries from defective station platforms or approaches—(16) English v. Minneapolis & St. L. R. Co., 117 Minn. 131, 134 N. W. 518 (union station—defective steps to platform—platform used as approach to station by public—plaintiff injured while using steps in leaving station where she had gone to inquire about trains—immaterial that her inquiry was concerning trains of another company which maintained the station jointly with defendant—recovery by plaintiff sustained). See Fox v. Minneapolis & St. L. R. Co., 114 Minn. 336, 131 N. W. 374; Rudd v. Great Eastern Casualty & Indemnity Co., 114 Minn. 512, 131 N. W. 633; § 1268.

8157a. Injuries from defective stockyards—A recovery sustained where plaintiff, who was rightfully on the premises, stepped on a nail protruding from a board that was in a passageway leading to the stockyards of defendant. Beck v. Chicago etc. Ry. Co., 125 Minn. 256, 146 N. W. 1092.

INJURIES TO PERSONS ON OR NEAR TRACKS

8160. In general—Signs warning trespassers—Effect of signs warning trespassers off railroad property. Note, 47 L. R. A. (N. S.) 506.

8164. Duty to trespassers—(26) Piper v. Chicago etc. Ry. Co., 116 Minn. 238, 133 N. W. 984; Havel v. Minneapolis & St. L. R. Co., 120 Minn. 195, 139 N. W. 137; Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894; Gill v. Minneapolis etc. Traction Co., 129 Minn. 142, 151 N. W. 896; Hanks v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1088. See Smith v. Baltimore & Ohio R. Co., 210 Fed. 414 (child on track running ahead of train); Note, 41 L. R. A. (N. S.) 264.

(27) Erdner v. Chicago & N. W. Ry. Co., 115 Minn. 392, 132 N. W. 339. See Piper v. Chicago etc. Ry. Co., 116 Minn. 238, 133 N. W. 984; Mellon v. Great Northern Ry. Co., 116 Minn. 449, 134 N. W. 116; Hanks v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1088. Note 8 L. R. A. (N. S.) 1069; 41 Id. 264.

8165. Who are trespassers—The mere fact that pedestrians frequently walk on the tracks of a railroad in rural districts does not justify an inference that they do so upon the implied invitation or passive consent of the railroad company. Such pedestrians are ordinarily trespassers and guilty of contributory negligence as a matter of law, if they are struck by passing trains. Engineers of trains are not ordinarily bound to anticipate their presence or keep a lookout for them. Hanks v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1088.

(28) Piper v. Chicago etc. Ry. Co., 116 Minn. 238, 133 N. W. 984. See Rudd v. Great Eastern Casualty & Indemnity Co., 114 Minn. 512, 131 N. W. 633.

(29) Hanks v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1088.

8166. Wilful negligence or injury—(35) Piper v. Chicago etc. Ry. Co., 116 Minn. 238, 133 N. W. 984; Gill v. Minneapolis etc. Traction Co., 129 Minn. 142, 151 N. W. 896; Hanks v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1088; Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894; Mellon v. Great Northern Ry. Co., 116 Minn. 449, 134 N. W. 116; Gibson v. Chicago, G. W. R. Co., 117 Minn. 143, 134 N. W. 516; Havel v. Minneapolis & St. L. R. Co., 120 Minn. 195, 139 N. W. 137.

8167. Duty of engineer to keep a lookout—(37) See Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177.

8168. Assumption by engineer as to action of persons on tracks—(38) Gill v. Minneapolis etc. Traction Co., 129 Minn. 142, 151 N. W. 896.

8169. Contributory negligence—Law and fact—(39) Piper v. Chicago etc. Ry. Co., 116 Minn. 238, 133 N. W. 984 (boy fourteen years old walking between main line double tracks); Mellon v. Great Northern Ry. Co., 116 Minn. 449, 134 N. W. 116 (decedent walking on track about fifty rods from station—track level and view unobstructed—customary for public to walk there—high wind—train running at high speed); Hanks v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1088 (walking on track in the evening—strong wind—air filled with snow and dirt).

(40) Erdner v. Chicago & N. W. Ry. Co., 115 Minn. 392, 132 N. W. 339 (boy sixteen years old walking on track).

8170. Duty to look and listen—(43) Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180. See §§ 8188, 8189.

8172. Pleading—A complaint held to state a cause of action for wilful negligence. Demerany v. Great Northern Ry. Co., 114 Minn. 496, 131 N. W. 634.

8173. Cases classified as to the facts—Plaintiff, the owner of a grain elevator near track, mounted a car to assist in stopping it opposite the elevator. Car stopped suddenly and threw him to the ground. Demerany v. Great Northern Ry. Co., 114 Minn. 496, 131 N. W. 634.

Train struck a trespassing horse and threw it against a sectionman working on the right of way. Kommerstad v. Great Northern Ry. Co., 128 Minn. 505, 151 N. W. 177.

(47) Erdner v. Chicago & N. W. Ry. Co., 115 Minn. 392, 132 N. W. 339; Piper v. Chicago etc. Ry. Co., 116 Minn. 238, 133 N. W. 984; Mellon v. Great Northern Ry. Co., 116 Minn. 449, 134 N. W. 116; Havel

v. Minneapolis & St. L. R. Co., 120 Minn. 195, 139 N. W. 137; Hanks v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 1088.

(48) Palon v. Great Northern Ry. Co., 129 Minn. 101, 151 N. W. 894 (foot caught in frog); Gill v. Minneapolis etc. Traction Co., 129 Minn. 142, 151 N. W. 896.

ACCIDENTS AT HIGHWAY CROSSINGS

8174. Duty of railroad company—In general—A railroad company is bound to be on the lookout for men, women, and children at public crossings. It is charged with notice that they are likely to be there. It is bound to exercise due care to discover them and it is not enough to exercise due care to avoid injuring them after discovering them in a place of danger. Urbas v. Duluth, M. & N. Ry. Co., 113 Minn. 309, 129 N. W. 513.

It is bound to exercise due care to avoid injuring property on crossings. A company has been held liable for cutting a fire hose laid across its tracks at a crossing, so that a fire company was unable to put out a fire. Erickson v. Great Northern Ry. Co., 117 Minn. 348, 135 N. W. 1129; Bodkin v. Great Northern Ry. Co., 124 Minn. 219, 144 N. W. 937.

It is bound to exercise greater care toward children than toward adults. When an engineer observes children playing about the tracks due care may require him to sound his whistle and slow down. Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804. See 27 Harv. L. Rev. 595.

It is not bound to exercise care to discover trespassers or to watch for attempts by pedestrians to pass through its trains by climbing over couplers between cars. Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799.

(68) See 11 Col. L. Rev. 793.

(69, 70) Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

8175. Duty to give signals—Statute—The duty rests on the railroad company as well as on the engineer. Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8.

(74) Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729. See Libaire v. Minneapolis & St. L. R. Co., 113 Minn. 517, 130 N. W. 8 (court erroneously charged that failure to give the statutory signals is evidence of negligence).

(76) Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889; Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882.

(77) See 25 Harv. L. Rev. 392.

(78) Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889.

(90) Weiss v. Great Northern Ry. Co., 119 Minn. 355, 138 N. W. 423; Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882.

8175a. Duty to maintain headlights—Railroad companies are required by statute to maintain headlights of a certain capacity on their engines and have them lighted when in use between sundown and sunrise. A failure to do so probably constitutes negligence per se and not merely evidence of negligence. G. S. 1913, § 4421; Weiss v. Great Northern Ry. Co., 119 Minn. 355, 138 N. W. 423; Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889.

8176. Duty to maintain gates—Where there was an ordinance requiring the company to maintain gates or a watchman, and it failed to do so, it was held that the question of its negligence was one of fact for the jury. Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419. This case is not to be taken as holding that in all cases a failure to comply with such an ordinance is merely evidence of negligence and not negligence per se. See Digest, § 6976.

(91) Cawley v. Great Northern Ry. Co., 113 Minn. 489, 129 N. W. 842 (plaintiff knew that gates were not operated—court charged that he could not rely on the fact that they were up); Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419. See, as to duty independent of statute or ordinance, Evans v. Erie Railroad Co., 213 Fed. 129.

(92) Flygen v. Chicago etc. Ry. Co., 115 Minn. 197, 132 N. W. 10. See Lang v. Northern Pacific Ry. Co., 118 Minn. 68, 136 N. W. 297 (where a person sees a train passing he cannot rely on open gates as an invitation to cross the tracks); Digest, § 8188(29).

8178. Duty to maintain flagmen—The failure to maintain a flagman in violation of an ordinance is negligence per se, and not merely evidence of negligence, unless the ordinance provides otherwise. See Summer v. Chicago & N. W. Ry. Co., 122 Minn. 44, 141 N. W. 854; Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275; Digest, § 6976.

(96, 97) Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419; Summer v. Chicago etc. Ry. Co., 122 Minn. 44, 141 N. W. 854. See Evans v. Erie Railroad Co., 213 Fed. 129.

(99) Summer v. Chicago etc. Ry. Co., 122 Minn. 44, 141 N. W. 854 (presumption that decedent knew of ordinance and relied on the assurance of safety from the absence of a flagman).

8179. Defective crossings—(1) See § 8123.

8180. Excessive speed of trains—Ordinances—Whether the operation of a train of cars at a high and dangerous rate of speed through a country village and over and across the streets thereof, irrespective of statute or ordinance regulating the speed of such trains, is an act of negligence, will depend upon the facts of the particular case, the presence or

absence of fixed crossing signals, the population of the village, the extent of the use of the streets crossing the railroad track, and other facts throwing light upon the question, and ordinarily will present an issue for the jury. Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882.

(3) Drews v. Northern Pacific Ry. Co., 116 Minn. 385, 133 N. W. 865; Simonson v. Minneapolis etc. Ry. Co., 117 Minn. 243, 135 N. W. 745; Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164 (negligence of defendant conceded—engine run through village at high speed without warnings on no schedule time); Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729; Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882.

(4) Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882.

(8) Whether a violation of an ordinance as to speed constitutes negligence per se or is merely evidence of negligence depends on the language of the ordinance. Unless otherwise provided a violation of an ordinance is deemed negligence per se. See Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275; Digest, § 6976.

8181. Backing trains over crossings—Where it was customary to have a man with a lighted lantern either on the top of the front end of the car, or walking ahead of it, when backing a car in the nighttime over a crossing in the milling district of Minneapolis, a failure to do so was held to justify a finding of negligence. Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

(12) Urbas v. Duluth, M. & N. Ry. Co., 113 Minn. 309, 129 N. W. 513; Anderson v. Duluth & Iron Range R. Co., 116 Minn. 346, 133 N. W. 805; Gambell v. Minneapolis etc. Ry. Co., 129 Minn. 262, 152 N. W. 408; Brennan v. Minnesota, D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611.

(13, 14) Cawley v. Great Northern Ry. Co., 113 Minn. 489, 129 N. W. 842; Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

8182a. Blocking crossings—Pedestrians passing through train—Under the evidence, it was a question for the jury whether the defendant was negligent in starting its train, which had been blocking a street crossing, with knowledge on the part of the brakeman, when he gave the signal to start, that the plaintiff had just started to cross between two cars. Amann v. Minneapolis & St. L. R. Co., 126 Minn. 279, 148 N. W. 101. See Sikorski v. Great Northern Ry. Co., 127 Minn. 110, 149 N. W. 5.

8183. Assumption by engineer as to conduct of travelers—An engineer may act on the assumption that pedestrians on the highway will not attempt to pass through a train by climbing over the couplers be-

tween cars. Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799.

8186. Traveler not generally a trespasser—A pedestrian attempting to pass through a train by climbing over the couplers between cars is a trespasser. Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799.

(19) Urbas v. Duluth, M. & N. Ry. Co., 113 Minn. 309, 129 N. W. 513 (complaint held not to show that a child was a trespasser on a crossing); Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

8188. Duty of traveler to look and listen—A traveler is not bound to look for trains as soon as he reaches a point where it is possible to do so, but only when he reaches a point so near that he is in a position of danger and reasonable care requires him to look and listen. Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882. See Note, 37 L. R. A. (N. S.) 135.

(26) Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40; Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889; Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164 (driver of automobile). See Note, 37 L. R. A. (N. S.) 135 (place and direction of observation); 46 L. R. A. (N. S.) 702 (duty of driver of automobile).

(27) Green v. Great Northern Ry. Co., 123 Minn. 279, 143 N. W. 722; Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889; Chicago etc. Ry. Co. v. Bennett, 181 Fed. 799.

(29) Lang v. Northern Pacific Ry. Co., 118 Minn. 68, 136 N. W. 297. See Digest, § 8176.

(33) Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40; Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889.

(34) Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889 (failure of the company to give the statutory signals may excuse the traveler in relaxing somewhat in his vigilance, but it does not excuse a total want of vigilance); Chicago etc. Ry. Co. v. Bennett, 181 Fed. 799.

(37) Chicago etc. Ry. Co. v. Bennett, 181 Fed. 799.

8188a. Same—Duty of passenger in vehicle driven by another—A passenger in a vehicle driven by another is bound to exercise reasonable care for his own safety. A person of ordinary prudence riding with another, upon his invitation, will naturally put a certain trust in his judgment, and will rely in some measure on the assumption that he will use care to avoid the ordinary dangers of the road. In order to conclusively charge a mere passenger with contributory negligence in failing to see an approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive

against him. In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and, being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety. Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164.

8189. Presumption as to looking and listening—The presumption that a person who was killed by a train while crossing a railroad track at a street intersection exercised due care for his safety contains no elements differentiating it from the ordinary presumption of right conduct, and is not conclusive. It may be overcome by direct evidence, or by facts and circumstances clearly showing a failure to exercise due care. Force and effect will be given the evidence tending to overcome the presumption, whether it appears from the plaintiff's case in chief or from that offered by defendant. Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419.

The undisputed evidence must clearly and fully rebut every reasonable presumption that a person killed was in the exercise of due care. Unless the evidence is conclusive it is for the jury to determine whether the presumption is overcome. Lewis v. Chicago etc. Ry. Co., 111 Minn. 509, 127 N. W. 180; Green v. Great Northern Ry. Co., 123 Minn. 279, 143 N. W. 722.

(38) Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40.

(39) Knudson v. Great Northern Ry. Co., 114 Minn. 244, 130 N. W. 994; Anderson v. Duluth & Iron Range R. Co., 116 Minn. 346, 133 N. W. 805; Drews v. Northern Pacific Ry. Co., 116 Minn. 385, 133 N. W. 865; Simonson v. Minneapolis etc. Ry. Co., 117 Minn. 243, 135 N. W. 745; Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419; Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945; Summer v. Chicago etc. Ry. Co., 122 Minn. 44, 141 N. W. 854; Green v. Great Northern Ry. Co., 123 Minn. 279, 143 N. W. 722; Gillespie v. Great Northern Ry. Co., 127 Minn. 234, 149 N. W. 302; Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729; Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882; Baltimore etc. R. Co. v. Landrigan, 191 U. S. 461. See Digest, § 7032; Note, 4 L. R. A. (N. S.) 344.

8190. Traveler not ordinarily bound to stop—(42) Nelson v. Minneapolis & St. L. R. Co., 123 Minn. 350, 143 N. W. 914; Jenkins v. Minne-

apolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40; Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729.

8192. Assumption that company will exercise due care—While a traveler may assume that the company will give the statutory signals he cannot rely on this assumption to the extent of omitting to look and listen simply because he does not hear the signals. Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889.

(45) Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613; Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40; Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889; Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729.

8193. Contributory negligence—Law and fact—The fact that the deceased was familiar with the crossing is not conclusive against him. Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419.

The supreme court is extremely loath to reverse a case on the ground that the evidence shows contributory negligence as a matter of law. See, for example, Weiss v. Great Northern Ry. Co., 119 Minn. 355, 138 N. W. 423, and Digest, § 7034.

It is not negligent as a matter of law for a pedestrian to take an unusual course in walking on a public crossing or street. Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613.

A boy six years old, riding with his father, cannot be charged with contributory negligence for failing to take precautions for his own safety at a railroad crossing. Brennan v. Minnesota, D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611.

(48) Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419.

(50) Lang v. Northern Pacific Ry. Co., 118 Minn. 68, 136 N. W. 297 (city crossing—gates up—smoke from switching engine prevented plaintiff from seeing approaching fast passenger train, which he knew was due—plaintiff knew that gates were not closed for train—crossing occupied by switch train); Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799 (village crossing—gates to crossing closed—pedestrian attempting to climb through train between cars—his negligence conceded—claim of wilful negligence on part of company not justified by the evidence); Sikorski v. Great Northern Ry. Co., 127 Minn. 110, 149 N. W. 5 (crossing blocked by freight train—plaintiff attempted to cross by climbing over coupling between cars); Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164 (village crossing—driver of automobile failed to look or listen).

(51) Cawley v. Great Northern Ry. Co., 113 Minn. 489, 129 N. W. 842 (city crossing—gates not operated—freight cars backed across street—no lights or trainman on leading car—no signals—8:40 p. m.);

Knudson v. Great Northern Ry. Co., 114 Minn. 244, 130 N. W. 994 (crossing near village—no signals—dim headlight—night very dark and hazy—wind interfered with hearing); Anderson v. Duluth & Iron Range R. Co., 116 Minn. 346, 133 N. W. 805 (country crossing—night dark and cloudy—fog or mist—view obstructed by curve in road and topography—train being backed between stations); Drews v. Northern Pacific Ry. Co., 116 Minn. 385, 133 N. W. 865 (village crossing—trains moving in opposite directions—two tracks); Belshan v. Illinois Central R. Co., 117 Minn. 110, 134 N. W. 507 (taking threshing outfit across tracks—rails above planks of crossing—outfit slid on rails and delayed passage—whether plaintiff took reasonable precautions to signal approaching train held a question for the jury); Simonson v. Minneapolis etc. Ry. Co., 117 Minn. 243, 135 N. W. 745 (village crossing—no whistle except a faint blast at a considerable distance from station—bell not rung—excessive speed—view obstructed); Lane v. Northern Pacific Ry. Co., 119 Minn. 258, 137 N. W. 1114 (dangerous crossing because near junction of two lines of railroad—view obstructed by trees—dark night—passenger train running at excessive speed without ringing bell or blowing whistle—deceased thirty-three years old—driving an automobile at high speed); Nelson v. Northern Pacific Ry. Co., 119 Minn. 347, 138 N. W. 419 (city crossing—dark cold evening about 6:30—wind blowing from northwest—deceased facing wind and away from approaching train—view obstructed by lumber yard and piles of lumber—conditions for hearing or seeing trains unfavorable—no flagman or gates at crossing though required by ordinance—deceased lived near crossing and was going to his barn across tracks); Weiss v. Great Northern Ry. Co., 119 Minn. 355, 138 N. W. 423 (city crossing—very dark evening about 7:30—high wind blowing—place unlighted—headlight of engine not lighted—plaintiff, a young woman, lived near and was familiar with crossing—train made a great deal of noise and plaintiff admitted hearing noise before reaching track); Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945 (village crossing—hazy night—train running forty miles an hour with dim headlight—no signals given—train made little noise—view obstructed—no stop made at station—another train due from opposite direction—deceased a young man with normal senses and familiar with crossing); Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613 (crossing in milling district of Minneapolis—nighttime—car backed over crossing without light on car or other warning—to avoid collision plaintiff attempted to jump on the loading platform of an adjoining mill—caught between platform and car); Summer v. Chicago etc. Ry. Co., 122 Minn. 44, 141 N. W. 854 (city crossing—spur track—ordinance requiring flagman—no flagman at time of accident—9:30 in the evening—view obstructed—noise from electric light plant near—headlight dim—no signal of approach—crossing down grade and

slippery—deceased sixty-two years old—had been drinking); Campbell v. Northern Pacific Ry. Co., 122 Minn. 102, 141 N. W. 855 (grade crossing in suburbs of city—dusk—snow falling—wind blowing toward train—headlight dim—no bell rung—train drifting with steam shut off—train made little noise—plaintiff was alive to his dangers and looked for approaching train—another train approaching with brilliant headlight). Green v. Great Northern Ry. Co., 123 Minn. 279, 143 N. W. 722 (village crossing—driving a noisy automobile—dark night about 10 o'clock—driving only two or three miles an hour—freight cars standing on one track—fast passenger train struck machine and killed driver—noise of machine enough to prevent him from hearing whistle of train—he was not a resident and it did not appear that he knew that a passenger train was due—view obstructed); Nelson v. Minneapolis & St. L. R. Co., 123 Minn. 350, 143 N. W. 914 (village crossing—two tracks—view obstructed by cars standing on tracks—plaintiff driving team standing in wagon behind seat—familiar with crossing—day clear); Jenkins v. Minneapolis & St. L. R. Co., 124 Minn. 368, 145 N. W. 40 (city crossing near station—parallel tracks—view obstructed—growing dark—train unlighted—no signals—oblique approach of train—plaintiff driving team); Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804 (village crossing—deceased one of several boys running back and forth across track as train approached—engineer saw boys playing about tracks for a mile or more before crossing was reached—deceased saw train approach and attempted to run across track in front of it); Amann v. Minneapolis & St. L. R. Co., 126 Minn. 279, 148 N. W. 101 (boy eight years old attempting to pass between cars at a city crossing—train blocking the crossing—no engine attached to train so far as boy could see—brakeman saw boy make attempt); Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889 (village crossing—dark evening about 6 p. m.—headlight not lighted—no statutory signals—view obstructed by box cars on an intervening track—plaintiff driving an automobile); Gillespie v. Great Northern Ry. Co., 127 Minn. 234, 149 N. W. 302 (village crossing near station—freight cars standing on crossing—deceased was passing around them when they were struck by other cars in switching operations and he was knocked down and killed); Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164 (gratuitous passenger in automobile); Gambell v. Minneapolis etc. Ry. Co., 129 Minn. 262, 152 N. W. 408 (grade crossing in city—four tracks—growing dark—car stood on third track near center of street—planks on crossing only sixteen feet long—plaintiff attempted to drive his automobile around car over the rails beyond the planking—engine of automobile died—after cranking it plaintiff attempted to back off to avoid approaching cars—automobile struck twice by cars and injured—no

attendants on cars that caused injury and no warning of their approach —engine was at a distance); Brown v. Chicago & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729 (country crossing—crossing of two railroads at highway crossing—just ahead of deceased two men on horseback had crossed tracks in safety—attention may have been diverted by a freight train approaching on other tracks from an opposite direction—fast express train which struck deceased gave no warnings); Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882 (village crossing—dark day with flurries of snow—strong wind in face of traveler—freight train on tracks—switching operations going on, with noise and smoke—wind carried smoke in direction of fast approaching passenger train which struck and killed traveler—distracting circumstances).

8194. Imputed negligence—(52) Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164; Brennan v. Minn. D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611 (negligence of parent not imputed to child).

8195. Sudden emergency—Distracting circumstances—(54) Simonson v. Minneapolis etc. Ry. Co., 117 Minn. 243, 135 N. W. 745; Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613; Lawler v. Minneapolis etc. Ry. Co., 129 Minn. 506, 152 N. W. 882.

8196. Wilful negligence or injury—(56) Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804; Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799; Gillespie v. Great Northern Ry. Co., 127 Minn. 234, 149 N. W. 302.

8200. Pleading—A complaint charging negligence in the backing of cars across a public crossing, whereby a child three years old was injured, held sufficient on demurrer. Urbas v. Duluth, M. & N. Ry. Co., 113 Minn. 309, 129 N. W. 513.

Where the complaint merely alleged negligence in the operation of the train the court limited the case to a failure to give the statutory signals. Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945.

A complaint construed as alleging both wilful and ordinary negligence so that proof of ordinary negligence did not constitute a fatal variance. Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804.

8201. Burden of proof—Where the plaintiff is injured when attempting to pass through the train over couplers between cars he has the burden of showing with reasonable certainty that the engineer had notice of his perilous position. Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799.

8202. Evidence—Admissibility—(65) Gillespie v. Great Northern Ry. Co., 127 Minn. 234, 149 N. W. 302 (private rules of railroad company for guidance of its servants held inadmissible).

8203. Evidence—Sufficiency—Evidence, in an action for the death of a pedestrian at a railway crossing, considered, and held sufficient to take the case to the jury upon the question as to whether the defendant's employees in charge of its train were guilty of negligence in failing to give the necessary and statutory signals. The jury, in such action, had the right to consider the defendant's failure to produce as a witness the fireman of the engine which struck the deceased, in determining the truth of the engineer's testimony that he signaled by whistle and that the fireman rang the bell. Tegels v. Great Northern Ry. Co., 120 Minn. 31, 138 N. W. 945.

Evidence held sufficient to justify the submission of defendant's negligence to the jury. Howell v. Great Northern Ry. Co., 125 Minn. 137, 145 N. W. 804.

Evidence held insufficient to justify a recovery for wilful negligence. Helback v. Northern Pacific Ry. Co., 125 Minn. 155, 145 N. W. 799.

FIRES CAUSED BY TRAINS

8204. Duty of company—Degree of care—Where a fire not caused by the company, was burning for several days on its right of way, to its knowledge and under such circumstances that it was likely to spread to plaintiff's land and destroy his timber, if reasonable care was not taken to prevent it, it was held that the company owed plaintiff the duty to take such care. The company started a second fire and allowed the first fire to join it, and to spread and destroy plaintiff's timber. The company was held liable for the damages. Farrell v. Minneapolis & Rainy River Ry. Co., 121 Minn. 357, 141 N. W. 491.

8204a. Property of licensees on right of way—When a railroad company allows others to place their property on its right of way the measure of its duty to avoid injury to the property from fire is the same as if the property were off, but adjacent to, its right of way. L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 423, 144 N. W. 145 (railroad ties of plaintiff piled on right of way with the consent of the railroad company—recovery for loss by fire sustained).

8206. Combustible material on right of way—(74) See Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491; L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 423, 144 N. W. 145 (railroad ties on right of way in Wisconsin—instructions as to statute of Wisconsin requiring railroad companies to keep their right of way reasonably free from dead grass and debris held proper).

8211. Evidence—Sufficiency as to cause of fire—(83) Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275; Trustees v. Chicago etc. Ry. Co., 119 Minn. 181, 137 N. W. 970; Holden & Wheel-

ing Mutual Fire Ins. Co. v. Chicago, G. W. R. Co., 120 Minn. 230, 139 N. W. 157; McClure v. Minneapolis etc. Ry. Co., 120 Minn. 523, 139 N. W. 1134; Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491; Sembum v. Duluth & Iron Range R. Co., 121 Minn. 439, 141 N. W. 523.

8212. Statutory liability absolute—Proof of negligence unnecessary—(85) Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275 (statute does not affect degree of proof required as to cause of fire); Trustees v. Chicago etc. Ry. Co., 119 Minn. 181, 137 N. W. 970 (sufficient under the statute to prove that fire was caused by a locomotive of defendant—not necessary to prove negligence); Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491 (case not controlled by statute—constitutionality of statute left undetermined); Chicago etc. Ry. Co. v. Kendall, 186 Fed. 139 (statute held constitutional). See 25 Harv. L. Rev. 463, 465; 27 Id., 688.

8213. Contributory negligence—In an action for the loss from fire of railroad ties piled on the right of way of defendant by its license, the contributory negligence of plaintiff held a question for the jury. L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 423, 144 N. W. 145.

As respects liability for the destruction by fire of property lawfully held on private premises adjacent to a railroad right of way and track, the owner discharges his full legal duty for its protection if he exercises that care which a reasonably prudent man would exercise under like circumstances to protect it from the dangers incident to the operation of the railroad conducted with reasonable care. Le Roy Fibre Co. v. Chicago etc. Ry. Co., 232 U. S. 340. See 27 Harv. L. Rev. 688.

8215. Pleading—A complaint which alleges that a railway company was negligent in failing to patrol its right of way to prevent and extinguish fires, and in not equipping certain locomotive engines with proper spark arresters, that certain engineers negligently failed to inspect their engines before taking them out on the road, and that a section boss was negligent in failing to keep the right of way clear from combustible matter, which resulted in starting a fire from sparks from the engines, which destroyed the property of another on adjoining premises, states a cause of action against each defendant. Patry v. Northern Pacific Ry. Co., 114 Minn. 375, 131 N. W. 462.

(88) Farrell v. Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491 (variance immaterial).

8216. Measure of damages—(89) Reynolds v. Great Northern Ry. Co., 119 Minn. 251, 138 N. W. 30 (timber—standing and down); Farrell v.

Minneapolis etc. Ry. Co., 121 Minn. 357, 141 N. W. 491 (timber); Chicago etc. Ry. Co. v. Kendall, 186 Fed. 139 (destruction of buildings——measure of damages the value of the buildings detached from the land and not the difference in the value of the land before and after the destruction of the buildings).

8217. **Evidence—Admissibility**—(90) Trustees v. Chicago etc. Ry. Co., 119 Minn. 181, 137 N. W. 970 (instructions that circumstantial evidence was necessary because sparks emitted in the daytime are invisible, held not prejudicial); Sembum v. Duluth & Iron Range R. Co., 121 Minn. 439, 141 N. W. 523 (evidence tending to show negligence of defendant in not attempting to put out a fire held admissible); L. R. Martin Timber Co. v. Great Northern Ry. Co., 123 Minn. 423, 144 N. W. 145 (action for loss of railroad ties piled on the right of way of defendant with its license—custom of piling ties and wood there for shipment held admissible).

COMMON-LAW LIABILITY FOR INJURIES TO ANIMALS

8224. **Animals trespassing on tracks**—Evidence held insufficient to justify a recovery for the killing of cattle on right of way. Anderson v. Chicago etc. Ry. Co., 111 Minn. 531, 127 N. W. 455.

RAPE

8229. **What constitutes**—(6) State v. Ingraham, 118 Minn. 13, 136 N. W. 258.

8231. **Evidence—Admissibility**—Exclamations of prosecutrix held admissible as part of res gestæ. State v. Ingraham, 118 Minn. 13, 136 N. W. 258. See Note, 19 L. R. A. 744.

Evidence of acts of sexual intercourse between the parties immediately prior to the time relied upon by the state for conviction, and other than the act so relied upon, held competent and proper, as tending to corroborate the charge made by complainant. State v. Schueller, 120 Minn. 26, 138 N. W. 937.

Evidence of subsequent sexual intercourse is admissible. State v. Roby, 128 Minn. 187, 150 N. W. 793; People v. Thompson, 212 N. Y. 249, 106 N. E. 78.

8232. **Degree of proof required—Corroboration of prosecutrix**—(15) See State v. Johnson, 114 Minn. 493, 131 N. W. 629.

8233. **Evidence—Sufficiency**—(16) State v. Ingraham, 118 Minn. 13, 136 N. W. 258; State v. Schueller, 120 Minn. 26, 138 N. W. 937.

CARNAL ABUSE OF CHILD

8243. Variance—(28) See State v. Schueller, 120 Minn. 26, 138 N. W. 937.

8243a. Evidence—Admissibility—Cross-examination of prosecutrix—Evidence of pregnancy, following the intercourse with defendant, and the subsequent birth of a child, held admissible in corroboration of the charge of carnal knowledge. State v. Johnson, 114 Minn. 493, 131 N. W. 629.

Evidence of conduct on the part of the defendant tending to destroy the child's modesty and physically to prepare her for coition is admissible. State v. Kaufman, 125 Minn. 315, 146 N. W. 1115.

Evidence of subsequent sexual intercourse held admissible. State v. Roby, 128 Minn. 187, 150 N. W. 793. See People v. Thompson, 212 N. Y. 249, 106 N. E. 78.

The defendant is entitled to wide latitude in the cross-examination of the prosecutrix. She may be asked as to her testimony before the grand jury. The extent of the cross-examination rests largely in the discretion of the trial court. State v. Trocke, 127 Minn. 485, 149 N. W. 944 (exclusion of question as to her testimony before grand jury merely to test her memory held not prejudicial).

8244. Evidence—Sufficiency—Corroboration of prosecutrix—A conviction may rest on the uncorroborated testimony of the prosecutrix, unless such testimony is discredited by facts and circumstances casting doubt upon its truth. When the prosecutrix and the defendant flatly contradict each other, the jury should be cautioned to weigh carefully all the facts and circumstances tending to show where the truth lies. State v. Trocke, 127 Minn. 485, 149 N. W. 944.

(29) State v. Johnson, 114 Minn. 493, 131 N. W. 629; State v. Kaufman, 125 Minn. 315, 146 N. W. 1115; State v. Trocke, 127 Minn. 485, 149 N. W. 944; State v. Roby, 128 Minn. 187, 150 N. W. 793. See State v. Clark, 114 Minn. 342, 131 N. W. 369.

REAPPORTIONMENT—See State, 8831b.

RECAPTION

8246a. Of personal property by the owner—It probably is the law that the owner of personal property which has been wrongfully and unlawfully taken from him may, in a particular case, forcibly retake it from the wrongdoer, using no more force than is necessary for the purpose. In other words, that this statement may not be construed too broadly, where the owner sees a thief steal and make off with some valuable article of personal property, he may pursue the thief and retake his property, using no more force than is necessary, and not submit to the delay incident to suing out a writ of replevin. But the rule does not apply to all cases of wrongful taking of property. Evertson v. McKay, 124 Minn. 260, 144 N. W. 950. See 28 Law Quarterly Rev. 262.

RECEIVERS

8248. In what cases appointed—Discretion—A receivership remedy is merely ancillary to the main cause of action, and not an independent remedy, and can only be resorted to in a pending action brought to obtain specific relief which the court has jurisdiction to grant. Red River Potato Growers Assn. v. Bernardy, 126 Minn. 440, 148 N. W. 449.

The appointment of a receiver to take possession of property pendente lite is a matter resting largely in the discretion of the court. A receiver will be appointed for such purpose only under circumstances requiring summary relief or where the court is satisfied there is imminent danger of loss and where there is no adequate remedy at law. Such relief will not ordinarily be granted while the question of title is in dispute, at least unless the party making the application establishes a reasonable probability of his ultimate success in establishing title. Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264, 537.

In an action for the dissolution of a copartnership and for the appointment of a receiver to wind up the firm affairs, the only questions necessary to be determined preceding the appointment of a receiver are: (1) The existence of the alleged partnership; and (2) the facts necessary to vest in the court jurisdiction of the controversy. The appointment of a receiver in such an action in no way determines the rights of the partners, but is merely preliminary to a full hearing and adjustment of all differences, upon which the partners may be heard in the due course of subsequent proceedings. Norton v. Sperry, 113 Minn. 447, 129 N. W. 843.

In an action for the dissolution of a partnership a receiver should not be appointed unless it is necessary to protect the property or the in-

terests of the parties. Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101.

A receiver will not be appointed when there is another adequate remedy. Red River Potato Growers Assn. v. Bernardy, 126 Minn. 440, 148 N. W. 449 (another remedy by mandamus or replevin).

Certain property was acquired by defendants, assuming to act for plaintiff corporation, but wholly without authority. The corporation repudiated their assumed authority and all contracts made by them in its name. It does not claim to own the property, and does not seek in this action to have the title thereto adjudicated. Persons who made contracts with the defendants, so assuming to act for plaintiff, have demanded of plaintiff the performance of the same, which plaintiff has refused. Held, that since plaintiff repudiated the authority of defendants to act for it, and denies liability for their contracts, and does not claim to own the property, it is not entitled to have a receiver appointed to hold the property pending a determination of its controversy with such third persons. Red River Potato Growers Assn. v. Bernardy, 126 Minn. 440, 148 N. W. 449.

(40) Albrecht v. Diamon, 125 Minn. 283, 146 N. W. 1101; Red River Potato Growers Assn. v. Bernardy, 126 Minn. 440, 148 N. W. 449; Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264.

8252. Order of appointment—(60, 61) See Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315 (foreign receiver).

8253. Powers—Power to create liens. Note, 83 Am. St. Rep. 72.

Right to take property from possession of stranger. Note, 47 L. R. A. (N. S.) 744.

(62) See Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264 (action for an accounting between alleged former partners—court properly refused to authorize a receiver to take possession of property claimed by each as individual property).

8260. Actions by—Pleading—(84) See Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

(86) Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315 (a receiver is a trustee of an express trust).

See Dunnell, Minn. Pl. 2 ed. § 849.

8262. Compensation—(13) See Crosby v. Larson, 127 Minn. 315, 149 N. W. 466 (plaintiff sued to recover for services rendered and disbursements made as attorney for a receiver—upon conflicting evidence, the court found as a fact that plaintiff rendered no services and made no disbursements in the capacity of attorney for the receiver—evidence held sufficient to sustain the finding).

8264. Foreign receivers—Where there was nothing in a complaint by foreign receivers of a foreign corporation to recover a stock subscription, to show, either expressly or by implication, that the appointing court made its adjudication under its general equity powers or without statutory authority, or that it exceeded its jurisdiction, a general demurrer founded upon the existence of such jurisdictional defects was properly overruled. The right of the receivers to sue in this state was properly sustained as against the demurrer, it appearing from the complaint that they were duly authorized by the appointing decree to sue upon claims due the corporation, and there being no showing of the existence of domestic creditors who would be prejudiced by the maintenance of the action. The rule of comity, whereby the receivers were entitled to maintain the action, held not affected by the fact that plaintiffs were appointed by a federal court. Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

RECITALS IN CONTRACTS—See Contracts, 1730a; Estoppel, 3178; Municipal Corporations, 6730.

RECORDING ACT

IN GENERAL

8269. Object of statute—(24) Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494; Finley v. Erickson, 122 Minn. 235, 142 N. W. 198. See Digest, § 8271.

8270. Unrecorded conveyances good between the parties—(25) Undeleak v. Scott, 117 Minn. 136, 134 N. W. 731; Whitman v. Gorman, 126 Minn. 141, 147 N. W. 958.

8271. Right to rely upon record—(26) See Finley v. Erickson, 122 Minn. 235, 142 N. W. 198.

8272. What required to be recorded—(29) United States v. Wesely, 186 Fed. 276 (government patent).

(31) Foss v. Dullam, 111 Minn. 220, 126 N. W. 820. See Digest, §§ 6285, 8298.

8277. Not to be used as an instrument of fraud—(52) See Quinn v. Johnson, 117 Minn. 378, 135 N. W. 1000.

8278. Fraudulent conveyance to innocent purchaser—(53) See Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 222.

RECORDING

8280. Requisites to entitle to record—A forged deed is not entitled to record. Nesland v. Eddy, 131 Minn. —, 154 N. W. 661.

(57) Tiedt v. Boyce, 122 Minn. 283, 142 N. W. 195.

8283. Certificate of record—Certificate of treasurer—A certificate made by the county treasurer on the back of a mortgage that it was not subject to a tax held a nullity. Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

EFFECT OF RECORD AS NOTICE

8288. Instruments not "properly" recorded—Where the defect in the execution of an instrument does not appear on its face, the record thereof is constructive notice to persons dealing with the property. Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449; Berkner v. D'Evelyn, 119 Minn. 246, 137 N. W. 1097.

A forged deed is not entitled to record and does not operate as constructive notice. Nesland v. Eddy, 131 Minn. —, 154 N. W. 661.

(74) Orr v. Sutton, 119 Minn. 193, 137 N. W. 973 (mortgage registry tax not paid held to render record a nullity); Tiedt v. Boyce, 122 Minn. 283, 142 N. W. 195 (mortgage with one witness). See Digest, § 8280; Note, 96 Am. St. Rep. 397.

8291. To whom notice—Where an owner of land conveys it as security by a deed which is duly recorded, a judgment subsequently docketed against the grantor is not constructive notice of the lien thereof to a subsequent purchaser from the vendee. Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720.

Section 3350, R. L. 1905 (G. S. 1913, § 6837), providing that "a certified copy of any judgment, decree, or order made by any court of record within the state, affecting title to real estate or any interest therein, may be recorded in any county where any of the lands lie, in the same manner and with like effect as a conveyance," is a recording act, and does not make the record of such judgment "notice" of the entry thereof, within the meaning of that part of section 4160, R. L. 1905 (G. S. 1913, § 7786), which limits the time within which applications for relief from judgments may be made to one year from notice thereof. Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

(82) Foster v. Coughran, 113 Minn. 433, 129 N. W. 853.

(84) Crowley v. Norton, 131 Minn. —, 154 N. W. 743. See Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

(85) See Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

8293. Scope of notice—Under R. L. 1905, § 4735 (G. S. 1913, § 8454), authorizing the recording of government patents, and under R. L. 1905, § 3356 (G. S. 1913, § 6843), making properly recorded instruments notice to subsequent purchasers, purchasers from a prior patentee are chargeable with notice of a junior recorded patent, and are chargeable through such patent with knowledge that, on account of the junior patentee's prior application to enter the land, the senior patentee was not entitled to the land as against him. United States v. Wesely, 189 Fed. 276.

(88) Ochoa v. Hernandes, 230 U. S. 139 (notice includes invalidity of order on which title rests). See Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

8297. Executory contracts for sale of land—(3) See Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 222.

8298. Assignment of mortgage—An assignment of a mortgage upon real property, though not recorded until after the death of the assignor, is valid and superior to the rights of the heirs of the assignor, who are not, within the recording act, in the position of subsequent bona fide purchasers. An unacknowledged assignment of a mortgage is valid between the parties; the acknowledgment thereof being essential only to entitle it to record. Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812.

EFFECT OF NOT RECORDING

8302. Subsequent purchasers—Under R. L. 1905, § 3357 (G. S. 1913, § 6844), a subsequent purchaser in good faith for a valuable consideration, whose conveyance is first duly recorded, has the title as against a prior unrecorded conveyance, notwithstanding the fact that he purchases from the holder of an unrecorded deed from the record owner, and files for record this deed with that to himself, and thus completes the chain of title of record. Quinn v. Johnson, 117 Minn. 378, 135 N. W. 1000.

Where the deed of a subsequent purchaser in good faith for a valuable consideration is recorded before a prior deed from the common grantor, the prior deed is void as to such subsequent purchaser; and the record of a deed from the grantee in such unrecorded deed to a third person before the deed to the subsequent purchaser is recorded is not notice of the unrecorded deed, and does not give title as against such subsequent purchaser. Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

Heirs are not bona fide purchasers within the recording act. Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812.

(11) Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095; Henry v. White, 123 Minn. 182, 143 N. W. 324.

(16) Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

(17) Barnes v. Gunter, 111 Minn. 383, 395, 127 N. W. 398.

8306. Purchasers with notice—(24) German-American Bank v. Anderberg, 114 Minn. 431, 131 N. W. 468.

8307. Judgments and attachments—(29) Kelly v. Byers, 115 Minn. 489, 132 N. W. 919.

(33) Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720.

RECORDS

8309. Right of inspection—(36) Note, 124 Am. St. Rep. 911.

REFORMATION OF INSTRUMENTS

8328. When granted—General principles—(91) Norman v. Kelso Farmers Mutual Fire Ins. Co., 114 Minn. 49, 130 N. W. 13; Barnum v. White, 128 Minn. 58, 150 N. W. 227.

(94, 95) Wilson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

See § 2914 (election of remedies).

8329. Mistake must be mutual—(97) Note, 117 Am. St. Rep. 227.

(98) Efta v. Swanson, 115 Minn. 373, 132 N. W. 335.

8330. Mistake of law—A contract entered into under a mistake on the part of one of the parties as to its legal effect, coupled with inequitable conduct on the part of the other party, may be reformed. This rule does not apply to a written contract, expressed in unambiguous language, concerning the legal effect of which there can be no question, signed and executed with full knowledge of its various terms and provisions. Inequitable conduct in this connection means representations, acts, or omissions naturally tending to deceive as to the true meaning of the contract. American Fruit Product Co. v. Barrett & Barrett, 113 Minn. 22, 128 N. W. 1009.

(99) Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455 (absolute deed intended as a mortgage executed in ignorance of statute changing former rule as to effect of such a deed); Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721 (id.); Barnum v. White, 128 Minn. 58, 61, 150 N. W. 227. See 24 Harv. L. Rev. 394; Note, 28 L. R. A. (N. S.) 785.

8331. What instruments may be reformed—When parties, through mutual mistake or ignorance, have failed to insert in a deed given to secure a debt the fact that it is so intended, or the amount of the

debt, or both, and there is no intent or purpose to evade the mortgage tax, the instrument may be reformed so as to conform to the provisions of chapter 328, Laws 1907. Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455; Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721.

A conveyance of the homestead, or a portion thereof, executed by both husband and wife, as required by statute, may be reformed by correcting a misdescription of the property intended to be conveyed thereby. Lindell v. Peters, 129 Minn. 288, 152 N. W. 648.

(2) Note, 6 L. R. A. (N. S.) 942; 26 Harv. L. Rev. 212.

(4) Norman v. Kelso Farmers Mut. Fire Ins. Co., 114 Minn. 49, 130 N. W. 13 (policy of insurance); Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794 (contract between husband and wife for payment of permanent alimony); Ætna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955 (policy of insurance).

See cases under § 8347.

8334. Negligence of applicant—(10) See Norman v. Kelso Farmers Mut. Fire Ins. Co., 114 Minn. 49, 51, 130 N. W. 13.

8335. Rights of third parties—Wife—A wife cannot resist the reformation of an executory contract of her husband for the purchase of land on the ground that no mistake was shown on her part, she not being a party to the contract. Herberger v. Zion, 129 Minn. 217, 152 N. W. 268.

8343. Limitation of actions—Laches—(20) See Norman v. Kelso Farmers Mut. Life Ins. Co., 114 Minn. 49, 130 N. W. 13.

8344. Parties to actions—Wife—A wife is not a necessary party to an action against the husband to reform an executory contract entered into by him alone to purchase land. Herberger v. Zion, 129 Minn. 217, 152 N. W. 268.

8347. Evidence—Sufficiency—Especially strong evidence is required to justify a reformation at the instance of an attorney at law who drafted the instrument. Barnum v. White, 128 Minn. 58, 150 N. W. 227.

(26) Norman v. Kelso Farmers Mut. Fire Ins. Co., 114 Minn. 49, 130 N. W. 13; Barnum v. White, 128 Minn. 58, 150 N. W. 227; Ætna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955.

(27) Young v. Baker, 128 Minn. 398, 151 N. W. 132.

(28) Mulgrew-Boyce Co. v. Freeborn County Bank, 112 Minn. 5, 127 N. W. 396 (contract for county ditch—reformation as to engineer's estimate of amount excavated); Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455 (absolute deed intended as security for a debt); Borgstrom v. Haverty, 112 Minn. 500, 128 N. W. 824 (lease);

Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794 (contract between husband and wife for payment of permanent alimony); Efta v. Swanson, 115 Minn. 373, 132 N. W. 335 (deed—reformed by inserting usual covenants of warranty); Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721 (absolute deed intended as a mortgage); Lindell v. Peters, 129 Minn. 288, 152 N. W. 648 (grant of perpetual right of way over homestead by husband and wife—misdescription); Herberger v. Zion, 129 Minn. 217, 152 N. W. 268 (executory contract for purchase of land).

(29) Ætna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955 (policy of employer's liability insurance); Stearn v. Mikolas, 122 Minn. 526, 141 N. W. 1134 (lease); Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469 (where purchasers of realty made a valid contract with the owners to buy the property for a stipulated price, knowing that such price included a broker's commission, held that they could not have the contract reformed so as to reduce the purchase price to the net price given in the first instance by the owners to the broker); Barnum v. White, 128 Minn. 58, 150 N. W. 227 (contract for a joint adventure in dealing in real estate).

REGISTER OF DEEDS

8349. Powers and duties—Liability for negligence—A register of deeds may be liable to a purchaser or incumbrancer for failing to register instruments. See Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

REGISTRATION OF TITLE

8354. Nature and object of proceeding—The right to apply for the registration of title is not affected by the availability or adequacy of other remedies. Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

The proceedings are of an equitable nature. Brown v. Hagadorn, 119 Minn. 491, 138 N. W. 941.

The basic principle of the system is the registration of the title to the land instead of registering only the evidence of title. A title is created by the decree and certificate of registration. Henry v. White, 123 Minn. 182, 143 N. W. 324.

(43) Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

8355. Statute constitutional—(44) Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

8355a. United States lands excepted—The state courts have no jurisdiction over the proprietary title of the United States to land within the

state, and a decree of registration under the Torrens Act, rendered before the United States has parted with such proprietary title, is a nullity as against the United States and its subsequent vendees. Shevlin-Mathieu Lumber Co. v. Fogarty, 130 Minn. 456, 153 N. W. 871.

8355b. Tax titles—Necessity of prior adjudication of validity—A judgment adjudicating the validity of a tax title, rendered in an action against the holder of the legal title of the property, is a sufficient compliance with section 3373, R. L. 1905 (G. S. 1913, § 6871), which provides that no land, title to which is derived from a tax sale, shall be registered under the Torrens Act until the title so acquired has been adjudicated valid by a court of competent jurisdiction, even though the judgment does not conclude all persons claiming an interest in the property. All persons not concluded by the judgment may contest the validity of the tax title in the registration proceedings, and present and have determined therein their claims of title adverse to the applicant. Hendricks v. Hess, 112 Minn. 252, 127 N. W. 995.

8356. Procedure—Application of general rules of procedure—There is no constitutional or statutory right to a jury trial of any of the issues. Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

(45) Kuby v. Ryder, 114 Minn. 217, 130 Minn. 1100 (judgment on the pleadings—amendment of pleadings—findings of fact and conclusions of law should be made as in an ordinary action); Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

8357. Application of law of real property—Equitable principles are applicable. Brown v. Hagadorn, 119 Minn. 491, 138 N. W. 941.

The doctrine of part performance of an oral contract for the conveyance of land is applicable. Midway Realty Co. v. Covell, 128 Minn. 135, 150 N. W. 615.

8358. Who may make application—Existence of other remedies—The right to apply for the registration of a title is unaffected by the availability or adequacy of other remedies. Peters v. Duluth, 119 Minn. 96, 137 N. W. 390.

8359. Summons—Publication—Misnomer—Strict accuracy is required in the names of defendants in published summons. Designating a married woman by her maiden surname is fatal. So is a wrong initial. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

8360. Parties defendant—It is the duty of the court to determine what parties shall be named as defendants, but it is not to be expected that the court can or should do this without the aid of the applicant and the examiner. Riley v. Pearson, 120 Minn. 210, 139 N. W. 361.

An applicant is charged with knowledge of his attorney of facts making claimants necessary parties. He is also charged with notice when

the claimant is in the actual possession of the land. Riley v. Pearson, 120 Minn. 210, 139 N. W. 361.

The state cannot be made a party unless in the opinion of the examiner, it has an interest in or lien on the land. State v. Ries, 123 Minn. 397, 143 N. W. 981.

(53) Arnold v. Smith, 121 Minn. 116, 140 N. W. 748; Riley v. Pearson, 120 Minn. 210, 139 N. W. 361; Henry v. White, 123 Minn. 182, 143 N. W. 324.

8360a. Parties acquiring title pendente lite—Must appear and answer at once—Under R. L. 1905, § 3395 (G. S. 1913, § 6894), providing that, where a person acquires an interest in land pending proceedings to register the title thereof and prior to the entry of decree, he must appear and answer in such proceedings "at once," persons who delayed more than six months after actual notice of proceedings to register the title to certain land before making application for permission to answer in such proceedings, in order to assert interests alleged to have been acquired pendente lite, were not entitled to answer as a matter of right. R. L. 1905, § 3396 (G. S. 1913, § 6895), has no application to such a case. Brown v. Hagadorn, 119 Minn. 491, 138 N. W. 941.

8361. Effect in establishing title—A title is created by the decree and certificate of registration. Henry v. White, 123 Minn. 182, 143 N. W. 324.

(54) Riley v. Pearson, 120 Minn. 210, 139 N. W. 361; Henry v. White, 123 Minn. 182, 143 N. W. 324 (effect of fraud in failing to serve known claimants—bona fide purchasers). See § 8364.

8361a. Decree—Issues—Relief allowable—Dismissal—The court not only has authority to adjudicate the issues, but is required to do so, as in ordinary civil actions, before awarding applicant relief. When the applicant fails to establish his title the court cannot decree title in defendant, or order such title registered, but can only dismiss the application. Seeger v. Young, 127 Minn. 416, 149 N. W. 735.

8363. Opening and vacating decrees—(57) See Brown v. Hagadorn, 119 Minn. 491, 138 N. W. 941.

8364. Fraud—Failure to make known claimant a party—Collateral attack on decree—Where the applicant fails to disclose to the court the names of persons known to him to have an interest in or lien upon the property, and such persons are not named as parties to the proceeding or served with summons, and do not have actual notice of the proceeding, a judgment rendered therein is not binding upon such persons. Applicant in the proceedings in question herein held to have known before the summons was applied for that her title was subject to permanent easements owned by persons known to her. Such judgment, rendered without jurisdiction of the persons owning such easements, was void

as to them, and may be attacked collaterally. Riley v. Pearson, 120 Minn. 210, 139 N. W. 361.

A plaintiff seeking to have a trust impressed upon property in the hands of defendant, held not estopped from seeking the relief by a Torrens decree adjudging title in defendant, she having been knowingly misnamed in the summons as bearing her former husband's name, and having neither appeared in the proceeding nor been personally served therein. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

Where a judgment is procured by fraud on the part of the applicant in failing to name as parties or serve claimants known to him, it is not binding upon such omitted claimants. If the want of jurisdiction due to the failure to serve known claimants appears from the judgment roll itself, the judgment is void as against such claimants and may be attacked collaterally. Where such want of jurisdiction does not appear from the judgment roll itself, the judgment is not subject to collateral attack, though the applicant fraudulently concealed the existence of a known claimant. Where the existence of such claimant does not appear from the judgment roll itself, or the proceedings, and where such proceedings are absolutely regular on their face, one who purchases from the registered owner for a valuable consideration in reliance upon the judgment and without notice or anything to put him on inquiry, takes the title free from all incumbrances and adverse claims except these noted on the certificate. Henry v. White, 123 Minn. 182, 143 N. W. 324.

In proceedings to register title, to which the holder of tax certificates on the land and the county where the land was situated were parties, the tax sales on which the certificates were issued were adjudged void for reasons that entitled the holder to refundment. Held, that such judgment cannot be attacked collaterally for error or fraud, and is, as against the county, conclusive of the right to refundment. State v. Ries, 123 Minn. 397, 143 N. W. 981.

8364a. Reimbursement from assurance fund—To entitle land to registration under the Torrens Act, it must be established that the United States has parted with its original title thereto; and, where the United States has not parted with such title, the omission of the examiner to ascertain and report such fact is an "omission" which entitles a good-faith purchaser who subsequently, and without negligence on his own part, purchases the land on the faith of a certificate of title issued in such proceedings and whose title failed because the land belonged to the United States, to reimbursement out of the assurance fund. Purchasing registered land on the faith of the certificate of title and without making an independent investigation of the title is not negligence on the part of the purchaser. The statute imposes upon the examiner the

duty to make his investigation full and thorough, and he is not justified in relying upon a receipt or certificate issued to an entryman by a local land office as establishing that the United States has parted with its proprietary title. A certificate of title is an assurance to subsequent purchasers that the court had jurisdiction of the subject-matter of the title, and if the examiner neglected to report that no patent had issued and the title of a good-faith purchaser fails because the land belonged to the United States, the failure of the examiner to report the absence of a patent entitles such purchaser to reimbursement out of the assurance fund although the certificate does not purport to bar the rights of the United States. Shevlin-Mathieu Lumber Co. v. Fogarty, 130 Minn. 456, 153 N. W. 871.

RELATION

8366. Application—(61) Christopherson v. Harrington, 118 Minn. 42, 136 N. W. 289 (title of trustee in bankruptcy relates back as of the date of the adjudication of bankruptcy).

RELEASE

8368. What constitutes—Validity—A release of liability made upon the sale of a threshing machine held inoperative because of the failure of the defendant to put the machine in order. Pederson v. Reeves & Co., 115 Minn. 249, 132 N. W. 204.

Releases and covenants not to sue joint, or joint and several, debtors. 25 Harv. L. Rev. 203.

(64) Murray Cure Institutes Co. v. McClure, 110 Minn. 1, 124 N. W. 213.

8370. Consideration—Failure—A release of liability made upon the sale of a threshing machine held inoperative because of the failure of the defendant to put the machine in order. Pederson v. Reeves & Co., 115 Minn. 249, 132 N. W. 204.

(66) Note, 107 Am. St. Rep. 615.

8373. Of joint tortfeasors—A cause of action under the statute for death by wrongful act is one and indivisible, and a recovery against, or settlement with, one of the wrongdoers is a bar to an action against the others. Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796.

(70) See Walsh v. New York etc. R. Co., 204 N. Y. 58, 97 N. E. 409 (one seeking to avoid liability for personal injury through discharge from liability of a joint wrongdoer must show that the settlement was made under such circumstances as to discharge him); Note, 111 Am. St. Rep. 281.

8374. Fraud—Mental incompetency—A release of a claim for personal injuries, executed in reliance on fraudulent and false representations of probability of recovery, made to the injured person by an attending physician in the employ of persons sought to be charged therewith, is voidable. Such release may also be avoided when its execution was due to a mutual mistake of the injured person and of such a physician, who has assisted in procuring the settlement. Where, however, such an attending physician in the course of treatment expresses a mistaken, but honest, opinion as to the period within which the injured person, suffering from a known injury, would recover, and where that expression of opinion, when made, had no connection whatever with a settlement, or with negotiations for a settlement, a release executed in reliance on his statement under circumstances here shown was properly held valid. Nelson v. Chicago & N. W. Ry. Co., 111 Minn. 193, 126 N. W. 902.

To justify setting aside a written release for mental incompetency the evidence must be clear and convincing. Carlson v. Elwell, 128 Minn. 440, 151 N. W. 188; McDonnell v. Chicago etc. Ry. Co., 130 Minn. 125, 153 N. W. 255.

(71) Mah-Eng-Aunce v. Anundsen, 110 Minn. 488, 126 N. W. 136 (dismissal of action based on a fraudulent release set aside); Gibson v. Nelson, 111 Minn. 183, 190, 126 N. W. 731 (collateral attack on fraudulent compromise and settlement); Nelson v. Chicago & N. W. Ry. Co., 111 Minn. 193, 126 N. W. 902 (misrepresentations of physician as to probability of recovery); Marple v. Minneapolis & St. L. R. Co., 115 Minn. 262, 132 N. W. 333 (release of claim for personal injuries—representations of defendant's claim agent as to probability of recovery—ratification—duty to return money on rescission of contract—duty to rescind within reasonable time); Winter v. Great Northern Ry. Co., 118 Minn. 487, 136 N. W. 1089 (release of claim for personal injuries—evidence held to justify finding of fraud); Rase v. Minneapolis etc. Ry. Co., 118 Minn. 437, 137 N. W. 176 (claim for personal injuries—vacating stipulation obtained by fraud—duty to return money received—inability to return money—held error to require plaintiff to return more money than he had the ability to do before trial—allowing adjustment to await termination of litigation); Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070 (action for breach of promise—defence of release—fraud—law and fact—erroneous instructions); Fitzpatrick v. Chicago etc. Ry. Co., 121 Minn. 370, 141 N. W. 485 (certain statements of the physician of the defendant to the effect that plaintiff would recover and that his injured arm would be all right and in good condition within six months, held not a ground for avoiding a release); Maki v. St. Luke's Hospital Assn., 122 Minn. 444, 142 N. W. 705 (ratification of release by taking money); Petterson v. Butler Bros., 123 Minn. 516, 144 N. W. 407

(instructions as to degree of proof of fraud sustained); Cox v. Edwards, 126 Minn. 350, 148 N. W. 500 (claim for breach of promise); Carlson v. Elwell, 128 Minn. 440, 151 N. W. 188 (charge of fraud and mental incompetency—evidence held insufficient to justify setting release aside); Hannula v. Duluth & I. R. R. Co., 130 Minn. 3, 153 N. W. 250 (finding of a want of fraud sustained); McDonnell v. Chicago etc. Ry. Co., 130 Minn. 125, 153 N. W. 255 (evidence held insufficient to require the submission of an issue of fraud and undue influence to a jury); Kowatch v. Pittsburgh Construction Co., 130 Minn. 174, 153 N. W. 326 (finding that release was procured by fraud held not justified by the evidence and a new trial granted). See Digest, §§ 1524, 2611, 1810, 1815.

8375. Mistake—(74) See Nelson v. Chicago & N. W. Ry. Co., 111 Minn. 193, 126 N. W. 902; Fitzpatrick v. Chicago etc. Ry. Co., 121 Minn. 370, 141 N. W. 485.

8377. Evidence—Sufficiency—An agreement in parol to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside the written contract. First National Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

(79) Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Cox v. Edwards, 126 Minn. 350, 148 N. W. 500.

RELIGIOUS SOCIETIES

8381. Meetings—Want of notice—Ratification—(85) See First M. E. Church v. White Bear Beach Church, 126 Minn. 282, 148 N. W. 271.

8385. Contract with pastor—Salary—Liability for salary of pastor. Note, 52 L. R. A. (N. S.) 171.

8386a. Fraudulent conveyances—Certain conveyances of the realty of a society by some of its officers held unauthorized and fraudulent as to the society and its members and properly canceled. First M. E. Church v. White Bear Beach Church, 126 Minn. 282, 148 N. W. 271.

8387. Property in trust—Diversion—Schism—(91) Lindstrom v. Tell, 131 Minn. ——, 154 N. W. 969.

REMOVAL OF CAUSES

8391. Order of state court unnecessary—Record must show prima facie right to removal—The state court is not bound to surrender its jurisdiction until a record has been made which on its face shows that the petitioner has a right to the transfer and the state court has a right to determine, subject to review on appeal, the question of law whether it appears on the face of the record—that is, the petition, the pleadings, and the proceedings down to that time—that the petitioner is entitled to a removal of the suit. Peterson v. Carlson, 127 Minn. 324, 149 N. W. 536.

8395. Diversity of citizenship—When, in a personal injury action, a resident defendant is joined with a nonresident defendant, and on motion of the latter the case is dismissed as to the former at the close of plaintiff's case for insufficiency of the evidence, such dismissal does not operate to make the cause removable to the federal court. Flygen v. Chicago etc. Ry. Co., 115 Minn. 197, 132 N. W. 10.

8398. Artifice to defeat—(8) See Flygen v. Chicago etc. Ry. Co., 115 Minn. 197, 132 N. W. 10.

8399. Waiver—(9) Nelson v. Chicago & N. W. Ry. Co., 129 Minn. 316, 152 N. W. 721.

8401. Appeal—Motion for remand—No appeal lies to the state supreme court from an order of a state district court transferring a cause to the federal district court. The remedy is a motion in the federal court for an order remanding the cause to the state court. Ewert v. Minneapolis & St. L. R. Co., 128 Minn. 77, 150 N. W. 224.

RENDERING PLANTS—See Health, 4152a.

REPLEVIN

8403. Nature and object of action—Replevin is the proper form of action in which to determine which of two contending parties is the owner of personal property. Bacon v. Engstrom, 129 Minn. 229, 151 N. W. 264.

(22) O'Brien v. Curry & White, 111 Minn. 533, 127 N. W. 411.

See Note, 80 Am. St. Rep. 741.

8404. Subject-matter—(26) Johnson v. Stone, 111 Minn. 228, 126 N. W. 720 (held to lie for undivided part of quantity of grain).

(29) Red River Potato Growers Assn. v. Bernardy, 126 Minn. 440, 445, 148 N. W. 449 (books and papers of corporation).

See Note, 37 L. R. A. (N. S.) 267.

8405. Property in custodia legis—(32) Manter v. Petrie, 123 Minn. 333, 143 N. W. 907 (property seized by a sheriff under a search warrant issued under the statute relating to intoxicating liquors).

8406. Title to support—Parties plaintiff—A bailor may maintain replevin against even a good faith purchaser from or under the bailee, in the absence of circumstances giving rise to an estoppel. This rule applies where property is consigned to a factor for sale, who wrongfully disposes of it to satisfy his own debt. Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971.

One who has a title which, without any affirmative equitable relief, gives him a right to the immediate possession, may maintain replevin, though his title may have been equitable in its origin. Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

(39) Wilkes v. Holmes, 128 Minn. 349, 150 N. W. 1098. See Johnson v. Stone, 111 Minn. 228, 233, 126 N. W. 720.

8409. Demand before suit—(50) C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164.

8409a. Conditions precedent—Return of partial payments—It is not a condition precedent to the maintenance by the seller of an action in replevin to recover the property that he return or tender to the buyer partial payments made or notes given for unpaid instalments. C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164.

8410. Complaint—(59) See C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164; Dunnell, Minn. Pl. 2 ed. § 853.

(63) National Citizens Bank v. McKinley, 115 Minn. 378, 132 N. W. 290 (usual form of complaint in replevin—recovery as for conversion).

See Dunnell, Minn. Pl. 2 ed. § 853.

8411. Answer—See Dunnell, Minn. Pl. 2 ed. § 854.

8414. Issues—Variance—Where, on an exchange of merchandise owned by the plaintiff for land owned by the defendant, the latter gave a bond secured by a chattel mortgage upon the merchandise to perfect the title within thirty days, or, not doing so, to furnish a further bond to perfect the title within a year, and failed to perfect title or give such bond within thirty days, the issue in an action of replevin then brought to recover the merchandise included in the chattel mortgage was whether the defendant furnished the required bond, and not whether he perfected title afterwards; and whether he did so perfect title was immaterial. Blied v. Barnard, 126 Minn. 159, 147 N. W. 1095.

8415. Counterclaim—Plaintiff replevied a piano in defendant's possession under a conditional contract of purchase. The defendant answered, setting up, as a counterclaim, a warranty of the piano by the seller, a breach of the warranty, notice thereof to the seller, a neglect to make it conform to the warranty, payment of a certain amount on the purchase price, and a readiness to return the piano, upon being repaid this amount, and demanding judgment therefor. He did not ask for a return of the piano. Held, that the answer stated a cause of action, and that such cause of action was a proper counterclaim. W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307.

(73) W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307.

8418. Burden of proof—The plaintiff has the burden of proving title to the particular property sought to be recovered, and to identify it from a mass. Lohrenz v. Nelson, 123 Minn. 525, 143 N. W. 268 (several piles of cordwood on a tract of land—plaintiff claimed title to only part of the wood—part of the wood was taken by defendant—burden on plaintiff to identify that taken as his).

(80) Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768 (plaintiff must generally prove his right of possession).

8419. Proof of value—(87) See Blied v. Barnard, 126 Minn. 159, 147 N. W. 1095.

(89) See Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264.

8422. Evidence—Admissibility—(4) Itasca Cedar & Tie Co. v. McKinley, 124 Minn. 183, 144 N. W. 768 (assignment of contract—material in process of manufacture—evidence as to value of material—qualification of experts as to value—admission of value—books of account—memoranda).

8423. Evidence—Sufficiency—(5) Farmers Nat. Bank v. Scheidt, 121 Minn. 248, 141 N. W. 103; Lohrenz v. Nelson, 123 Minn. 525, 143 N. W. 268; Busack v. Johnson, 129 Minn. 364, 152 N. W. 757.

CLAIMING IMMEDIATE DELIVERY

8432. Bond of defendant for redelivery—The rebonding of the property does not vest absolute title in the defendant, but he holds it subject to the final determination of the action. A purchaser from a rebonding defendant acquires no better title than the defendant had. O'Brien v. Curry & Whyte, 111 Minn. 533, 127 N. W. 411.

The fact that the amount of the bond is inadequate affords no ground for the appointment of a receiver of the property on the application of the plaintiff. Bacon v. Engstrom, 129 Minn. 229, 152 N. W. 264.

Surety on bond held not released by amendment increasing damages within the amount of the penalty. Bierce v. Waterhouse, 219 U. S. 320.

8433. Remedy for wrongful delivery—Replevin cannot be maintained to recover replevied property. Note, 8 L. R. A. (N. S.) 216.

RESTRAINT OF TRADE

8434. Contracts in restraint of trade—In general—A contract for the sale of a mercantile business held not invalid as in restraint of trade or as tending to create a monopoly. Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201.

Price restrictions on resale of goods. 25 Harv. L. Rev. 59; 26 Id. 640.

Effect of federal anti-trust laws on commerce in patented and copyrighted articles. 28 Harv. L. Rev. 394.

Contracts of wholesalers or manufacturers to regulate the retail prices of their goods. Dr. Mills Medical Co. v. Park & Sons Co., 220 U. S. 373.

8435. Monopolies—(41) Disbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115; State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623; State v. Standard Oil Co., 111 Minn. 85, 99, 126 N. W. 527. See Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; Standard Oil Co. v. United States, 221 U. S. 1; United States v. American Tobacco Co., 221 U. S. 106; 12 Col. L. Rev. 97, 220.

8436. Contracts not to engage in business—It is immaterial that the covenant is unlimited in time. If it is, it remains in force during the life of the covenantor. Such covenants are enforceable by injunction, which should be freely granted. While such covenants will not be extended beyond the fair and natural import of the language used, they must be reasonably construed so as to carry out the intentions of the parties. Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415.

(43) Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415 (a covenant in a bill of sale of a bus and baggage transfer business not to engage in the same business in a certain city, held not unreasonable—construed

as an agreement by the covenantors not to engage in the business so as to bring their names and influence to the aid of any competitor—agent entering into contract in his own name for benefit of undisclosed principal, held entitled to enforce covenant). See Berghuis v. Schultz, 119 Minn. 87, 137 N. W. 201; 12 Col. L. Rev. 128; 27 Harv. L. Rev. 680.

(44) See 10 Col. L. Rev. 72.

8437. Trusts—Combinations, etc.—Statute—A combination of several persons and corporations, all independent dealers in milk and cream, to raise and increase the price thereof, is a violation of the statute, though the increased price was necessary to afford them a profit. A violation of the statute by the formation of a combination to do the acts prohibited cannot be excused by facts tending to justify the act, and which would have been proper and legal had the members thereof acted independently of the combination. The original statute, chapter 359, Laws 1899, imposed both fine and forfeiture of charter, but the revision of 1905 (sections 5168, 5169) changed the statute in that respect thereby making the penalty of forfeiture of the charter the exclusive punishment as to domestic corporations. For the violation of sections 5168 and 5169, R. L. 1905 (G. S. 1913, §§ 8973, 8974), by entering into a combination with others to raise the price of commodities offered for sale by those forming the combination, the domestic corporation is not subject to the penalty imposed by section 5168, but only to the penalty of forfeiture of its charter as prescribed by section 5169. An indictment under section 5168, R. L. 1905, charging that defendants, several persons and corporations, were "jointly and severally" engaged in a certain occupation, and in violation of the statute formed a combination for the purpose of increasing the price of their products, construed, and held to charge that defendants were to some extent independent dealers, and not jointly associated in business as one concern. State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

(01) State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623; State v. Creamery Package Mfg. Co., 115 Minn. 207, 132 N. W. 268.

(45) State v. Creamery Package Mfg. Co., 115 Minn. 207, 132 N. W. 268 (quo warranto to exclude from state foreign corporation violating statute—form of judgment—discretion of court—judgment held not to prohibit defendant from doing an interstate business in this state); State v. People's Ice Co., 127 Minn. 252, 149 N. W. 286 (payment of fine held voluntary and a waiver of the right to appeal). See Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Id., 227 U. S. 8; Standard Oil Co. v. United States, 221 U. S. 1; United States v. American Tobacco Co., 221 U. S. 106; Note, 74 Am. St. Rep. 235; 12 Col. L. Rev. 97, 220.

8438. Combination not to deal with person—(46) See Scott-Stafford Opera House Co. v. Minneapolis Musicians Assn., 118 Minn. 410, 136 N. W. 1092; Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790; Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U. S. 600; § 1566.

REWARDS

8439. Who entitled to reward—A person having knowledge of a reward for the arrest and conviction of a criminal, whose arrest is not one of his official or contractual duties, who renders services which materially and proximately aid in the arrest and conviction, is entitled to an equitable and relative share of the reward, where the amount thereof is in court upon interpleader. Forsythe v. Murnane, 113 Minn. 181, 129 N. W. 134; Id., 115 Minn. 534, 132 N. W. 1134. See Note, 7 L. R. A. (N. S.) 216.

It is not the official duty of the president of a village council to detect and apprehend persons suspected of committing crimes outside of his village. Such officer may therefore earn a reward offered for the arrest and conviction of the perpetrators of such a crime. Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025. See Note, 11 L. R. A. (N. S.) 1170; 48 Id. 392.

8440. For arrest and conviction of horse thieves—A mule is not a horse within the meaning of the statute. The statute has little justification at the present time. It is in derogation of the common law and is to be strictly construed. State v. Ost, 129 Minn. 520, 152 N. W. 866.

ROADS

IN GENERAL

8442a. Width—R. L. 1905, § 1194, prescribing the width of roads established by town or county boards, has no application to a street dedicated by a plat. Keyes v. Excelsior, 126 Minn. 456, 148 N. W. 501.

8443. Discretionary power to establish—Judicial control—(59) See Obert v. Otter Tail County, 122 Minn. 20, 141 N. W. 810.

8444. Dedication by user—Statute—To establish a road under the statute the mere use of the premises for public travel for six years is not alone sufficient. It must also be shown that it has been worked and kept in repair in some degree for that period. Minneapolis Brewing Co. v. East Grand Forks, 118 Minn. 467, 136 N. W. 1103; Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244. See Note, 57 Am. St. Rep. 744.

(69) State v. Hager, 119 Minn. 512, 138 N. W. 935 (statute not retroactive).

(70, 71) Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244.

(75) Great Scott v. Robinson, 115 Minn. 247, 132 N. W. 204; Kalkbrenner v. Augusta, 115 Minn. 538, 133 N. W. 1134; Orth v. Norfolk, 120 Minn. 530, 139 N. W. 1134; Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244. See Curtis & Yale Co. v. Minneapolis, 123 Minn. 344, 144 N. W. 150.

8448. Evidence as to location—A finding that no road was established at the place in controversy, held justified by the evidence. Kalkbrenner v. Augusta, 115 Minn. 538, 133 N. W. 1134.

8452. State rural highways—Elwell Law—The so-called Elwell Law, G. S. 1913, §§ 2603–2609, providing for state rural highways, construed and held constitutional. Murray v. Smith, 117 Minn. 490, 136 N. W. 5; Benton v. Hennepin County, 125 Minn. 325, 146 N. W. 1110; Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899. The Elwell Law was repealed by Laws 1915, c. 52. See State v. Anding, 131 Minn. ——, 155 N. W. 1048.

POWERS AND DUTIES OF TOWNS

8454. In general—Under Sp. Laws 1889, the village of Preston held bound to construct and maintain its own roads and bridges. Love v. Preston, 112 Minn. 459, 128 N. W. 673.

TOWN ROADS

8459. Petition for establishment—A petition is sufficient if the place and termini of the road may be determined by reference to the entire document. Great Scott v. Robinson, 115 Minn. 247, 132 N. W. 204.

A description of a road in a petition held fatally defective in a prosecution for obstructing a highway. State v. Hager, 119 Minn. 512, 138 N. W. 935.

A description, in proceedings for the establishment of a town road, which is impossible of location, is void, and it renders all the proceedings void. Failure of the landowner to appeal does not make valid what is on its face void. In such case the receipt by the landowner of money as damages, upon being informed and in the belief that a road had been legally laid out in a definite location, does not estop him from asserting that the description was impossible and void. Dahlin v. Eddy, 125 Minn. 359, 147 N. W. 240.

A description in a highway petition is sufficient if monuments be designated which enable persons familiar with the locality to locate the way upon the ground with reasonable certainty. The description in a petition for a cartway in this case, locating the way by reference to a

bridge, a railroad track, a section line highway, and a private road, is held to be sufficient. The court having dismissed the petition on receiving it in evidence, it was not necessary for the petitioner to offer further proof. Martinson v. Eagle Creek, 129 Minn. 392, 152 N. W. 761.

8460. Notice of hearing—Waiver—(5, 9) Great Scott v. Robinson, 115 Minn. 247, 132 N. W. 204.

(10) McCauley v. McCauleyville, 111 Minn. 423, 127 N. W. 190 (owner in actual possession and control held an "occupant" within the meaning of the statute though not living on the land).

(12) McCauley v. McCauleyville, 111 Minn. 423, 127 N. W. 190 (occupant held not to waive notice by filing protest against laying out of road on the ground that the board was without jurisdiction).

8461. Hearing—Order establishing—Adjournment of hearing—In proceedings upon a petition under section 1171, R. L. 1905, as amended by chapter 217, Laws of 1911, which requires the town board to lay out a road to connect with a public road a tract having no access thereto, the propriety of the location of such road is a matter for the determination of the town board, and for the jury on appeal. The town board is not obliged to lay out the road on the route selected by the petitioner. Johnson v. Chisago Lake, 122 Minn. 134, 141 N. W. 1115.

(16) Baldwin v. Rosendale, 110 Minn. 87, 124 N. W. 641.

(18) State v. Hager, 119 Minn. 512, 138 N. W. 935 (description held fatally defective in a prosecution for obstructing a highway).

(20) Johnson v. Chisago Lake, 122 Minn. 134, 141 N. W. 1115; Dahlin v. Eddy, 125 Minn. 359, 147 N. W. 240 (road order must adhere substantially to the petition as to the point of beginning, general course and termination—a variance of thirty rods at the point of termination held fatal).

8464. Construction of statutes—(29) Baldwin v. Rosendale, 110 Minn. 87, 124 N. W. 641.

8467. Vacation—Alteration—In proceedings to alter a highway, the description thereof at certain places was inaccurate as to course or distance, but by designated fixed lines and points no practical difficulty would be found in locating the highway upon the ground. Held, that such inaccuracies were not fatal to the proceedings. Obert v. Otter Tail County, 122 Minn. 20, 141 N. W. 810.

APPEAL TO DISTRICT COURT

8479. Notice—The requirement of R. L. 1905, § 1188 (G. S. 1913, § 2549), that where an appeal is taken from the decision of a town board in the matter of laying out a road, etc., a copy of the notice of the appeal shall be filed with the town clerk of each town through which the

road involved runs, is jurisdictional; but, since no provision is made as to how such filing must be proved, the appellant, when jurisdiction of an appeal is challenged for lack of such filing, may show the same by extraneous evidence. The order of receiving the proofs in such cases rests in the sound discretion of the court, and there was no abuse of such discretion in receiving such proofs on the trial to the jury. Evidence to the effect that a copy of the notice was delivered to the town clerk at his home in the town whereof he was clerk, and that he placed it with the other papers in the case, where it remained until the said papers were delivered to his successor, held sufficient to sustain the district court's finding that such copy was in fact filed, though it was not indorsed by the town clerk as having been filed. Mueller v. Courtland, 117 Minn. 290, 135 N. W. 996.

(60) Baldwin v. Rosendale, 110 Minn. 87, 124 N. W. 641.

8481. Trial in district court—Upon an appeal to the district court from the refusal of a town board to lay out a public cartway, the determination of the damages incident to the establishment of such way is not involved; and where the determination of the town board is reversed, it will be for such board, under the verdict and the judgment entered thereon, to assess the damages and open the way. Mueller v. Courtland, 117 Minn. 290, 135 N. W. 996.

The statute relating to appeals to the district court provides that "its proceedings shall be based upon the same principles which the board was required to follow in its determination," but this plainly refers, not to the evidence to be received, but to the principles to govern the determination of the court upon the evidence. On appeal to the district court the case is tried on the facts as they exist at the time of the trial. If a connecting road has been laid out since the action of the town board, evidence of such fact should be received and considered. Johnson v. Chisago Lake, 122 Minn. 134, 141 N. W. 1115.

8482. Dismissal—Where the court dismisses a petition on receiving it in evidence it is not necessary for the petitioner to offer further proof. Martinson v. Eagle Creek, 129 Minn. 392, 152 N. W. 761.

8483. Evidence—Sufficiency—(73) Mueller v. Courtland, 117 Minn. 290, 135 N. W. 996; Jentz v. Tyrone, 127 Minn. 534, 149 N. W. 1069.

ROBBERY

8488. What constitutes—(79) Sufficiency of force. Note, 46 L. R. A. (N. S.) 1149.

See Note, 135 Am. St. Rep. 474.

8490. Evidence—Admissibility—(81) State v. Briggs, 122 Minn. 493, 142 N. W. 823 (evidence of other crimes admissible in corroboration—general scheme of crime—self-serving declarations of defendant inadmissible).

8491. Evidence—Sufficiency—(82) State v. Briggs, 122 Minn. 493, 142 N. W. 823; State v. Flockey, 128 Minn. 40, 150 N. W. 168.

SALES

THE CONTRACT IN GENERAL

8492. Definition and nature—Purchase and sale are correlative terms. State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496.

A sale contemplates that, at some time, the title shall pass to the buyer, and that, at some time and in some manner, he shall pay the purchase price. Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971.

(84) Green & De Laittre Co. v. Fasbender & Son, 122 Minn. 17, 141 N. W. 789.

8493. What constitutes—(86) Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971.

(90) Note, 45 Am. St. Rep. 203.

(93) Baskerville v. Bates, 123 Minn. 339, 143 N. W. 909 (contract for sale and peddling of patent medicines).

8495. Parties—(2) Elliott v. Bardin, 126 Minn. 533, 148 N. W. 1082. See Digest, § 1731.

8496. Mutuality—Goods to be furnished as needed—Contract to repurchase—If from the terms of the contract mutuality of engagement is necessarily implied a binding obligation is created thereby. Whenever the accepted proposition or contract is for the sale or delivery of a specific article or number of articles, or a specific amount of service or materials, or where, by the terms of the contract, the number of such articles, or the amount of such service or materials, is ascertainable, a promise of the other party may be implied, though not expressed in the contract, and hence the engagements are mutual. Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 256.

In many lines of business it has become common in late years for

those engaged therein to contract in advance, at specified prices, for such quantity of materials or of goods as may be needed in such business during a specified period of time. Where such contracts are supported by a consideration other than the mutual promises of the parties their validity is beyond question. Where the only consideration for the promise to sell is the promise of the buyer to purchase such quantity as he may need, the authorities are not unanimous but the decided weight of authority is to the effect that, if the buyer has an established business whose requirements may be estimated approximately, the contract is not void either for uncertainty or want of mutuality, but is valid and may be enforced to the extent of the ordinary requirements of such business when carried on and conducted in the manner contemplated by the parties at the time of making such contract. Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

Where a manufacturer made a contract with a wholesale dealer, having an established business, to supply him, at specified prices, with such quantity of certain goods as should be required for his trade during the next ensuing selling season, and as a part of the same transaction sold and delivered to him more than $6,000 worth of such goods to be used by his traveling salesmen as samples in procuring orders, and in prior seasons had made similar contracts with him which had been performed by both parties, such contract is valid. Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

An agreement of the seller to repurchase the property sold at the option of the buyer is generally enforceable. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

(3) First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296.

See Digest, § 1758.

8497. Terms of contract must be definite—A contract of a manufacturer, to sell to a wholesaler such a quantity of goods as the latter might need for his trade during a season, held not void for uncertainty. Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

8499. Offer and acceptance—Where defendant offered to supply plaintiff with ice for his meat market and to deliver it as ordered, and plaintiff made an order for delivery, it was held that the offer and order constituted a contract. Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125.

(6) Bastian Bros. Co. v. Wemott-Howard Co., 113 Minn. 196, 129 N. W. 369; Van Meeuwen v. Swanson, 121 Minn. 250, 141 N. W. 112.

(7) Green & DeLaittre Co. v. Fasbender & Son, 122 Minn. 17, 141 N. W. 789.

See Digest, §§ 1740–1749, 10000.

8501. Conditional offer to buy—(9) See Van Meeuwen v. Swanson, 121 Minn. 250, 141 N. W. 112.

8502. Acceptance—Time—An offer to buy which requires acceptance must be accepted within a reasonable time. Where it is understood that the goods to be bought are wanted within two weeks, evidence that an offer to buy was not accepted until thirty days after it was made, sustains a finding that acceptance was not within a reasonable time. S. F. Bowser & Co. v. Fountain, 128 Minn. 198, 150 N. W. 795.

8504. Sales by sample—(12) See Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

8504a. Order for manufacture of goods—Upon the acceptance by a manufacturer of an order for the manufacture of goods to be delivered in the future the order becomes a contract between the parties, and for a breach thereof by the buyer the seller has an election of three remedies. He may retain the goods for the use of the buyer and sue for the purchase price, or he may sell them as the agent of the buyer and recover any deficiency from the buyer, or he may retain the goods as his own and recover the difference between the contract price and the market value at the time fixed for delivery to the buyer. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

8505. Order for goods to be paid for as furnished—(13) See Van Meeuwen v. Swanson, 121 Minn. 250, 141 N. W. 112.

8509a. Breach of contract to sell—What constitutes—A manufacturer having stipulated, in a contract to furnish goods as they should be required in the trade of the buyer, "prices guaranteed to March 1, 1910, after that we are to give thirty days notice before we advance price," his refusal to furnish goods in January and February, except at an advanced price, was a breach of the contract. This breach relieved the buyer from the duty of sending further orders for goods. Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

8509b. Termination—A contract by one party to sell goods to another as ordered, but for no fixed period, is terminable at will of either party, and no right to damages can be predicated on its termination. Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790.

8510. Particular contracts construed—(18) Northwestern Fuel Co. v. Central Lumber & Coal Co., 110 Minn. 128, 124 N. W. 981 (conditional order for coal to be delivered in April if price were $6 per ton—conditional acceptance of order at price of $6.50 per ton until price for April was fixed—shipments in April billed at $6.50 per ton, payments to be made in October—objection on May 11 to amount of rebate allowed); Geiser Mfg. Co. v. Holzer, 110 Minn. 138, 124 N. W. 827 (sale of second-hand engine—reduced price to be paid without offset—possession for

five days conclusive evidence of satisfaction and a waiver of all claims against the seller—stipulation as to freight if engine refused); Gutmann v. Klimek, 116 Minn. 110, 133 N. W. 475, (credit—extension—mortgage as security for payment of price); Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343 (contract for a retail automobile sales agency and for the future purchase of cars by the agent—deposit by agent); Curtis v. Northwestern Bedding Co., 121 Minn. 288, 141 N. W. 161 (sale of business of corporation—guaranty of correctness of books of accounts); Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125 (contract for delivery of ice for a meat market as ordered); Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316 (contract of manufacturer to sell to a wholesaler at specified prices as required for his trade—stipulation for notice of an advance of prices).

WHEN TITLE PASSES

8511. In general—It is the general rule that where a contract is made for the purchase of goods, and nothing is said about payment or delivery, the title passes immediately so as to cast all further risk upon the buyer, if nothing further remains to be done to the goods, though he cannot take them away without paying the price. Gardner v. Northern Pacific Ry. Co., 118 Minn. 275, 136 N. W. 1028.

In case of a sale of specific goods, title passes at the time the contract is made, unless some facts are shown that indicate a contrary intention. Neither payment nor delivery are necessary to the passing of title. If no credit is given, the seller then has a lien on the goods for the price. The term "cash sale" is sometimes used to denote a sale where title is not to pass until the price is paid, and sometimes to denote a sale where title has passed, but possession is not to be delivered until payment is made. In either case, if the seller gives up possession in expectation of immediate payment, and payment is not forthcoming, he may repossess himself of the goods or sue in conversion one who refuses his demand for repossession. Where the sale is of goods not specified at the time the contract is made, the contract is executory, and title passes at the time specific goods are appropriated to the contract. To constitute an "appropriation," the goods must be identified and applied irrevocably to the contract. No particular words or acts are necessary for this purpose. The intent of the parties controls. If the parties intend that payment is to be made before title passes, there is no transfer of title until payment is made. The presumption is in favor of a cash sale, but facts and circumstances may show a contrary intent. The fact that goods are evidenced by a bill of lading, which is retained by the seller, is a circumstance tending to show that title had not passed. But where the bill of lading covers other cars, and where bills of lading in

the same form are not usually delivered to buyers, these facts tend to rebut any inference raised by retention of the bill of lading. The fact that goods are still to be weighed by the seller in order to ascertain the price raises a presumption that title has not passed. Requirement of weighing for that purpose by a third person has less force as a presumption. A delivery, apparently unrestricted and unconditional, of goods sold for cash, is presumptive evidence of the waiver of the condition that payment should be made on delivery to vest title in the purchaser. E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828. See 14 Col. L. Rev. 93.

If the title passes the failure of the buyer to make stipulated payments does not revest the title in the seller. Gardner v. Northern Pacific Ry. Co., 118 Minn. 275, 136 N. W. 1028.

The evidence showed a sale of wheat by plaintiff, a commission merchant, at a fixed price, for future delivery, the subsequent application of certain cars of wheat on track to the contract, an order from plaintiff to the railroad company to deliver these cars at an elevator named for account of the buyer, the rendering of bills to the buyer after his known insolvency, and, later, an accounting to the consignor as of a sale made to said buyer. Held to sustain a finding that the title passed and the wheat was delivered on the personal responsibility of the buyer, though the wheat had not yet been weighed to determine the amount due. A custom in such cases to resell grain over and over again before the same is weighed may be considered in arriving at the intent of the parties. E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828.

(19) Gardner v. Northern Pacific Ry. Co., 118 Minn. 275, 136 N. W. 1028; E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828; Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115. See Note, 50 L. R. A. (N. S.) 111 (sale of goods to be produced or manufactured).

(21, 22) Gardner v. Northern Pacific Ry. Co., 118 Minn. 275, 136 N. W. 1028; Wherland Electric Co. v. Burmeister, 122 Minn. 110, 141 N. W. 1117; E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828.

8511a. Delivery to carrier—Draft with bill of lading attached—Where, on a sale of goods not specific, which are to be selected and appropriated to the contract by the seller, the seller selects and ships goods, taking a bill of lading to the buyer as consignee, prima facie the title passes. If he reserves possession of the bill of lading, drawing on the buyer for the price, and forwarding through a bank the draft with the bill of lading attached, with instruction to deliver the bill of lading only on payment of the draft, prima facie title does not pass until payment. The question is, however, one of intention of the parties, and where the goods are

sold f. o. b. cars at point of shipment, and the buyer is required to furnish the seller a bank guaranty before shipment, and he does so, depositing the price with the guaranteeing bank to secure the guaranty, it is proper to instruct the jury as a matter of law that the title passes on delivery to the carrier. Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115. See Digest, §§ 1341, 1342.

8512. Conditions subsequent—(27) Delaware etc. Ry. Co. v. United States, 231 U. S. 363.

8513. Sale out of uniform mass—(28) Note, 26 L. R. A. (N. S.) 1.

8514. Appropriation of property—This was not a sale of specific goods. It was a sale of goods not specified at the time the contract was made. The rules as to sale of specified goods do not fully apply, but they must be borne in mind, for the executory contract is converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. In such case the title passes at the time the goods are "appropriated" to the contract; that is, when the parties do something which signifies an intention that the title shall pass. To constitute an appropriation, the goods must be identified and they must be applied irrevocably to the contract. It is not always easy to determine, in a given case, whether they have been so applied. No particular words or acts are required. The intent of the parties governs. E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828.

(29) E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828. See Note, 26 L. R. A. (N. S.) 1.

8515. Cash sales—Of course payment may by agreement be made a condition to the passing of title. The term "cash sale," as applied to a sale of specific goods, is sometimes used to denote a sale where title is not to pass until the cash price is paid, and sometimes to denote a sale where title has passed, but possession is not to be delivered until payment is made. In either case payment and delivery are concurrent and mutually dependent acts, and if the seller gives up possession in expectation of immediate payment, and payment is not forthcoming, he may repossess himself of the goods or sue in conversion one who refuses his demand for repossession. E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828. See Note, 120 Am. St. Rep. 868.

PRICE

8516. Payment as condition precedent—An unconditional delivery of goods sold for cash is presumptive evidence of a waiver of the condi-

tion that payment should be made on delivery to vest title in the buyer. E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828. See Note, 31 L. R. A. (N. S.) 942.

If the title vests in the buyer his failure to make stipulated payments does not revest title in the seller. Gardner v. Northern Pacific Ry. Co., 118 Minn. 275, 136 N. W. 1028.

(32) E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828. See Digest, § 8515.

8517. Time of payment—(34) Gutmann v. Klimek, 116 Minn. 110, 133 N. W. 475 (time of payment held a question for the jury).

8520. Measurement or weighing by third party—(37) See E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828; 14 Col. L. Rev. 93.

DELIVERY OF GOODS

8521. Necessity—(38) J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570. See Digest, § 8630.

8522. To carrier—(40) See J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570; Thompson-McDonald Lumber Co. v. Morawetz, 127 Minn. 277, 149 N. W. 300.

8528. Property in hands of lienor—(50) See J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570.

8529a. Expense or loss in preparing for delivery—One who agrees to sell and deliver specific personal property of a certain kind, or prepared in a certain way before delivery, must stand any expense or loss incurred by him in preparing the property for delivery. Wherland Electric Co. v. Burmeister, 122 Minn. 110, 141 N. W. 1117.

8533. Cases determining sufficiency of delivery—(61) J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570 (goods delivered to carrier and deposited in its warehouse—invoice and order on carrier sent to buyer—evidence held to show delivery in accordance with contract).

ACCEPTANCE OF GOODS

8535. Requisites—(64) Delaware etc. Ry. Co. v. United States, 231 U. S. 363.

8537. Delay in rejection—A car load of defective building material was shipped by plaintiff to defendants Butler, building contractors, who, without examining the material while on the car, sent a drayman to haul it to the building for which it was intended. When the first load arrived at the building, they discovered the defect, and thereupon conferred with the owner of the building, and, being informed that the use

of such material would not be permitted, they reloaded upon the car all the material removed therefrom and immediately returned the entire car load to plaintiff. Held, that unloading a portion of the defective material under such circumstances did not constitute an acceptance thereof. Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140.

(68) Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993.

8538. Acts of ownership—Use of property—A contract to furnish cut stone as per plans and specifications for certain buildings, held to be in the nature of an executory contract of sale upon condition precedent, so that acceptance and use of the stone waived all non-conformity thereof to plans and specifications known to the buyer prior to such acceptance and use. Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993. See Note, 36 L. R. A. (N. S.) 467.

(69) See Duluth Log Co. v. John C. Hill Lumber Co., 110 Minn. 124, 124 N. W. 967.

8539. Of part—(71) Duluth Log Co. v. John C. Hill Lumber Co., 110 Minn. 124, 124 N. W. 967.

EXPRESS WARRANTIES AND CONDITIONS

8546. Requisites—In general—A written contract for the sale of a boat dredge, providing, among other things, that the seller would furnish an expert who would show the dredge to be of a certain capacity, held a warranty of capacity. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

(86) Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

(87) Siegel v. Riebolt, 110 Minn. 344, 125 N. W. 582. See 27 Harv. L. Rev. 1.

8555. Qualified or conditional—A warranty is a matter of contract, expressed or implied, and the seller may attach such limitations or conditions as he may see fit. Condition that if buyer failed to give note for purchase price seller should be discharged from all warranties. Hansmann v. Pollard, 113 Minn. 429, 129 N. W. 848.

8560. Notice to seller of defects—(18, 20) Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422.

8565. Return of property—(36) W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307. See Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

(37) Geiser Mfg. Co. v. Holzer, 110 Minn. 138, 124 N. W. 827.

(40) Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422. See Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

(42) J. G. Cherry Co. v. Larson, 124 Minn. 251, 144 N. W. 949.

8568. Construction—(57) Hansmann v. Pollard, 113 Minn. 429, 129 N. W. 848. See Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422.

8569. Various warranties considered—A warranty as to the quality and working capacity of a sawmill. Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422.

A warranty as to the capacity of a boat dredge. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

(61) Hansmann v. Pollard, 113 Minn. 429, 129 N. W. 848; Pederson v. Reeves & Co., 115 Minn. 249, 132 N. W. 204.

(62) Siegel v. Riebolt, 110 Minn. 344, 125 N. W. 582 (warranty that horse was sound, free from heaves, a good worker and not balky); Wilson v. Danderand, 124 Minn. 120, 144 N. W. 460 (warranty that a horse was a full blood Percheron). See Note, 32 L. R. A. (N. S.) 182.

IMPLIED WARRANTIES AND CONDITIONS

8570. Exclusion by express warranty—(78) Hansmann v. Pollard, 113 Minn. 429, 129 N. W. 848. See Note, 33 L. R. A. (N. S.) 501; 102 Am. St. Rep. 607; 28 Harv. L. Rev. 213.

8575. Conformity to description—(87) See Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993; Note, 35 L. R. A. (N. S.) 258.

8576. Of fitness for intended use—(88) Hansmann v. Pollard, 113 Minn. 429, 129 N. W. 848. See 25 Harv. L. Rev. 75.

(91) Note, 37 L. R. A. (N. S.) 79.

8577. Of fitness for food—(93) See 10 Col. L. Rev. 570; 25 Harv. L. Rev. 670 (food for animals); 26 Harv. L. Rev. 556 (wholesomeness of canned goods served on dining car).

SELLER'S LIEN

8583. When exists—Possession essential—Where goods are shipped by carrier, the consignee is presumed to be the owner. A direction in the bill of lading to "notify" a third party does not make such party the consignee, nor does it give rise to any presumption that he is the owner. The presumption of ownership in the consignee may be rebutted by proof of a completed sale to the party to be notified before the shipment. In such case, if the price is not paid, the vendor holds a vendor's lien until payment or delivery. If he consigns the goods to himself, the effect is simply to preserve such vendor's lien. Ammon v. Illinois Central Ry. Co., 120 Minn. 438, 139 N. W. 819.

In case of a sale of specific goods, title passes at the time the contract is made, unless some facts are shown that indicate a contrary intention. Neither payment nor delivery is necessary to the passing of title. If no credit is given, the seller then has a lien on the goods for the price. E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828.

See Note, 83 Am. St. Rep. 451.

8584. Revival—Insolvency of buyer—(5) See 26 Harv. L. Rev. 557.

STOPPAGE IN TRANSITU

8587. When right ends—When goods are delivered into the actual possession of the buyer, or one standing in his shoes, the right of stoppage in transit is gone. E. L. Welch Co. v. Lahart Elevator Co., 122 Minn. 432, 142 N. W. 828.

FRAUD

8589. In general—(11) Jones v. Burgess, 124 Minn. 265, 144 N. W. 954; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

(15) Providence Jewelry Co. v. Crowe, 113 Minn. 209, 129 N. W. 224 (sale of jewelry); Brown v. Andrews, 116 Minn. 150, 133 N. W. 568 (sale of mining stock); Adan v. Steinbrecher, 116 Minn. 174, 133 N. W. 477 (sale of inn); General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404 (sale of electric drills); Bigelow v. Barnes, 121 Minn. 148, 140 N. W. 1032 (sale of law books—representations as to continuance of series); Walsh v. Paine, 123 Minn. 185, 143 N. W. 718 (sale of stock in a corporation); Jones v. Burgess, 124 Minn. 265, 144 N. W. 954 (representations as to breed of horse and as to blue ribbons and medals which he had won); Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965 (representations as to the value of bank stock by the president and general manager of the bank); Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167 (sale of gasolene engine); Bragg & Co. v. Johnson, 128 Minn. 64, 150 N. W. 223 (sale of carload of berries).

See Digest, §§ 10059–10069.

8590. Representations as to value—(16) Adan v. Steinbrecher, 116 Minn. 174, 133 N. W. 477 (general rule inapplicable where parties are not dealing at arm's length).

(17) Brown v. Andrews, 116 Minn. 150, 133 N. W. 568; Jones v. Burgess, 124 Minn. 265, 144 N. W. 954; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965 (representations as to the value of bank stock by the president and manager of the bank).

See Digest, § 10060.

8591. Representations as to other sales—A false representation by the agent of a law book company that he had not made any other sales in

the city held material and ground for rescission by the buyer. Edward Thompson Co. v. Schroeder, 131 Minn. ——, 154 N. W. 792.

8592. Buying with intention of not paying—(21) Note, 44 L. R. A. (N. S.) 1.

BONA FIDE PURCHASERS

8594. General rule—Caveat emptor—(25) See Note, 103 Am. St. Rep. 979 (stolen property).

8597. From bailee—(29) Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971.

8599. From one with indicia of ownership—Where a thing is sold for cash, but a check is accepted for the purchase money, and the property is delivered on the implied condition that the check will be paid on presentation, but the vendor gives to the vendee an absolute bill of sale or assignment of the property, he will be estopped from asserting that the delivery was conditional as against a subvendee in good faith for value, who purchased in reliance on the vendee's muniments of title. Ammon v. Gamble-Robinson Commission Co., 111 Minn. 452, 127 N. W. 448. See Digest, § 3204.

RESCISSION OF CONTRACT BY ACT OF PARTIES

8604. By seller—(40) Note, 32 L. R. A. (N. S.) 1.

8605. By buyer—(47) Duluth Log Co. v. John C. Hill Lumber Co., 110 Minn. 124, 124 N. W. 967.

(49) Edward Thompson Co. v. Schroeder, 131 Minn. ——, 154 N. W. 792.

(50) See W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307 (conditional sale).

8607. Waiver—(55) J. G. Cherry Co. v. Larson, 124 Minn. 251, 144 N. W. 949.

ACTION BY BUYER FOR FRAUD

8612. In general—A mere attempt to rescind will not bar an action for fraud. Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

Where a sale of property is effected by fraud, the defrauded party may rescind the contract on discovering the fraud, or affirm the same and retain the property. Where he elects to affirm the contract by retaining the property, the measure of his damages for the fraud is the difference between the actual value of the property and the price paid, together with such special damage as he may have suffered in consequence of the fraud. Even though the property be sold for a particular use, the defrauded party, where he affirms the contract, can have

no recovery for depreciation in the value of the use of the property accruing after discovery of the fraud. Magnuson v. Burgess, 124 Minn. 374, 145 N. W. 32.

(60) Jones v. Magoon, 119 Minn. 434, 138 N. W. 686; Jones v. Burgess, 124 Minn. 265, 144 N. W. 954; Meland v. Youngberg, 124 Minn. 446, 145 N. W. 167; Clark v. Wells, 127 Minn. 353, 149 N. W. 547. See Digest, § 1815.

ACTION BY BUYER FOR NON-DELIVERY

8613. Default in delivery—Demand—(64) See Snow v. Johnson, 1 Minn. 48 (32); Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

8614. Pleading—A promise to sell may be inferred from an allegation of a contract to buy. Where a contract for the sale of all the lumber in a certain lumber-yard gave the seller the privilege of reserving an indefinite amount of the lumber for use in the erection of a certain building, it was incumbent upon the seller, when sued for failure to deliver as agreed, to plead and prove the facts necessary to a reduction of liability in consequence of the exercise of the privilege so reserved. Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

8614a. Burden of proof—Where a contract for the sale of all the lumber in a certain lumber-yard gave the seller the privilege of reserving an indefinite amount of lumber for use in the erection of a certain building, it was incumbent upon the seller, when sued for failure to deliver as agreed, to plead and prove the facts necessary to a reduction of liability in consequence of the exercise of the privilege so reserved. Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

8614b. Evidence—Admissibility—In an action for damages for delay in delivery it is error to exclude evidence tending to show that the damages might have been lessened by reasonable efforts on the part of the buyer. Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140.

8615. Measure of damages—The measure of damages for delay in delivering building material to a contractor for use in a building which the seller knows the contractor is under contract to complete within a certain time, the material not being procurable in the market, is the additional expense necessarily incurred by the contractor in consequence of the delay. The damages should not include any expense to which the contractor would have been subjected if no delay had occurred, nor any expense which he might have avoided by reasonable effort. Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140.

(68) Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316 (a manufacturer having stipulated, "Price guaranteed to March 1, 1910, after that we are to give thirty days notice before we advance price," his refusal to furnish goods in January and February, except at an advanced price was a breach of the contract—the stipulation did not require him to wait until March 1 before giving notice of an advance in price, and a notice given in January took effect immediately after March 1—the expense above the contract price necessarily incurred in procuring the goods, which, in the ordinary course of business, would have been ordered from the manufacturer on or before March 1, if he had not repudiated the contract, may be recovered as damages; but it was error to include in the damages the increased cost of the goods which would not have been ordered until after that date).

(74) Mason v. Cedar Lake Ice Co., 123 Minn. 401, 143 N. W. 1125 (damage to meat from failure to deliver ice as agreed).

(77) See Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140.

(78) Hydraulic-Press Brick Co. v. Haynes Bread Co., 128 Minn. 401, 151 N. W. 140.

ACTION BY BUYER FOR RECOVERY OF PRICE PAID

8616. In general—Counterclaim—Evidence to show a breach of warranty held inadmissible, the issue being an alleged rescission and agreement to pay back to plaintiff the amount paid by him for a machine. John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180.

Where the seller fails to deliver the goods the buyer may recover any payments as for money had and received. Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253.

When sued in replevin for the goods sold under a conditional contract, the title not passing, the buyer may rescind for breach of a warranty of quality and counterclaim for instalments of the purchase money paid. W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307.

8617. Complaint—(82) John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180 (action on contract to rescind sale and return purchase price—complaint sustained—allegations suggestive of a breach of warranty disregarded); Rotzien-Furber Lumber Co. v. Franson, 123 Minn. 122, 143 N. W. 253 (contract for sale of lumber—failure to deliver—complaint held sufficient for recovery of payment as for money had and received).

See Dunnell, Minn. Pl. 2 ed. § 871.

ACTION BY BUYER FOR BREACH OF WARRANTY

8618. When lies—A conditional sale, when title is reserved in the vendor until payment, gives the vendor an election to retake the property upon default or to sue for the price, and the assertion of one remedy is the waiver of the other; and when the vendor brings suit for the purchase price the sale becomes absolute, and an action may be brought upon the warranty. Whether an action for general damages on a warranty in a conditional sale can be maintained, while the sale remains conditional, is not determined. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

An action on a warranty cannot be maintained unless the property is accepted. The buyer cannot rescind and bring an action for general damages on the warranty. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

For the breach of a warranty of quality a buyer who has resold may recover full damages for the liability incurred, though no claim has been made upon him by the sub-buyer. Buckbee v. P. Hohenadel, Jr., Co., 224 Fed. 14; 29 Harv. L. Rev. 221.

(86) Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

8619. When accrues—(89) See W. W. Kimball Co. v. Massey, 126 Minn. 461, 148 N. W. 307 (conditional sale—replevin for thing sold—counterclaim for breach of warranty); 29 Harv. L. Rev. 336 (limitation of actions).

8621. Complaint—In an action on a warranty in a conditional sale, a complaint held to show that the plaintiff accepted the article and that he could sue on the warranty, though there was an allegation that he did not accept it. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

(1) Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

(94) John S. Bradstreet Co. v. Four Traction Auto Co., 118 Minn. 454, 137 N. W. 180.

See Dunnell, Minn. Pl. 2 ed. § 872.

8624. Measure of damages—(8) Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193 (a charge stating the correct general rule held not erroneous though it referred to proof of defective construction as if necessary to a recovery on the warranty); Magnuson v. Burgess, 124 Minn. 374, 145 N. W. 32.

(20) Siegel v. Riebolt, 110 Minn. 344, 125 N. W. 582 (warranty of horse—amount recoverable limited by allegations of complaint). See Vogel v. D. M. Osborne & Co., 34 Minn. 454, 26 N. W. 453.

8626. Evidence—Admissibility—Evidence of success or failure of similar things. Note, L. R. A. 1915B, 626.

8627. Evidence—Sufficiency—The jury were justified by the evidence in finding that the machine purchased by plaintiff from defendant was under an oral and not under a written contract, and that a certain release of liability executed by plaintiff became inoperative, by the failure of the defendant to put the machine in order. Pederson v. Reeves & Co., 115 Minn. 249, 132 N. W. 204.

(24) Siegel v. Riebolt, 110 Minn. 344, 125 N. W. 582.

ACTION BY SELLER FOR BREACH OF CONTRACT

8628. When lies—Election of remedies—On the breach by the buyer of a contract for the manufacture and sale of goods, the seller has an election of remedies. He may retain the goods for the use of the buyer and sue for the purchase price, or he may sell them as the agent of the buyer and recover any deficiency from the buyer, or he may retain them as his own and recover the difference between the contract price and the market value at the time fixed for delivery to the buyer. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

8629. Measure of damages—Defendant contracted to purchase from plaintiff a specified amount of "lagging" and "mining timber" at stated prices. Plaintiff had stumpage rights on certain land, from which it was understood the timber was to be cut to fulfil the contract, which called for all of the timber on the land, and plaintiff had no other land from which he could cut lagging or mining timber. After a portion of the contract had been completed, defendant notified plaintiff that it would receive no further lagging. Plaintiff at this time had 200 cords cut and ready to deliver. He continued to cut the remaining timber on his land into lagging and mining timber and sold it all to others. It is held, as to the 200 cords of lagging that had been cut, but not delivered, at the time of the breach of the contract, the evidence was conclusive that it had a market value at that time, and the measure of damages was the difference between the contract price and such market value. The general rule as to the measure of damages for breach by the vendee of an executory contract for the sale of personal property is that the vendor may recover the difference between the contract price and the market value. Where such property has no market value, or where the goods are to be manufactured to fill the contract, and the vendee renounces the contract before this is done, the measure of damages is the difference between the contract price and the cost to the vendor of completing the contract. Plaintiff having, after the notice of cancelation, gone on and completed the preparation of the lagging and mining timber called for by the contract, the measure of his damages is the difference between the market value thereof and the contract price; the evidence being conclusive that the property had a market value. It appearing that plaintiff

had no other lagging or mining timber save that growing on this particular land, and that he actually sold such lagging and timber, he can recover as damages no greater sum than the difference between the contract price and the amounts realized from such sales, making proper allowance for the additional cost of hauling. Baessetti v. Shenango Furnace Co., 122 Minn. 335, 142 N. W. 322.

The seller may in good faith and with reasonable diligence sell the goods, and the price received on such sale is evidence of their market value. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

(27) Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

8629a. Defences—Non-conformity to sample—Burden of proof—The rule that the burden of proof is upon the party alleging a fact in his pleading applied, and the burden held to be upon defendants to show that the goods in question did not correspond to the samples by which they were guided in giving the order; such failure being alleged by defendants in justification of their refusal to accept the goods. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

ACTION BY SELLER FOR PRICE

8630. When lies—Executory contracts—(30) J. B. Inderrieden Co. v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570.

(31) Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

(32) J. B. Inderrieden v. J. C. Johnson Co., 112 Minn. 469, 128 N. W. 570.

8634. Counterclaim for breach of warranty—An answer setting up a counterclaim for breach of warranty held to allege sufficiently a waiver of a written notice of a breach of warranty. Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422.

8636. Recoupment—In general—Answer, in an action for the price of machinery, setting up fraud on the part of the seller in obtaining the written contracts sued on, and claiming damages on account thereof, held not obnoxious to demurrer, on the ground that its establishment would involve the admission of parol evidence to vary the terms or the scope of the said contracts. General Electric Co. v. O'Connell, 118 Minn. 53, 136 N. W. 404.

8638. Pleading—A complaint in the form of the common indebitatus assumpsit count for goods sold and delivered, or substantially in that form, is sufficient. Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340. See Digest, § 8646; Dunnell, Minn. Pl. 2 ed. § 860.

(50) Wilson v. Danderand, 124 Minn. 120, 144 N. W. 460 (answer alleging fraud and deceit held to present a case of ordinary warranty and

a breach thereof—reply held to admit warranty alleged in the answer), Detwiler v. Downes, 119 Minn. 44, 137 N. W. 422 (an answer held to allege sufficiently a waiver of a written notice of a breach of warranty); Harbeck v. Carpenter-Robinson Co., 123 Minn. 389, 143 N. W. 916 (defendant must plead any partial payment); Edward Thompson Co. v. Schroeder, 131 Minn. ——, 154 N. W. 792 (answer alleging fraud and rescission therefor held to state a defence).

8639. Failure of consideration—A discontinuance of a series of law books held not a failure of consideration as to the books actually published and delivered. Bigelow v. Barnes, 121 Minn. 148, 140 N. W. 1032.

8640. Variance—A variance, if any, between an express and an implied contract held immaterial. Larson v. Barlow, 112 Minn. 246, 127 N. W. 924.

Under a complaint in the form of indebitatus assumpsit for goods sold and delivered a recovery cannot be had over objection for the breach of an executory contract of sale. St. Paul Motor Vehicle Co. v. Johnston, 127 Minn. 443, 149 N. W. 667.

8642. Burden of proof—(55) Duluth Log Co. v. John C. Hill Lumber Co., 110 Minn. 124, 124 N. W. 967 (action for price of goods sold which defendant refused to accept because not in accordance with the contract —burden on plaintiff to prove that defendant's conduct was inconsistent with plaintiff's ownership so as to negative a rescission); Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613 (non-conformity to sample).

8644. Evidence—Sufficiency—(58) Duluth Log Co. v. John C. Hill Lumber Co., 110 Minn. 124, 124 N. W. 967; Northwestern Fuel Co. v. Central Lumber & Coal Co., 110 Minn. 128, 124 N. W. 981; Gutmann v. Klimek, 116 Minn. 110, 133 N. W. 475; Green & DeLaittre Co. v. Fasbender & Son, 122 Minn. 17, 141 N. W. 789; Wilson v. Danderand, 124 Minn. 120, 144 N. W. 460 (evidence held to sustain a finding that there was a breach of warranty as to the breed of a horse); Goldish v. Andrew Schoch Grocery Co., 125 Minn. 134, 145 N. W. 803 (action on bank check given in payment for certain oranges sold by plaintiff to defendant —defence that the oranges were falsely and fraudulently represented as sound and in good condition and equal to samples—verdict for plaintiff justified by the evidence); Anderson v. Peterson, 125 Minn. 534, 147 N. W. 426; Russo v. Alberto, 129 Minn. 437, 152 N. W. 833; Youn v. Belt Line Brick Co., 131 Minn. ——, 154 N. W. 1102.

ACTION BY SELLER FOR VALUE OF GOODS

8645. When lies—See Dunnell, Minn. Pl. 2 ed. § 869.

8646. Complaint—See Dunnell, Minn. Pl. 2 ed. § 868.

CONDITIONAL SALES

8648. What constitutes—If the contract under which the owner delivers personal property to another to sell contemplates that the title shall never pass to the other, and imposes no obligation upon him ever to pay the purchase price, it does not constitute a conditional sale of the property. A contract under which the owner delivers property to another to sell, and which provides that the title to the property shall remain in the owner until sold to an actual purchaser, and that all property not so sold, and the proceeds of all sales, shall be returned to such owner, and which imposes no obligation upon the other party to pay the purchase price for any of the property, constitutes a bailment with power of sale and not a conditional sale. Norris v. Boston Music Co., 129 Minn. 198, 151 N. W. 971.

(69) See Digest, § 8651.

See Note, 46 Am. St. Rep. 295; 94 Id. 209.

8649. Sale of goods to be paid for if satisfactory—(71) See French v. Yale, 124 Minn. 63, 144 N. W. 451 (condition provable by parol); Digest, § 8562.

8650a. Resale by buyer—The vendee of personal property under a conditional sale contract, by the terms of which the legal title remained in the vendor until the purchase price was paid, held to have had, after possession was taken and payment of a part of the purchase price, an equitable interest in the property, which he could convey, subject to the rights of the vendor. Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440.

8651. Title reserved—Election of remedies—Where personal property is sold upon the condition and reservation that title thereto shall not pass from the seller until the purchase price is paid in full, the seller, upon the default of the purchaser to make payment as required by the contract, has the election of one of three remedies: (1) He may reclaim the property; (2) he may treat the sale as absolute and sue to recover the debt; or (3) bring an action to foreclose his lien; but the assertion of either right is the abandonment of the other. When the property is retaken by the seller the contract is at an end, and no further rights thereunder exist against the purchaser. It operates as a rescission of the executory agreement to sell. In this respect it can make no difference, from the standpoint of law, whether the seller reclaim the property as a matter of right and in virtue of the authority conferred by the contract, or by the voluntary return by the purchaser and acceptance by the vendor under agreement to discharge the debt. In either case the contract relations between the parties, as respects the particular contract, came to an end. Nelson v. International Harvester

Co., 117 Minn. 298, 135 N. W. 808; C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164; A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113.

When the seller brings an action for the purchase price the sale becomes absolute and an action may be brought on the warranty. Whether an action for general damages on a warranty in a conditional sale can be maintained while the sale remains conditional is undetermined. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193.

In a so-called conditional sale contract by which the seller retains title to the property and the right to recover it on default of the buyer, when the seller exercises this right and retakes the property, he cannot thereafter maintain an action to recover unpaid instalments of the purchase price. Whether partial payments made by the buyer are forfeited, in the absence of language to that effect in the contract, when the seller recovers the property, is not decided. It is not a condition precedent to the maintenance by the seller of an action in replevin to recover the property, that he return or tender to the buyer partial payments made or notes given for unpaid instalments. C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164.

(74) Nelson v. International Harvester Co., 117 Minn. 298, 135 N. W. 808; Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193; C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164.

8652. Retaking property on default—Replevin—It is not a condition precedent to the maintenance by the seller of an action in replevin to recover the property, that he return or tender to the buyer partial payments made or notes given for unpaid instalments. C. W. Raymond Co. v. Kahn, 124 Minn. 426, 145 N. W. 164.

A contract for the sale of an automobile by plaintiff to defendant stipulated that the title should remain in plaintiff until the purchase price was paid in full according to certain promissory notes then given by defendant, and that if default was made in the payments the seller had right to take possession of the machine. After default, plaintiff, having obtained possession, refused to deliver up the car to defendant until the overdue payments were made, and finally sued on the notes representing the balance of the unpaid purchase price. The defendant answered, admitted the execution of the notes, alleged neither payment nor failure of consideration, but set up a counterclaim for depriving her of the possession and use of the automobile for a long period prior to the commencement of the action. Held, that, since defendant was in default, plaintiff's possession was not wrongful until it began suit, and therefore the court properly limited recovery on the counterclaim to the time subsequent thereto. A. F. Chase & Co. v. Kelly, 125 Minn. 317, 146 N. W. 1113.

It is generally held that a breach of warranty is no defence to an action of replevin by the seller. 28 Harv. L. Rev. 821.

Breach of collateral contract as a defence to replevin by the seller. 28 Harv. L. Rev. 821.

8653. Waiver—A condition against a sale by the buyer without the written consent of the seller held waived. Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440.

SCHOOLS AND SCHOOL DISTRICTS

IN GENERAL

8656. Uniform system—Constitutional requirement—The rule of uniformity contemplated by this constitutional provision, which the legislature is required to observe, has reference to the system which it may provide, and not to the district organizations that may be established under it. These may differ in respect to size, grade, corporate powers, and franchises, as may seem to the legislature best, under different circumstances and conditions; but the principle of uniformity is not violated, if the system which is adopted is made to have a general and uniform application to the entire state, so that the same grade or class of public schools may be enjoyed by all localities similarly situated, and having the requisite conditions for that particular class or grade. Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325.

(95, 96) Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569; State v. St. Paul, 128 Minn. 82, 150 N. W. 389.

8660a. Agricultural and industrial departments—The statute providing for agricultural and industrial departments in the public schools of this state, has been sustained against various objections. The funds for the maintenance of these departments may be raised by taxation under the general statutes. An action may be maintained by one school district against another for instruction to pupils of the latter district, as provided by the statute. Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325.

8660b. Compensation for pupils from another district—State aid—In an action by one district against another for instruction to pupils of the latter district receiving instruction in the former, held that the court did not err in submitting to the jury the single issue as to the qualification of the school to receive state aid. Independent School District v. School District, 130 Minn. 19, 153 N. W. 113.

SCHOOL DISTRICTS

8663. Organization—Appeal—The question of when and under what conditions school districts may be organized, or their boundaries changed is a legislative one, which has been qualifiedly delegated to the respective county boards of the state. On an appeal to the district court from an order of the county board organizing a new school district, the question must be determined by a consideration of what is for the best interests, present and future, of the people of the territory, considered as a whole. Irons v. Independent School District, 119 Minn. 119, 137 N. W. 303.

(15) See Irons v. Independent School District, 119 Minn. 119, 137 N. W. 303 (admissibility of evidence on appeal—finding of jury sustained); Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723.

8664. Change of boundaries—Enlargement—Division—Distribution of funds—Where, upon a petition, filed under the proviso of Laws 1907, c. 188, for the enlargement of a school district, the county board, in rearranging the districts affected by the change, included in one of the districts land situated in another, under the belief that the same already belonged to the former, such land, furthermore, not being mentioned in either the petition or the notice of hearing, and there being no appearance at the hearing in behalf of the district to which the land belonged, the action of the district court, on appeal from the order of the board, in modifying such order by omitting therefrom the land thus erroneously included therein, did not constitute an excess of jurisdiction, as being a usurpation of legislative power or otherwise; the action of the board with reference to such land being a mere nullity. The term "legal voters," as used in the proviso of Laws 1907, c. 188, defining who may petition in certain cases for an enlargement of a school district, must be taken in its ordinary and usual sense, and hence does not include women. Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949.

The sole purpose of a petition for an enlargement of a district is to bring the matter before the board for consideration and determination by it. At the hearing on the petition the board must hear all evidence, objections and contentions relevant to the inquiry, and finally determine the question. Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949.

Under G. S. 1913, § 2677, the county board may enlarge a school district, having wholly within its limits an incorporated village of the character specified in the statute, by including lands wholly without such village, but contiguous to the district. School District v. School District, 130 Minn. 25, 153 N. W. 253.

Section 2696, G. S. 1913, providing that, whenever a school district is

divided and a part of the territory thereof set off and formed into a new district, the funds in the treasury thereof shall be divided equitably between the old and new districts, held to vest in the new district a legal right to a proportionate share of such funds, and that the action of the county commissioners in making the division may be reviewed on certiorari. The statute applies to all money in the treasury at the time of the organization of the new district, including a building fund raised by the sale of bonds for the construction of a new schoolhouse in the old district. The division of the fund is the act of the legislature, and not that of the officers charged with the duty of making it, and there is no unlawful diversion of the fund from the purposes for which it was raised. The legislature has the power to direct the distribution of such a fund in a situation of this kind. The courts will not interfere with the exercise of the discretion vested in the county board by G. S. 1913, § 2696, providing that, when a new district is formed from part of an existing district, funds of the old district shall be divided equitably between the two districts, where it does not appear that such discretion has been arbitrarily exercised or abused. State v. Wright County, 126 Minn. 209, 148 N. W. 53.

Upon a statutory appeal to the district court from an order of the county board detaching land from one school district and attaching it to another, the act of the county board being legislative in character, the court will limit its inquiry to the question whether the act of the board was arbitrary or fraudulent or oppressive and such as to work manifest injustice, and will not review the legislative judgment and discretion committed to the board. Upon such appeal the petition to the board need not be drawn with the formality of a pleading; and, if sufficient to put before the board facts upon which it can base an investigation and determination as to the propriety of the detachment, it is sufficient. The county board having detached land from one district and attached it to another, and a freeholder having appealed to the district court, which reversed the order of the county board upon the ground that the allegations of the petition were insufficient, it is held, upon the appeal of the petitioner to this court, that the petition was sufficient to justify the board in hearing it, and making the order, though the complaint in the petition was, in substance, that the taxes were exorbitant and confiscatory. Sorknes v. Lac Qui Parle County, 131 Minn. ——, 154 N. W. 669.

(19) See 10 Col. L. Rev. 260.

(23) Oppegaard v. Renville County, 110 Minn. 300, 125 N. W. 504; Sorknes v. Lac Qui Parle County, 131 Minn. ——, 154 N. W. 669.

8664a. Consolidation of districts—Statute—Laws 1911, c. 207, providing for the consolidation of school districts is not unconstitutional as

an attempt to confer on the courts questions of a legislative character. While the formation and organization of school districts, and the consolidation thereof under the statute cited, is legislative, the statute properly confers upon the court, by way of appeal, authority to determine questions affecting the jurisdiction of the officers charged with the duty of organization, and with the power to determine whether a particular consolidation of districts is arbitrary, and unreasonably injurious to the rights of those affected thereby. The petition for an election on the question of consolidation is jurisdictional, and must, to confer authority to call an election, be signed by the number of legal voters required by the statute, namely, "at least 25 per cent." A petition signed by less than the required number is ineffectual for any purpose, and confers no jurisdiction to call or hold the election. Those who oppose the consolidation are not estopped to question the validity of the same by participating in the election. Schweigert v. Abbott, 122 Minn. 383, 142 N. W. 723.

The last day for posting notices of election in proceedings for the consolidation of school districts, under G. S. 1913, §§ 2686–2694, was Monday, February 10. The notices were tacked up on Sunday, February 9, remaining up on Monday, the 10th. The notices were valid. Where such a notice is left posted on Sunday, the court may presume that it remained posted on Monday, there being no evidence to the contrary. Thoreson v. Susens, 127 Minn. 84, 148 N. W. 891.

To authorize a county superintendent of schools to call an election to consolidate school districts the petitions for consolidation must state the location of the districts in the customary way, that is, by naming the county and state wherein they are situated. Peiper v. County Superintendent, 130 Minn. 54, 153 N. W. 112.

8665. De facto district—Collateral attack—(24) See § 6520b.

8667. Special meetings of district—(30) See School District v. Bolstad, 121 Minn. 376, 141 N. W. 801.

8672. Liability on unauthorized contracts—(42) Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569.

(43) First Nat. Bank v. Goodhue, 120 Minn. 362, 139 N. W. 599.

8675. Powers and duties of school boards—The board of education of Minneapolis held not authorized to employ special counsel. Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569.

A school board may employ a suitable person to ascertain the physical condition of the pupils in attendance at the public schools of the district. State v. Brown, 112 Minn. 370, 128 N. W. 294.

Subdivision 8, § 1320, R. L. 1905 (G. S. 1913, § 2746), conferring certain powers upon the trustees of common and independent school dis-

tricts, held inconsistent with the provisions of the St. Paul charter, and not to confer the powers specified upon the board of school inspectors of St. Paul. A resolution of the board of school inspectors of St. Paul, adopting for a term of three years a certain text-book for use in the schools, did not prevent such board from legally making a change from the text-book so adopted at any time such change was considered for the best interests of the schools. Schroeder v. St. Paul, 115 Minn. 222, 132 N. W. 217. See Note, 36 L. R. A. 277 (adoption of textbooks).

8679. Election and qualification of officers—(01) State v. Reusswig, 110 Minn. 473, 126 N. W. 279.

8680. Duties of clerk—It is the duty of the clerk to draw orders upon the treasurer for the payment of teachers' salaries as they become due, without requiring that a bill therefor be first presented to and allowed by the school board. State v. Jack, 126 Minn. 367, 148 N. W. 306.

8682. Independent districts—Many cities of the state, by special act of the legislature and the adoption of home rule charters, are organized as independent school districts. The validity of these organizations has been considered in several cases and the provisions of charters construed. Winona v. School District, 40 Minn. 13, 41 N. W. 539 (city of Winona); State v. West Duluth Land Co., 75 Minn. 456, 78 N. W. 115 (city of Duluth); Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569 (city of Minneapolis); Schroeder v. St. Paul, 115 Minn. 222, 132 N. W. 317 (city of St. Paul); State v. St. Paul, 128 Minn. 82, 150 N. W. 389 (city of St. Paul—commission charter sustained against the objection that it prevented women from voting on school matters).

(68) Schroeder v. St. Paul, 115 Minn. 222, 132 N. W. 317.

See Digest, § 8663.

8683. Schoolhouses—Change of site—A site may be changed at a special meeting called pursuant to statute. An admission made at the trial that the moderator of the special school meeting at which the proposition to change the location of the schoolhouse was voted on "duly declared said proposition carried" sufficiently shows that it was carried by the vote required by the statute, though the vote required was a majority of the resident voters, and the proof did not show that the affirmative voters were a majority of the resident voters. If the effect of R. L. 1905, § 1324 (G. S. 1913, § 2756), is to prevent the acquisition of a school site, unless the funds to pay for it are appropriated, levied or on hand, the failure to so provide funds is defensive matter. School District v. Bolstad, 121 Minn. 376, 141 N. W. 801.

Where, in an action to enjoin the abandonment of a schoolhouse site and the erection of a schoolhouse upon a new site and the issuance of certain bonds, the theory of the plaintiffs' cause of action made by

their pleadings was that the proceedings for the selection of a new site were abortive and resulted in a failure to make any selection, and no suggestion that another site than that claimed by the defendants to have been chosen was in fact selected was made until it was presented in the plaintiffs' motion to amend the findings, the plaintiffs could not complain of the court's failure so to find. Purchase of a new schoolhouse site by the directors of the school district, followed by the board's order upon its treasurer for the amount of the purchase price and the payment thereof, held ratified by the action of the voters of the district at the next annual meeting. Sorenson v. School District, 122 Minn. 59, 141 N. W. 1105.

TEACHERS

8688a. Wrongful discharge—Conspiracy—Damages—The jury found that defendants discharged plaintiff maliciously for the purpose of injuring her professional reputation, and not in the proper performance of any official duty. Held, that the evidence is sufficient to sustain the verdict, that there were no reversible errors in the rulings upon the admission of evidence, that the charge of the court was correct, and that the verdict as reduced by the court is not so excessive as to justify this court in interfering with it. Christensen v. Plummer, 130 Minn. 440, 153 N. W. 862.

COUNTY SUPERINTENDENTS

8689. In general—Vacancy—(83) State v. Billberg, 131 Minn. —, 154 N. W. 442 (held that there was a vacancy which the county board was authorized to fill).

STATE UNIVERSITY

8693a. Nature—The University of Minnesota is a public institution maintained by the state in the exercise of its governmental functions. It is not a private corporation; it is a public corporation—an agency of the state. State v. Reed, 125 Minn. 194, 145 N. W. 967.

ACTIONS

8698. When lie—The statute prescribes when an action will lie against a school district, but it is not exclusive. When the legislature imposes an obligation on a district it may be enforced by an appropriate action against the district. Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325.

SEALS

8701. What constitutes—Evidence held to justify a finding that an indistinct impression of a seal attached to an affidavit immediately to the left of the jurat was the impression of the seal of the notary public before whom the affidavit was made, and who signed the same as notary. Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292.

8702. Use of private seals abolished—Statute—(5) Efta v. Swanson, 115 Minn. 373, 132 N. W. 335.

(6) Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604.

8706. Blanks in sealed instruments—Parol authority to fill—Authority to a grantee to fill a blank in a deed under seal may be conferred by parol. Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

SEARCHES AND SEIZURES

8707. Constitutional provision—The sheriff and county attorney, without the knowledge or consent of the accused, entered upon his premises and took and carried away certain articles of property, which were used as evidence against accused on the trial. In this the accused's constitutional rights against unreasonable searches and seizures were not violated. State v. Rogne, 115 Minn. 204, 132 N. W. 5.

(13) See Weeks v. United States, 232 U. S. 383.

8708. Search warrants—Protection to officer—When a search warrant is fair on its face, is issued by a court which has jurisdiction of the subject-matter, contains nothing to apprise the officer directed to execute it that it was issued without authority, and is not a violation of the constitution or statute of this state, such a warrant is a full protection to the officer and his deputies who obey its commands. Such a warrant protects the officer, though it does not contain a technically accurate or sufficient charge of the offence, and though the complaint on which it was issued does not. The warrant under which defendants in this case searched plaintiff's premises and seized intoxicating liquors found thereon was a full protection to defendants. Ingraham v. Booton, 117 Minn. 105, 134 N. W. 505.

(15) See Manter v. Petrie, 123 Minn. 333, 143 N. W. 907.

See Note, 101 Am. St. Rep. 328.

SEDUCTION

CIVIL LIABILITY

8716. Damages—Amount of damages recoverable. Note, 52 L. R. A. (N. S.) 85.

8717a. No action by affianced husband—An affianced husband has no cause of action against one responsible for the seduction of his affianced wife, or for the alienation of her affections, or for her debauching, making proper the breach by him of the marriage contract. Davis v. Condit, 124 Minn. 365, 144 N. W. 1089.

CRIMINAL LIABILITY

8718. Indictment—(32) State v. Preuss, 112 Minn. 108, 127 N. W. 438.

8719. Nature of corroboration required—(35) State v. Preuss, 112 Minn. 108, 127 N. W. 438.

8720. Proof of chaste character—Corroboration—(36) State v. Preuss, 112 Minn. 108, 127 N. W. 438.

8724. What is a chaste character—(54, 55) State v. Preuss, 112 Minn. 108, 127 N. W. 438.

8725a. Evidence—Sufficiency—Evidence held insufficient to justify a conviction. State v. Preuss, 112 Minn. 108, 127 N. W. 488.

SELF-SERVING DECLARATIONS—See Evidence, 3287a; Criminal Law, 2468b.

SERVICE OF NOTICES AND PAPERS

8729. Upon whom—Attorney or client—(61) Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731 (service of notice of dismissal of action on party instead of on his attorney sustained).

8729a. Necessity of personal service—Where either a right to money or property or a forfeiture thereof depends upon the giving of a written notice, such notice, in the absence of custom, statute, estoppel, or express contract stipulation, means a personal notice to the proper party within the stipulated time and if it is sought to make use of the United States mail as a means of service the service is not effected until the notice comes into the hands of the one to be served. Hoban v. Hudson, 129 Minn. 335, 152 N. W. 723.

8731. By mail—Service of a notice of assessment in a mutual insurance company by registered mail held due service within the meaning of an order of court for "due service." Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N. W. 117.

The statute is inapplicable to notices required to be served under private contract, not in the course of judicial proceedings. Hoban v. Hudson, 129 Minn. 335, 152 N. W. 723.

Plaintiff was given the option to demand and receive a refund of the amount paid for certain shares of stock in a foreign corporation, provided he gave written notice of his election to have the refund on or before a certain date. In ignorance of the fact that the corporation had discontinued the office it maintained in this state when the contract was made, and that the officers thereof, then residents of the state, had removed to a distant state, plaintiff attempted to serve the notice by mail. He deposited such notice in the post office at Benson, Minn., where he resided, two days before the time expired within which it must be served, but it did not reach an officer of the corporation until two days after such time. Held, that service was not made until the notice was received by the officer of the corporation, there being no facts pleaded or proven which created an estoppel, or waiver, or any agreement express or implied which would warrant the inference that the notice was to be considered served when deposited in the United States mail. Hoban v. Hudson, 129 Minn. 335, 152 N. W. 723.

(71, 75) Hoff v. N. W. Elevator Co., 120 Minn. 224, 139 N. W. 153.

8733. Waiver by not returning papers—Failure to serve a notice of a motion for a new trial within time is deemed waived, where the notice, though personally served, is not returned for being too late. Noonan v. Spear, 129 Minn. 528, 152 N. W. 270.

SHERIFFS AND CONSTABLES

IN GENERAL

8738. Bonds—(97) Manter v. Petrie, 123 Minn. 333, 143 N. W. 907 (complaint for loss of property seized under a search warrant issued under the statute relating to intoxicating liquors—held defective in not alleging that an order had been made by the court directing a return of the property to plaintiff).

8739. Deputy sheriff—(3) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120.

POWERS, DUTIES AND LIABILITIES

8741. Duty to execute process fair on face—A failure of a sheriff to serve a notice of expiration of the time for redemption from a tax sale does not give the holder of the tax certificate a cause of action against the sheriff for the value of the land, since it is speculative and uncertain whether the owner of the land will fail to redeem. Foster v. Wagener, 129 Minn. 11, 151 N. W. 407.

An officer is justified in refusing to serve a warrant of arrest embodying a criminal complaint fatally defective on its face. Peake v. Milaca State Bank, 120 Minn. 455, 139 N. W. 813.

(11) Duty to levy under execution placed in his hands without express directions to levy. Fallows v. Cont. etc. Bank, 235 U. S. 300.

(14) Foster v. Wagener, 129 Minn. 11, 151 N. W. 407 (rule inapplicable where the injury does not flow directly from the official neglect).

8743. Protected by process fair on face—(16) Ingraham v. Booton, 117 Minn. 105, 134 N. W. 505. See Bryan v. Ker, 222 U. S. 107.

8747. Conversion—(30) Kroll v. Moritz, 112 Minn. 270, 127 N. W. 1120. See § 1935.

(32) Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995.

8752. Neglect of duty—Summary proceedings—Statute—(38) J. H. Allen & Co. v. Christensen, 111 Minn. 414, 127 N. W. 185.

ACTIONS

8757. Burden of proof—In actions against a sheriff for damages for neglect of duty the burden of showing injury and damage is on the plaintiff. Foster v. Wagener, 129 Minn. 11, 151 N. W. 407.

SHIPPING

8760. Ownership of vessels—Partnership—(84) Rights and liabilities of part owners. Note, 90 Am. St. Rep. 355.

SIGNATURES

8770. Words indicating representative capacity—(9) See Digest, § 2115; Note, 42 L. R. A. (N. S.) 1.

SPECIFIC PERFORMANCE

IN GENERAL

8772. Election of remedies—The vendor in an executory contract for the sale of real property may maintain an action for specific performance, and is not limited to an action for damages for a breach by the vendee, or to an equitable proceeding to foreclose the vendor's lien for the purchase price of the property. O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112.

Bringing an action to rescind an executory contract for fraudulent misrepresentations as to the quality of the land, and thereafter voluntarily dismissing such action because the right to rescind had been lost by laches, is not such an election of remedies as will debar plaintiff from subsequently bringing an action to enforce specific performance of such contract. International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

The mere commencement of an action for damages for breach of a contract will not bar a subsequent action for its specific performance. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

8773. Jurisdiction—In an action by a vendor for specific performance of a contract to convey land it is immaterial that the land is in a foreign state or country. The rule is different where the action is by the vendee and a transfer of title is effected by decree of court. O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112.

A court in this state may compel a person over whom it has jurisdiction to convey real estate situated in another state. Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176.

While a court of equity acting upon the person of the defendant may decree a conveyance of land in another jurisdiction and enforce the execution of the decree by process against the defendant, neither the

decree, nor any conveyance under it except by the party in whom title is vested, is of any efficacy beyond the jurisdiction of the court. Fall v. Eastin, 215 U. S. 1.

8774. Mutuality of obligation and remedy—In a general settlement agreement defendant agreed to repurchase certain corporate stock. The agreement to repurchase, being supported by the considerations involved in the general settlement, did not lack mutuality of obligation; nor was it wanting in mutuality of assent of parties. Plaintiff having elected, within the time prescribed, to sell the stock back to defendant, and having made proper and sufficient tender of the stock and agreement, both before the bringing of the action and on the trial thereof, the fact that the agreement theretofore was lacking in mutuality of remedy did not deprive the court of the power to decree its specific performance. Mutuality of remedy is not the sole test of specific enforceability, and is not always essential thereto. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

(25) Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791; First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084. See 49 Am. Law Reg. 270, 319, 383, 447, 507, 559; 50 Id. 65, 251, 329, 523.

(27) O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112.

(28) See First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

8776. Inadequacy of legal remedy—A contract for the purchase of shares of stock may be specifically enforced at the instance of the seller, where the difficulty in ascertaining the value of the stock is such that his remedy by action at law to recover damages for breach of contract is inadequate. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

(32) Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896.

8777. How far discretionary—In administering the remedy, current authority regards the jurisdiction as flexible, depending largely upon the facts of each individual case, and not bound by hard and fast rules, a reasonable discretion being allowed in awarding relief, and in determining the right thereto the situation involved should be considered from a practical, rather than a theoretical, viewpoint. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

(36) Haffner v. Dobrinski, 215 U. S. 446.

(38) See 9 Col. L. Rev. 68.

8779. Possibility of performance—The grantee in an absolute deed intended as a mortgage, with the knowledge and for the benefit of the grantors, mortgaged the property to third persons. He subsequently refused to reconvey the property, and this action was brought to compel

specific performance. Pending the action the mortgages so executed were foreclosed, from which no redemption was made, so that at the time of the trial title to the property had passed to the purchaser at the foreclosure sale. Held that, since performance was impossible, the trial court erred in directing judgment for a reconveyance of the property to the grantors. Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638.

A contract by the holder of the fee title to real property and the holder of the life estate to convey the property, including both estates, held a joint contract, to be enforced as to both, or not at all. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

(42) Schwab v. Baremore, 95 Minn. 295, 104 N. W. 10; Kasal v. Hlinka, 118 Minn. 37, 136 N. W. 569.

THE CONTRACT

8780. Contract basis of right—(45) Jacobson v. Rotzien, 111 Minn. 527, 531, 127 N. W. 419, 856 (agreement to purchase land with time to examine land—held that time was not of the essence and that the proposed purchaser exercised his right not to purchase within a reasonable time so that there was no valid existing contract that could be specifically enforced); Wunder v. Turner, 120 Minn. 13, 138 N. W. 770 (action to enforce specific performance of an alleged oral contract with reference to an invention relating to reinforced concrete construction and the assignment of an interest in patents to be obtained therefor—finding that contract was never made sustained).

8781. Terms must be definite and certain—(49) Miller v. Miller, 125 Minn. 49, 145 N. W. 615; Leslie v. Mathwig, 131 Minn. ——, 154 N. W. 951; Rahm v. Cummings, 131 Minn. ——, 155 N. W. 201.

(50) Miller v. Miller, 125 Minn. 49, 145 N. W. 615; Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287.

8784. Contract must be valid—A fraudulent or illegal contract will not be enforced. De La Motte v. N. W. Clearance Co., 126 Minn. 197, 148 N. W. 47. See Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944.

8786. Consideration—(76) Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

8787. Must be fair—Specific performance may be denied though there has been part performance if it would be unjust under the facts of the particular case. Haffner v. Dobrinski, 215 U. S. 446.

8788. Contracts to convey or purchase land—The option contract of purchase involved in this action was a mere offer to sell the premises until a stipulated date. It conferred no interest in the premises until

accepted, and it took effect from the date of acceptance. The buildings on the premises having been destroyed by fire before the date of acceptance, equity will not decree a specific performance of the contract, with an abatement in the stipulated price equal to the value of the lost improvements. Gamble v. Garlock, 116 Minn. 59, 133 N. W. 175.

A real estate company entered into a contract with defendant whereby it agreed to sell him certain real estate upon stipulated terms. The company was not the owner of the property, and the contract contained a provision that it should be approved by the owner. Plaintiff was the owner, and her husband was her business manager, and he indorsed upon the contract the words: "Approved. W. P. Davidson." Plaintiff then carried out all of the provisions of the contract, and tendered a deed with the usual covenants, executed by herself and husband. Held, plaintiff's remedy was by specific performance, as the undisclosed principal, and parol evidence was admissible to prove that she was the owner, that her husband acted with her authority, and that she had complied with the terms of the contract. Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862.

A contract by the holder of the fee title to real property, and the holder of the life estate, to convey the property, including both estates, held a joint contract to be enforced as to both or not at all. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

The defendant conveyed a one-fifth interest in a state mining lease to the plaintiff, both signing the agreement. The plaintiff, as a part of the agreement, signed and delivered to the defendant a writing which provided that, under certain conditions, the defendant might take back one-half of what he had conveyed, within six months, or that the plaintiff, under the same conditions, and within the same time, might require him to take it back. Held, that there was a sufficient consideration to support the agreement; that the defendant was bound by it, though he did not sign it; that there was no lack of mutuality preventing the enforcement of the contract; and that, there being nothing inequitable in the transaction, the contract should be specifically enforced. The provision of the agreement requiring the defendant, at the election of the plaintiff, to take back one-half of what he conveyed is enforceable, though the election was to be made within six months, and though the defendant might defeat the right of election by purchasing a one-fifth elsewhere within that period, the intent of the parties being clear notwithstanding the technical inconsistency of the provisions relative to repurchase and sale. Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

(78) Diebel v. Diebel, 116 Minn. 168, 133 N. W. 463 (evidence held to justify specific performance).

(85) O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112.

8789. Contracts for sale of personalty—Corporate stock—The general rule in this country is that a contract for the sale of corporate stock will not be specifically enforced, where the stock can be purchased on the market, and its value can be readily ascertained, unless there is some special reason for the purchaser's obtaining the same, but where the shares are limited and not easily obtainable, or where their value cannot be readily ascertained, the contract will be enforced. The tendency seems to be towards a more liberal allowance of the remedy. In England it seems to be allowed almost as a matter of course, except in case of government stocks, in which case it has generally been refused. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084. See Note, 135 Am. St. Rep. 689.

8789a. Contracts to devise or bequeath property—A person may by contract bind himself to give his property to certain designated persons at his death, and specific performance thereof may be enforced. To warrant specific performance of an oral contract to give property by will, the contract must be reasonable and satisfactorily established, and must have been performed to such extent and in such manner that the beneficiary cannot be properly compensated in damages. Assuming a peculiar personal and domestic relation as a member of the family of the promisor, pursuant to the contract, and giving him the society and services incident to such relation, and of a kind and character, the value of which is not measurable in money, is sufficient to justify specific performance; but services not of such peculiar character, and for which reasonable compensation can be made in money, are not sufficient to justify such relief. Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455; Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812; Odenbreit v. Utheim, 131 Minn. ——, 154 N. W. 741. See Digest, § 10207; Note, 44 L. R. A. (N. S.) 733, 756; 28 Harv. L. Rev. 241.

8790. Miscellaneous contracts held enforceable—A contract by the holder of a sheriff's certificate under foreclosure sale that he would, after the expiration of the time of redemption, transfer to plaintiffs, who possessed the right to redeem, their respective interests, on being paid their pro rata share. Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944.

A contract to repurchase corporate stock. First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

Contracts to give security. Note, 6 L. R. A. (N. S.) 585.

(97) Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812.

8791. Miscellaneous contracts held not enforceable—A parol contract to construct a tile drainage system in place of an existing open drainage system. Schuette v. Sutter, 128 Minn. 150, 150 N. W. 622.

(2) Note, 6 L. R. A. (N. S.) 1115; 140 Am. St. Rep. 55.

(4) Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025; Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744. See Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4.

(5) Gamble v. Garlock, 116 Minn. 59, 133 N. W. 175.

VARIOUS DEFENCES

8792. Good faith—Fraud—A defence based on a claim that the contract was inequitable and the action speculative held to be without merit. Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

(7) Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944 (the evidence does not show that the contract sought to be enforced was entered into for the corrupt purpose of unlawfully depriving a third party of property interests or rights); Kautenberger v. Johnson, 131 Minn. ——, 154 N. W. 943 (finding against a charge of fraud sustained).

8796. Miscellaneous—Fact that agent of defendant received a commission from the plaintiff without the knowledge of defendant. Palmer v. Gould, 144 N. Y. 671, 39 N. E. 378; 27 Harv. L. Rev. 288.

ACTIONS

8797. Limitation of actions—(19) Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

8799. Parties plaintiff—An undisclosed principal may maintain an action for specific performance, parol evidence being admissible to show his interest. Davidson v. Hurty, 116 Minn. 280, 133 N. W. 862.

Where the purchaser under an executory contract for the purchase of land acquires the legal title from the vendor after having assigned his interest in the contract to a third person, the assignee may have specific performance against the assignor to the extent of the latter's interest in the property so acquired, though such assignor's wife did not join in the assignment; but no relief can be had against the wife. Kasal v. Hlinka, 118 Minn. 37, 136 N. W. 569.

8800. Parties defendant—In an action to enforce an agreement by the holder of a sheriff's certificate under foreclosure sale that he would, after the expiration of the time for redemption, transfer to plaintiffs, who possessed the right to redeem, their respective interests, on being paid their pro rata share, the widow of the mortgagor, who was not a party to the oral agreement, and whose interest was extinguished when the time

for redemption from the foreclosure sale expired, held not a necessary party. Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944.

8802. Complaint—(52) Hobart v. Kehoe, 110 Minn. 490, 126 N. W. 66 (defendant agreed to convey if he could obtain a license from a probate court authorizing him to do so—complaint held insufficient for failure to allege performance of this condition precedent); O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112 (land in another state—complaint of vendor sustained); First Nat. Bank v. Corporation Securities Co., 120 Minn. 105, 139 N. W. 296 (complaint for specific performance of contract for sale of corporate stock sustained); Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827 (complaint for specific performance and for cancelation of a real estate security given by the vendee sustained).

8806. Degree of proof required—(57) Wunder v. Turner, 120 Minn. 13, 138 N. W. 770; Koch v. Fischer, 122 Minn. 123, 142 N. W. 18; Miller v. Miller, 125 Minn. 49, 145 N. W. 615.

8807. Tender of performance and payment into court—(61) See Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820.

8810. Evidence—Admissibility—(70) Wunder v. Turner, 120 Minn. 13, 138 N. W. 770 (evidence of collateral facts held properly excluded); Crystal Lake Cemetery Assn. v. Farnham, 129 Minn. 1, 151 N. W. 418 (evidence as to the character and value of improvements placed on the land by a lessee held admissible, though he had the right to remove them).

8811. Evidence—Sufficiency—(71) Diebel v. Diebel, 116 Minn. 168, 133 N. W. 463 (finding that name of plaintiff was inserted in contract as one of the vendees with intent to make her one of the purchasers of the land, and not by mistake, sustained); Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944 (findings that plaintiffs, who possessed the right to redeem from a foreclosure sale, refrained from doing so in reliance on an oral agreement of the one who had procured the sheriff's certificate that he would, after the time for redemption expired, transfer to them their respective interests, upon being paid their pro rata share, held justified by the evidence); Wunder v. Turner, 120 Minn. 13, 138 N. W. 770; Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744; Miller v. Miller, 125 Minn. 49, 145 N. W. 615 (evidence of oral contract held insufficient—evidence showing offer to sell but not an acceptance).

8813. Relief which may be awarded—Judgment—In general—It is not necessary, in an action by the vendor for specific performance, that the land, the subject-matter of the contract sought to be enforced, be within the jurisdiction of the court, though the rule is different where the vendee seeks performance by decree of court. In such a case the court

cannot decree a transfer of the title of land beyond its jurisdiction; but where the vendor brings the action, the whereabouts of the land is immaterial. The action is personal, and operates upon the person of defendant. The court requires a delivery to him of a valid conveyance of the land, and decrees that he thereupon pay the purchase price. O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112.

(76) Diebel v. Diebel, 116 Minn. 168, 133 N. W. 463.

8814. Damages in lieu of performance—(84, 90) See Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638.

8815. Rents and profits—(91) See 15 Col. L. Rev. 256.

STARE DECISIS

8819. In general—A court cannot decide cases according to its own views of natural justice, uncontrolled by established rules and principles of law. Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 416, 128 N. W. 455.

(4) Quackenbush v. Slayton, 120 Minn. 373, 139 N. W. 716.

8820. Limitations of doctrine—In considering how controlling is the language found in an opinion announcing the decision of a court, it is always necessary to ascertain the circumstances under which it was used. In each case, not only the result arrived at, but the reasoning advanced in its support, and the language used in expressing both reasons and conclusions, are inevitably affected by the particular facts under consideration. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; Longcor v. Atlantic Terra Cotta Co., 122 Minn. 245, 142 N. W. 310; Truan v. London Guarantee & Accident Co., 124 Minn. 339, 145 N. W. 26.

(15) See Beck v. Nelson, 126 Minn. 10, 147 N. W. 668.

(16) Truan v. London Guarantee & Accident Co., 124 Minn. 339, 145 N. W. 26.

STATE

IN GENERAL

8830. Works of internal improvement—(36) State v. Reed, 125 Minn. 194, 145 N. W. 967 (State University not a work of internal improvement within constitutional provision).

8831. Actions by and against—The Minnesota Employees' Compensation Commission created by Laws 1909, c. 286, was not a governmental agency of the state, nor were its members public officers, so that they were relieved from personal liability for debts, contracted in the name of the commission, beyond the amount of its appropriation, with a creditor having no knowledge of the deficiency. Wilkinson v. Mercier, 125 Minn. 201, 146 N. W. 362.

(39) Action against state officer as action against state. Note, 44 L. R. A. (N. S.) 189.

8831a. Legislative districts—Perfect exactness in the apportionment according to the number of inhabitants is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. If there is such a wide and bold departure from the constitutional rule that it cannot be possibly justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever. Section 2, art. 4, of the constitution, providing that senatorial and representative districts shall be apportioned equally throughout the state according to the population thereof, does not require that each district contain the same number of inhabitants. The legislature is vested with a wide discretion in forming such districts, with which the courts will not interfere, except when there has been a clear and arbitrary departure from the requirement of equality. A mere variance in the population of such districts is not alone sufficient to justify declaring the apportionment unconstitutional. Precincts 8 and 9 of the Ninth ward of the city of St. Paul are by the terms of the act expressly placed in the First representative district of the Thirty-Eighth senatorial district, and are therefore necessarily within and a part of that senatorial district. State v. Weatherill, 125 Minn. 336, 147 N. W. 105.

8831b. Reapportionment—Time—Section 23, art. 4, of the constitution, which provides that the legislature "shall have power" to reap-

portion the legislative districts at its first session after a state or federal census, construed as imposing a duty upon the legislature to make such reapportionment, and if not made at the first session after such census, that it is competent for the legislature to do so at some subsequent session. State v. Weatherill, 125 Minn. 336, 147 N. W. 105.

LEGISLATURE

8836. Members cannot hold certain offices—Members of the legislature which enacted chapter 400, Laws of 1913 (G. S. 1913, §§ 294–297), are not prohibited by section 9, art. 4, of the constitution from becoming candidates for state auditor at the ensuing primary election; there being no increase made by that law in the emoluments received by the incumbent of that office at the time of its enactment or at the time of its taking effect. State v. Schmahl, 125 Minn. 104, 145 N. W. 794.

8841. Journals—(53) State v. Wagener, 130 Minn. 424, 153 N. W. 749. See Digest, § 8963.

OFFICERS

8845. Attorney general—(61) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; State v. Osakis, 112 Minn. 365, 128 N. W. 295.

FINANCES

8849. No payment out of treasury without appropriation—This provision has no application to the issue by the state auditor of a warrant on the state treasury for the distribution of the gross-earnings tax on suburban railroad companies under Laws 1909, c. 454. State v. Iverson, 125 Minn. 67, 145 N. W. 607.

8849a. Standing appropriations—Laws 1913, c. 140, abolished all standing appropriations, except where there is a provision for a tax levy or fees or receipts for any purpose set apart in a special fund. State v. Iverson, 126 Minn. 110, 147 N. W. 946.

8849b. Right to fees collected by executive officers—License fees received by the secretary and treasurer of the state board of medical examiners under Laws 1905, c. 236 (G. S. 1913, §§ 4973, 4974), and R. L. 1905, §§ 2302, 2303, held properly retained by the board, notwithstanding R. L. 1905, § 66, requiring executive officers to pay into the state treasury all fees and charges received by them, except when otherwise expressly provided by law. State v. Fullerton, 124 Minn. 151, 144 N. W. 755.

STATUTE OF FRAUDS

IN GENERAL

8849c. Historical—Date and authorship of original statute of frauds. 26 Harv. L. Rev. 329.

8850. Construction—G. S. 1913, § 6998, does not merely prescribe a rule of evidence but rather precludes the substantive right of action on the oral contract. Hanson v. Marion, 128 Minn. 468, 151 N. W. 195.

(73) See O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677 (the statute of frauds is not to be defeated by construction where it is clearly applicable though the court doubts the wisdom of the particular provision of the statute).

8852. Executed contracts—(76) First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681; Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538; Kent v. Costin, 130 Minn. 450, 153 N. W. 874. See Elliott v. Robbins, 110 Minn. 481, 484, 126 N. W. 65.

8852a. Estoppel—Facts held not to estop a party from invoking the statute. Hanson v. Marion, 128 Minn. 468, 151 N. W. 195.

8854. Who may invoke statute—(81) Wright v. Waite, 126 Minn. 115, 148 N. W. 50 (broker cannot raise the objection that an agreement between his principal and another was within the statute).

8855. Parol modification of written contract—(82) See First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

(83) Blake v. J. Neils Lumber Co., 111 Minn. 513, 127 N. W. 450; McKinley v. Macbeth, 113 Minn. 148, 129 N. W. 216, 389.

8856. Recovery of money paid—Recovery may be had under a common count for money had and received. Dunnell, Minn. Pl. 2 ed. § 778.

(84) See Note, 105 Am. St. Rep. 793; Woodward, Quasi Contracts, §§ 93–108; Note, 105 Am. St. Rep. 793.

8857. How invoked—Pleading—Dismissal—Objection to evidence—Waiver—Where it does not appear from the pleadings that the contract sued upon was in parol and within the statute of frauds, the statute may be taken advantage of by motion to dismiss at the close of plaintiff's case. In such case the failure to object to the evidence when offered is not a waiver of the right to rely upon the statute. The statute (section 6998, G. S. 1913), declares that no action can be maintained upon a contract therein referred to, unless in writing. Held, that the statute is not to be construed as prescribing a mere rule of evidence, but rather as precluding the substantive right of action upon the oral contract. The rule that incompetent evidence received without objec-

tion is sufficient upon which to base a finding or verdict, applies only when such evidence establishes or tends to establish an enforceable right. It has no application where the fact shown or proved by the incompetent evidence furnishes no basis for recovery or of a right of action; as an oral agreement within the statute of frauds which the statute declares unenforceable. Hanson v. Marion, 128 Minn. 468, 151 N. W. 195.

(88) See, as to the necessity of pleading the statute. Note, 49 L. R. A. (N. S.) 1; 78 Am. St. Rep. 648.

(90) Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9.

CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR

8859. Performance by one party within year—If the agreement is fully performed within a year the statute is inapplicable. Kruse v. Tripp, 129 Minn. 252, 152 N. W. 538.

8861. When year begins to run—Where the date for the commencement of the performance of a contract is shown by the same evidence which establishes the contractual consensus, such date must, for the purpose of determining the applicability of the statute of frauds, be deemed to appear from the terms of the contract. A contract for services, which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute of frauds; but a contract for one year's services, commencing on the date on which the contract is made, is not within the statute. In determining the applicability of the statute of frauds to a contract of employment, the date of the contract will not be presumed to be the date for the commencement of its performance, where it affirmatively appears from the terms of the contract that a subsequent date therefor is contemplated. The doctrine of de minimis cannot be invoked to avoid the operation of the statute of frauds upon a contract which by its terms is not to be performed within one year. O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677.

8862a. Sufficiency of writings—A telegraphic offer of employment and a letter explaining the telegram, and a telegraphic acceptance, held not sufficient writings to satisfy the statute. O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677.

8863. Held within the statute—A contract to execute a lease, the lease when executed to extend over a longer period than one year. Hopkins v. Taylor, 128 Minn. 468, 151 N. W. 195.

(7) O'Donnell v. Daily News Co., 119 Minn. 378, 138 N. W. 677 (contract to act as advertising agent for one year to commence on a certain day in the future).

See Note, 138 Am. St. Rep. 588.

PROMISES TO ANSWER FOR ANOTHER

8865. In general—A promise to pay the debt of another upon a consideration directly beneficial to the promisor is not within the statute. Van Cappellan v. Chicago etc. Ry. Co., 126 Minn. 251, 148 N. W. 104.

See Note, 126 Am. St. Rep. 487.

8866. The memorandum—Where the consideration is an agreement the agreement need not be set out in full. First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

8867. Held within the statute—(34) See Van Cappellan v. Chicago etc. Ry. Co., 126 Minn. 251, 148 N. W. 104.

8868. Held not within statute—A promise by a principal to save a surety harmless from loss on a bond. Noyes v. Ostrom, 113 Minn. 111, 129 N. W. 142.

A promise by a railroad company to pay a physician for services rendered a servant of the company, the promise being made in consideration of the release of a claim of the servant against the company for personal injuries. Van Cappellan v. Chicago etc. Ry. Co., 126 Minn. 251, 148 N. W. 104.

(36) Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203.

(54) See 5 Mich. L. Rev. 142.

(56) Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644.

CONTRACTS FOR THE SALE OF GOODS

8871. Receipt of part of goods—Where a parol contract is made for the sale of goods, a subsequent delivery and acceptance of a part of the goods, under and pursuant to the contract, satisfies the statute of frauds. Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

(65) Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316.

See Note, 96 Am. St. Rep. 215.

8872. Part payment—(68) Note, 125 Am. St. Rep. 393.

8873. The memorandum—The contract cannot rest partly in writing and partly in parol. Wilson v. Hoy, 120 Minn. 451, 139 N. W. 817.

(75) Wilson v. Hoy, 120 Minn. 451, 139 N. W. 817. See 27 Harv. L. Rev. 397.

See Digest, § 8881.

8875. Held not within the statute—A contract of a carrier to furnish cars to a shipper. Pope v. Wisconsin Central Ry. Co., 112 Minn. 112, 127 N. W. 436.

A contract for the manufacture of goods for delivery in the future. Greenhut Cloak Co. v. Oreck, 130 Minn. 304, 153 N. W. 613.

(91) See First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

CONVEYANCES OF REALTY

8876. In general—Authority to a grantee to insert his name as the grantee in a blank space left in a deed for that purpose need not be in writing. Board of Education v. Hughes, 118 Minn. 404, 136 N. W. 1095.

A contract releasing a mortgagor from his personal liability held not within the statute. First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681.

A deed made by one partner in behalf of the firm may be ratified by the other partner by parol. National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879.

(1) Elliott v. Robbins, 110 Minn. 481, 126 N. W. 65.

8878. Trusts—A parol agreement and writings making certain persons trustees in the redemption of land from a foreclosure sale, and in the sale of such land, held not to create a parol trust in land, in violation of the statutes of North Dakota. Macklanburg v. Griffith, 115 Minn. 131, 131 N. W. 1063.

(15) See Burns v. Burns, 124 Minn. 176, 180, 144 N. W. 761; Note, 39 L. R. A. (N. S.) 906.

8879. Partnership to deal in realty—(17) Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476; Kent v. Costin, 130 Minn. 450, 153 N. W. 874. See Note, L. R. A. 1915A, 521.

CONTRACTS TO CONVEY REALTY

8880. In general—Where an offer to sell is made and rejected by suggesting other terms, a subsequent agreement to sell on the basis of the rejected offer must be in writing. Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127.

An agreement to share profits or losses arising from the purchase and sale of land is not a contract for the transfer or conveyance of an interest in land. Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

What constitutes a contract for the sale of land within the statute. Note, 102 Am. St. Rep. 230.

(22) Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127. See Digest, §§ 1740, 8499, 10000.

8881. The memorandum—(31, 32) Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

(33) Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127 (where a contract within the statute of frauds is made out by correspondence, the

correspondence taken together must establish the contract in all its terms, without aid from parol evidence); Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

(37) Wilson v. Hoy, 120 Minn. 451, 139 N. W. 817; Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791; Wright v. Waite, 126 Minn. 115, 148 N. W. 50. See 24 Harv. L. Rev. 681.

(38) Wright v. Waite, 126 Minn. 115, 148 N. W. 50.

8882. Authority of agent—An oral contract by an agent may be subsequently ratified by the principal in writing. Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997.

(43) Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997.

(46) Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997 (ratification held a question of fact on the evidence). See National Citizens Bank v. McKinley, 129 Minn. 481, 152 N. W. 879.

8883. Held within statute—(58) Hanson v. Marion, 128 Minn. 468, 151 N. W. 195.

8884. Held not within statute—An agreement to credit a certain amount on mortgage notes in consideration of the relinquishment of all interest in a timber contract which had been assigned to plaintiff by defendant. National Citizens Bank v. Babcock, 113 Minn. 493, 129 N. W. 1045.

(61) Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

8885. Part performance—Specific performance—A "part performance," to take an oral agreement to convey real estate out of the statute of frauds, must be substantial, and of such a nature that the refusal to enforce the agreement would result, not merely in the denial of the right which the agreement was intended to confer, but in an "unjust and unconscientious" injury. Bennett v. Harrison, 115 Minn. 342, 132 N. W. 300. See Chapel v. Chapel, 155 N. W. 1054; Holland v. Ousbye, 155 N. W. 1071.

Where a person holding a valuable right refrains from exercising it, in reliance on an oral agreement of another to convey, until such right expires it constitutes sufficient part performance to take the agreement out of the statute. Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944 (refraining to redeem from a foreclosure sale).

Specific performance will not be enforced unless the contract is clearly proved, both as to the fact of making it and as to its terms. Koch v. Fischer, 122 Minn. 123, 142 N. W. 18.

Adverse possession of land for the statutory time is not necessary in order to prove an executed parol gift. To take a parol gift of land out of the statute of frauds, there must be an acceptance by the donee, and

such a performance in the way of making valuable improvements as would make it substantial injustice or fraud to hold the gift void under the statute; but it is not essential that the possession continue for fifteen years or that its character be such as would give title by adverse possession. Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125.

The term "part performance" is a misnomer. The term is used as a short and convenient statement of the general ground on which verbal agreements regarding realty are enforced. Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754.

The fact that one in possession under a claim of title takes a lease of the land from one having an adverse title is strong evidence against his claim. Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754.

Application of doctrine to parol leases. Note, 49 L. R. A. (N. S.) 113.

(63) Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309; Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754. See Note, 37 L. R. A. (N. S.) 521; 13 Col. L. Rev. 150.

(64) Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754.

(66) Note, 3 L. R. A. (N. S.) 790.

(71) Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309; Koch v. Fischer, 122 Minn. 123, 142 N. W. 18.

(74) Hayes v. Hayes, 126 Minn. 389, 148 N. W. 125; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754. See Digest, § 4031.

(78) Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754.

(81) Koch v. Fischer, 122 Minn. 123, 142 N. W. 18. See Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287 (as a defence to an action of ejectment).

(84) Koch v. Fischer, 122 Minn. 123, 142 N. W. 18; Miller v. Miller, 125 Minn. 49, 145 N. W. 615; Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287; Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387. See Digest, § 8781.

(86) McKinley v. Macbeth, 113 Minn. 148, 155, 129 N. W. 216, 389; Janochosky v. Kurr, 120 Minn. 471, 139 N. W. 944; Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387; Midway Realty Co. v. Covell, 128 Minn. 135, 150 N. W. 615; Trebesch v. Trebesch, 130 Minn. 368, 153 N. W. 754; Sears v. Redick, 211 Fed. 856.

(87) Bennett v. Harrison, 115 Minn. 342, 132 N. W. 309; Hayes v. Hayes, 119 Minn. 1, 137 N. W. 162; Koch v. Fischer, 122 Minn. 123, 142 N. W. 18; Miller v. Miller, 125 Minn. 49, 145 N. W. 615; Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287.

STATUTES

IN GENERAL

8887. No extraterritorial effect—A statute should not be so construed as to give it extraterritorial effect. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954.

8887a. Private action on statute—See § 6976.

ENACTMENT

8891. Enacting clause—(95) Note, L. R. A. 1915B, 1060.

8892. Reading bills—A statute has been sustained where it affirmatively appeared from the journal that the bill was read a second and third time on the same day, but it did not affirmatively appear from the journal that the constitutional requirement had or had not been dispensed with by two-thirds of the house. There was a conflict between the daily journal and the permanent journal, but the house approved the daily journal and made it the only authorized journal of the day's proceedings. Two-thirds of the house, within the provision of the constitution requiring bills to be read on three different days in each house means two-thirds of all the members of the house and not merely two-thirds of a quorum. No particular formality is necessary to dispense with the rule. Action of the house, the necessary effect of which is to order a third reading of the bill and to place it on its final passage, and a passage of the bill by a vote of more than two-thirds of all the members of the house, dispense with the rule. State v. Wagener, 130 Minn. 424, 153 N. W. 749.

(96, 97) Orr v. Sutton, 119 Minn. 193, 137 N. W. 973; State v. Wagener, 130 Minn. 424, 153 N. W. 749.

8894. Necessity of two-thirds vote—A municipal court, established under the provisions of chapter 229, Laws 1895, as amended by chapters 127 and 271, Laws 1899, and sections 124 to 146, inclusive, R. L. 1905, is a state court within the meaning of art. 6, § 1, of the constitution which requires that all inferior courts not therein specified shall be established by the legislature by a two-thirds vote. State v. Fleming, 112 Minn. 136, 127 N. W. 473.

(1) State v. Wagener, 130 Minn. 424, 153 N. W. 749.

(2) See Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953.

8897. Journals—The printed daily journal and the permanent journal are both evidence of their contents. A house may so approve the daily

journal as to make it the only authorized journal of the day's proceedings. State v. Wagener, 130 Minn. 424, 153 N. W. 749.

(6, 7) State v. Wagener, 130 Minn. 424, 153 N. W. 749.

8898. Presumption of regular enactment—(9) Orr v. Sutton, 119 Minn. 193, 137 N. W. 973; State v. Wagener, 130 Minn. 424, 153 N. W. 749.

8899. Revenue bills must originate in house—(10) State v. Stroup, 131 Minn. ——, 155 N. W. 90 (penalty provided by the Abatement Act of 1913 held not a tax so as to require the bill to originate in the house).

8900. Enrolment—Omission—Conclusiveness—(14) Conclusiveness of enrolled bill. Note, 40 L. R. A. (N. S.) 1; 15 Col. L. Rev. 285.

8901. Approval by governor—Where two inconsistent statutes are approved on the same day it is presumed that they were approved in their numerical order. Syndicate Printing Co. v. Cashman, 115 Minn. 446, 132 N. W. 915.

TITLE

8906. Objects of constitutional provision—(27) State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962; State v. Erickson, 125 Minn. 238, 146 N. W. 364.

8907. Construed liberally—(28) State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496; State v. Armour & Co., 118 Minn. 128, 136 N. W. 565; Johnson v. Schmahl, 119 Minn. 179, 137 N. W. 741; State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962.

8908. Title may be general—Not an index—For the purpose of imposing regulations upon public corporations, whether organized under general or special acts of the legislature, it has never been held necessary to refer specifically to each corporation or the general or special law under which it was incorporated. It is sufficient if the title of the act is broad enough to include such corporation, and not of a character which would mislead or furnish a cover for secret legislation. Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569.

(01) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

(29) Johnson v. Schmahl, 119 Minn. 179, 137 N. W. 741; State v. Sharp, 121 Minn. 381, 141 N. W. 526; Gard v. Otter Tail County, 124 Minn. 136, 144 N. W. 748; State v. Droppo, 126 Minn. 68, 147 N. W. 829.

8909. Restrictive titles—(31) See Williams v. Minn. State Board, Medical Examiners, 120 Minn. 313, 139 N. W. 500; Balch v. St. Anthony Park West, 129 Minn. 305, 152 N. W. 643.

8910. Duplicity—(32) State v. Sharp, 121 Minn. 381, 141 N. W. 526; State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962; State v. Erickson, 125 Minn. 238, 146 N. W. 364; State v. Brooks-Scanlon Lumber

Co., 128 Minn. 300, 150 N. W. 912; State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

8912. Codifications and revisions—Charters—(34) State v. Erickson, 125 Minn. 238, 146 N. W. 364. See State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962.

(36) Mitchell v. Chisholm, 116 Minn. 323, 133 N. W. 804; Gaughan v. St. Paul, 119 Minn. 63, 137 N. W. 199.

8916. Reference to penalty unnecessary—(40) State v. Sharp, 121 Minn. 381, 141 N. W. 526.

8918. Amendatory acts—The title of an amendatory act may be sufficient though it merely refers to the section or chapter number of the amended statute, without describing in words the subject of the amended statute. State v. Erickson, 125 Minn. 238, 146 N. W. 364.

(42) State v. Erickson, 125 Minn. 238, 146 N. W. 364. See State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

8920. Titles held sufficient—"An act to amend the charter of the city of Minneapolis." Jackson v. Board of Education, 112 Minn. 167, 127 N. W. 569.

"An act to prevent unlawful discrimination in the sale of milk, cream, butter fat, and to provide a punishment for the same." State v. Bridgeman & Russell Co., 117 Minn. 186, 134 N. W. 496.

"An act creating a department of weights and measures to be under the jurisdiction of the railroad and warehouse commission, defining its duties and powers and providing penalties for interference therewith." State v. Armour & Co., 118 Minn. 128, 136 N. W. 565; State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962.

"An act to amend sections 181, 182, 184, 186, 187, 189, 193, 196, 197, 199, 200, 201, 217, 218, 241, 247, 251, and 316 of the Revised Laws of 1905, and acts amendatory thereof, relating to registration of voters and to primary and general elections, and to add certain provisions relating to registration of voters and to primary and general elections, and to repeal any acts or parts of acts inconsistent herewith." Johnson v. Schmahl, 119 Minn. 179, 137 N. W. 741.

"An act to create and establish a department of banking and to provide for a superintendent of banks * * * defining the powers * * * of such superintendent of banks * * *, and to provide for a system of examination, audit and control of state banks * * *." State v. Sharp, 121 Minn. 381, 141 N. W. 526.

"An act regulating the collection, indexing, preservation and use as evidence, of vital statistics." Gard v. Otter Tail County, 124 Minn. 136, 144 N. W. 748.

"An act to amend sections 181 and 182 of the Revised Laws 1905, as amended by chapter 2 of the General Laws, Special Session 1912,

Section 184 of the Revised Laws 1905, as amended by Chapter 226, General Laws 1907, and Chapter 95, General Laws 1909, and Chapter 2, General Laws, Special Session 1912, Section 187, Revised Laws 1905, Section 200, Revised Laws 1905, Section 213, Revised Laws 1905 and Section 217, Revised Laws 1905, all as amended by Chapter 2, General Laws, Special Session 1912, and to repeal a part of Section 18 of Chapter 2, Special Session 1912." State v. Erickson, 125 Minn. 238, 146 N. W. 364.

"An act prohibiting the soliciting, taking or receiving, or the aiding therein, in the state of Minnesota, of certain orders for the sale or delivery of intoxicating liquor from any person or persons except such as have either a lawful license to sell intoxicating liquor in said state, or a current receipt for the United States tax for the sale of spirituous, or vinous malt or fermented liquor; prohibiting any sale of intoxicating liquor in connection with which such prohibited order is filled in whole or in part, and providing a penalty for the violation thereof." State v. Droppo, 126 Minn. 68, 147 N. W. 829.

"An act to repeal all of the laws and parts of laws providing for standing appropriations." State v. Iverson, 126 Minn. 110, 147 N. W. 946.

"An act relating to the sale of timber on state lands, defining trespass thereon and prescribing penalties therefor." State v. Brooks-Scanlon Lumber Co., 128 Minn. 300, 150 N. W. 912.

"An act to amend three thousand three hundred sixty-nine (3369) of the Revised Laws of 1905, relating to the survey and platting of lands." Balch v. St. Anthony Park West, 129 Minn. 305, 152 N. W. 643.

(01) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

(16) Gould v. St. Paul, 111 Minn. 324, 125 N. W. 273.

REPEAL AND AMENDMENT

8923. Effects—(36) See Pushor v. Morris, 53 Minn. 325, 55 N. W. 143; State v. Haas, 110 Minn. 111, 124 N. W. 983.

(42) State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403.

8925. Re-enactment of old law—(45) See State v. Klasen, 123 Minn. 382, 143 N. W. 984.

8927. By implication—Statutes are presumed to have been passed with deliberation, and with full knowledge of all existing ones on the same subject. State v. Klasen, 123 Minn. 382, 143 N. W. 984.

Where two inconsistent statutes are enacted at the same session of the legislature, the first must give way to the last as the latest expression of the law-making power. Kommerstad v. Great Northern Ry. Co., 125 Minn. 297, 146 N. W. 975.

(47) State v. Klasen, 123 Minn. 382, 143 N. W. 984.

(48) Downing v. Lucy, 121 Minn. 301, 141 N. W. 183.

(49) See State v. Klasen, 123 Minn. 382, 143 N. W. 984; Kommerstad v. Great Northern Ry. Co., 125 Minn. 297, 146 N. W. 975.

(50) Fider v. Board of Education, 123 Minn. 514, 144 N. W. 161; Balch v. St. Anthony Park West, 129 Minn. 305, 152 N. W. 643; Washington v. Miller, 235 U. S. 422.

(51) State v. Baker, 114 Minn. 209, 130 N. W. 999.

(53) State v. Minn. Tax Commission, 117 Minn. 159, 134 N. W. 643.

See Note, 88 Am. St. Rep. 271.

8928a. Unconstitutional statutes—Amendment—There is authority for the proposition that a void or unconstitutional statute cannot be amended. State v. McDonald, 121 Minn. 207, 141 N. W. 110.

CONSTITUTIONALITY

8929. Presumption in favor of constitutionality—The presumption in favor of constitutionality applies to ordinances. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

(61) Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77; State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728; State v. Mankato, 117 Minn. 458, 136 N. W. 264; State v. St. Louis County, 124 Minn. 126, 144 N. W. 756; Farrell v. Hicken, 125 Minn. 407, 413, 147 N. W. 815; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71.

(62) Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398; Farrell v. Hicken, 125 Minn. 407, 413, 147 N. W. 815; State v. Ryder, 126 Minn. 95, 147 N. W. 953.

8930. Imperative duty of courts—(63) Davis v. Pierse, 7 Minn. 13 (1, 11).

8931. Laws to be held constitutional if reasonably possible—The general rule applies to ordinances. State v. Taubert, 126 Minn. 371, 148 N. W. 281.

(64) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 33, 124 N. W. 819; State v. Reusswig, 110 Minn. 473, 126 N. W. 279; State v. St. Louis County, 117 Minn. 42, 134 N. W. 299; State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728; State v. Mankato, 117 Minn. 458, 136 N. W. 264; State v. George, 123 Minn. 59, 142 N. W. 945; State v. St. Louis County, 124 Minn. 126, 144 N. W. 756; Farrell v. Hicken, 125 Minn. 407, 413, 147 N. W. 815; Minneota v. Martin, 125 Minn. 498, 145 N. W. 383; State v. Ryder, 126 Minn. 95, 147 N. W. 953; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71; Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899;

State v. Wagener, 130 Minn. 424, 153 N. W. 747. See 26 Political Science Quarterly, 238.

(65) Bender v. Fergus Falls, 115 Minn. 66, 131 N. W. 849; State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728; State v. Ryder, 126 Minn. 95, 147 N. W. 953; Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899.

8932. Laws opposed to spirit of constitution—Objection must be specific—Where a particular act of the legislature is questioned on constitutional grounds it is not the justification therefor which must be pointed out, but the specific provision of the constitution which it violates. State v. Weatherill, 125 Minn. 336, 147 N. W. 105.

(68) State v. Mankato, 117 Minn. 458, 136 N. W. 264.

8933. General operation decisive—(69) See State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

8935. Unconstitutional statute void—Who may question—Amendment—There is authority for the proposition that an unconstitutional statute cannot be amended. State v. McDonald, 121 Minn. 207, 141 N. W. 110.

Where the penalty provided in a criminal statute is declared unconstitutional it is doubtful if a violation of the statute constitutes a crime. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

A municipality has no such interest in contracts, or funds, held by it for governmental purposes, that it can invoke against a legislative act affecting such contracts or funds the constitutional objection of impairment of contract obligation or interference with vested rights. State v. George, 123 Minn. 59, 142 N. W. 945.

(02) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; State v. New England F. & C. Co., 126 Minn. 78, 147 N. W. 951; Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516. See Note, 32 L. R. A. (N. S.) 954.

8936. Partial unconstitutionality—Where a statute provides that if any part thereof is declared unconstitutional by the courts the remainder shall remain in force, the remainder will be sustained if there is enough to constitute an enforceable law. Saari v. Gleason, 126 Minn. 378, 148 N. W. 293.

Where the penalty provided in a criminal statute is declared unconstitutional it is doubtful if a violation of the statute constitutes a crime. State v. Chicago etc. Ry. Co., 130 Minn. 144, 153 N. W. 320.

(75) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; Smith v. St. Paul, 116 Minn. 44, 133 N. W. 74; State v. Ryder, 126 Minn. 95, 147 N. W. 953; Saari v. Gleason, 126 Minn. 378, 148 N. W. 293; Bofferding v. Mengelkoch, 129 Minn. 184, 152 N. W. 135.

8936a. Evidence to show unconstitutionality—The unconstitutionality of a statute may be shown by extrinsic evidence or by facts of which the court will take judicial notice. Minneota v. Martin, 124 Minn. 498, 145 N. W. 383. See § 3461.

CONSTRUCTION

8937. Force of rules of construction—Grounds of statutory construction are necessarily narrow, frequently requiring the ascertainment of legislative intent by deductions from meager data. Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

(78, 79) State v. Klasen, 123 Minn. 382, 143 N. W. 984.

8938. No construction when language plain—Construction lies wholly in the domain of ambiguity. State v. Iverson, 120 Minn. 247, 139 N. W. 498.

(82) State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403; Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949; State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417; State v. Wright County, 126 Minn. 209, 148 N. W. 52; Peterson v. Carlson, 127 Minn. 324, 149 N. W. 536; Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216; United States v. McCord, 233 U. S. 157. See State v. Chicago etc. Ry. Co., 128 Minn. 25, 150 N. W. 172 (statute held ambiguous and open to construction).

(83) Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949.

(84) Silberstein v. Prince, 127 Minn. 411, 149 N. W. 653.

(86) Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949.

8939. Must be reasonable and practical—Questions involving government must not be determined along technical lines. Broad and practical considerations should control. Woodbridge v. Duluth, 121 Minn. 99, 140 N. W. 182.

(89) Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746.

(91) Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746; Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275 (a statute should be given a "sensible" construction).

8940. Legislative intent the aim—(92) State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403.

(94) Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746.

8941. Intention of individual legislators immaterial—(97) See Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417.

8942. Motives of legislators—The rule is general with reference to enactments of all legislative bodies that the courts cannot inquire into the motives of legislators in passing them, except as they may be disclosed on the face of the acts or inferable from their operation consid-

ered with reference to the condition of the country and existing legislation. An exception to this general rule may be found where an act or ordinance relates to a private contract and was passed to defraud. Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417.

(98, 99) State v. St. Louis County, 124 Minn. 126, 144 N. W. 756.

8944. Expediency of statutes—(5) State v. Standard Oil Co., 111 Minn. 85, 95, 126 N. W. 527; O'Donnell v. Daily News Co., 119 Minn. 378, 387, 138 N. W. 677; State v. St. Louis County, 124 Minn. 126, 144 N. W. 756.

8945. Public policy—A constitutional law passed by the legislature is not against public policy. It is public policy. Midway Realty Co. v. St. Paul, 124 Minn. 300, 145 N. W. 21.

(6) State v. District Court, 120 Minn. 458, 139 N. W. 947.

(7) Martinsburg v. Butler, 112 Minn. 1, 127 N. W. 420.

8946. Prospective or retroactive operation—Statutes affecting substantive rights will be given a retroactive operation when it is clear that such was the intention of the legislature. Sorenson v. Rasmussen, 114 Minn. 324, 131 N. W. 325. See Smith v. St. Paul, 116 Minn. 44, 133 N. W. 74.

The word "shall" is not decisive against a retroactive construction. Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378; Sorenson v. Rasmussen, 114 Minn. 324, 131 N. W. 325; Harris v. Gale, 188 Fed. 712.

If the legislature has the power by retroactive or other legislation to revive a right once existing, but lost by reason of a failure to comply with statutory requirements essential to its preservation, the purpose to do so should clearly appear, and be not left to inference. Whittier v. Farmington, 115 Minn. 182, 131 N. W. 1079.

(8) Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728; Sorenson v. Rasmussen, 114 Minn. 324, 131 N. W. 325; Architectural Decorating Co. v. National Surety Co., 115 Minn. 382, 132 N. W. 289; Northfoss v. Welch, 116 Minn. 62, 133 N. W. 82; Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075; Union Pacific R. Co. v. Laramie Stock Yards, 231 U. S. 190; Cameron v. United States, 231 U. S. 710.

(9) Whittier v. Farmington, 115 Minn. 182, 131 N. W. 1079; Union Pacific R. Co. v. Laramie Stock Yards, 231 U. S. 190; Cameron v. United States, 231 U. S. 710.

(10) Oppegaard v. Renville County, 110 Minn. 300, 125 N. W. 504; Architectural Decorating Co. v. Nat. Surety Co., 115 Minn. 382, 132 N. W. 289; Smith v. St. Paul, 116 Minn. 44, 133 N. W. 74; Laird v. Carton, 196 N. Y. 169, 89 N. E. 822. See State v. Brooks-Scanlon Lum-

ber Co., 128 Minn. 300, 150 N. W. 912 (statute removing limitation of actions).

8947. Avoidance of absurd, unjust or inconvenient results—(12) State v. Ledbeter, 111 Minn. 110, 126 N. W. 477; Williams v. Minn. State Board, Medical Examiners, 120 Minn. 313, 139 N. W. 500; Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949; State v. District Court, 120 Minn. 458, 139 N. W. 947; First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132; Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746; Lassman v. Jacobson, 125 Minn. 218, 146 N. W. 350; Silberstein v. Prince, 127 Minn. 411, 149 N. W. 653; State v. Chicago etc. Ry. Co., 128 Minn. 25, 150 N. W. 172.

8947a. Changing conditions—In the construction of statutes their language must be adapted to changing conditions brought about by improved methods and the progress of the inventive arts. Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6.

8948. Restriction of general terms—Implied exceptions—Courts should be extremely cautious in reading an exception into a statute. Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292; McInerny v. St. Luke's Hospital Assn., 122 Minn. 10, 141 N. W. 837; La Mere v. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068; Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075.

Where express exceptions are made the inference is a strong one that no other exceptions were intended. Street v. Chicago etc. Ry. Co., 124 Minn. 517, 524, 145 N. W. 746.

(15) See Street v. Chicago etc. Ry. Co., 124 Minn. 517, 524, 145 N. W. 746.

(16) See Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292.

8949. Implied terms to effectuate object—(17) Baldwin v. Rosendale, 110 Minn. 87, 91, 124 N. W. 641; J. T. McMillan Co. v. State Board of Health, 110 Minn. 145, 124 N. W. 828.

8950. To be sustained if reasonably possible—A statute will not be construed so as to render it unconstitutional unless there is no reasonable alternative. Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118. See Digest, § 8931.

A construction which would impair vested rights is to be avoided when reasonably possible. Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

(18) State v. Reusswig, 110 Minn. 473, 126 N. W. 279; Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899.

8951. As a whole—(19) Foster v. Gage, 117 Minn. 99, 136 N. W. 299.

8952. Practical construction—A practical construction must be well settled and not out of harmony with the settled public policy of the state

in relation to the subject-matter. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

(23) Healy v. Hoy, 115 Minn. 321, 132 N. W. 208; State v. Sullivan, 117 Minn. 329, 135 N. W. 748; State v. Fullerton, 124 Minn. 151, 144 N. W. 755; Logan v. Davis, 233 U. S. 613. See State v. Chicago etc. Ry. Co., 128 Minn. 25, 150 N. W. 172 (held that there had been no practical construction of Laws 1913, c. 536).

(24) Logan v. Davis, 233 U. S. 613.

8954. Mandatory and directory provisions—There is no well-defined rule by which directory provisions of a statute may be distinguished from those which are mandatory. A statute couched in permissive language may, when construed in the light of the manifest purpose and intention of the legislature, be mandatory, and a failure of compliance therewith fatal to rights asserted thereunder. And a statute mandatory in language may be merely directory, depending upon the object to be subserved by the particular requirement. In cases where the statute does not, in express terms, require the thing to be done, and the act provided for is merely incidental or subsidiary to the chief purpose of the law, and not designed for the protection of third persons, and the statute does not declare the consequences of a failure of compliance, the statute will ordinarily be construed as directory and not fatal to rights granted. Farmers Co-operative Elevator Co. v. Enge, 122 Minn. 316, 142 N. W. 328.

(33) Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292; Kafka v. District Court, 128 Minn. 432, 151 N. W. 144.

(34) Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292.

See Digest, §§ 1580, 9178.

8956. Statutes adopted from another state—(41) See 14 Col. L. Rev. 613 (limitations of rule).

8957. Presumption against changes in law—(42) Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118.

8958. In derogation of common law—The presumption against a change in the common law is especially strong when the change would be contrary to public policy. State v. District Court, 120 Minn. 458, 139 N. W. 947.

(46) State v. District Court, 120 Minn. 458, 139 N. W. 947; Lindeke v. McArthur's, 125 Minn. 1, 145 N. W. 399; State v. Ost, 129 Minn. 520, 152 N. W. 866.

(48) State v. District Court, 120 Minn. 458, 139 N. W. 947.

8959. Statutes creating new liabilities—(50) Peet v. East Grand Forks, 101 Minn. 523, 112 N. W. 1005; Farley v. Boxville, 113 Minn. 203, 206, 129 N. W. 381.

8960. Conflict with general principles of law or equity—(51) Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118; American Central Ins. Co. v. District Court, 125 Minn. 374, 147 N. W. 242.

8961. General revisions of statutes—In construing the provisions of Revised Laws 1905, reference may be had to the report of the commission which drafted them, but such report is not controlling when the language of the statute is unambiguous. United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Williams v. Reid, 130 Minn. 256, 153 N. W. 324.

A change in the language or phraseology of statutes in a general revision thereof does not necessarily indicate an intention on the part of the legislature to depart from or to modify, in point of substance, the previously existing law. Such change of language is ordinarily to be ascribed to a purpose to condense and simplify the new statute. United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112.

An intent to change the law by a general revision of the statutes such as that of 1905 will not be inferred from the mere rearrangement and subdivision of sections. Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18.

In construing the provisions of the Revised Laws of 1905, the court may look to the history thereof as one of the guides to their interpretation; and, in the absence of a clear intention to change it, the law as therein written will be deemed to be the same as it was prior to the revision. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

The main purpose in preparing and adopting the revision of the statutes of 1905 was to embody the then existing statutes into more compact and orderly form and in clearer language. United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112; Wallinder v. Weiss, 119 Minn. 412, 138 N. W. 417.

The presumption is that no change in the existing law was intended by the revision of 1905, unless a contrary intention clearly appears from the language of the statute or its history. State v. Stroschein, 99 Minn. 248, 109 N. W. 235; Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243; Evans v. Redwood Falls, 103 Minn. 314, 317, 115 N. W. 200; State v. Ledbeter, 111 Minn. 110, 126 N. W. 477; Lockey v. Lockey, 112 Minn. 512, 128 N. W. 833; Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18; State v. Schmahl, 118 Minn. 319, 136 N. W. 870; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Independent School District v. State, 124 Minn. 271, 144 N. W. 960; State v. Jack, 126 Minn. 367, 148 N. W. 306; Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869.

The presumption that no change in the law was intended in the revision of 1905 is not conclusive. Where a statute clearly manifests an intention to change the law it will be so construed. State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

The headlines to the sections of Revised Laws 1905 are not a part of the laws, but were inserted by the editor. The subdivisions of the text were also inserted by the editor. Bond v. Penn. Railroad Co., 124 Minn. 195, 144 N. W. 942.

Subsequent legislation upon a subject covered by a previous codification carries the implication that general rules are not superseded by such subsequent legislation except where it clearly appears. United States v. Barnes, 222 U. S. 513.

(52) State v. Ledbeter, 111 Minn. 110, 126 N. W. 477; United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112; Duluth Terminal Ry. Co. v. Duluth, 113 Minn. 459, 130 N. W. 18; State v. Schmahl, 118 Minn. 319, 136 N. W. 870; Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307; State v. Jack, 126 Minn. 367, 148 N. W. 306; Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216.

(57) N. W. Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386; Lockey v. Lockey, 112 Minn. 512, 128 N. W. 833; State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417 (doubt cannot be raised by reference to prior statute where new statute is clear on its face).

(58) Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386; Lockey v. Lockey, 112 Minn. 512, 128 N. W. 833; Wallinder v. Weis, 119 Minn. 412, 138 N. W. 417; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Independent School District v. State, 124 Minn. 271, 144 N. W. 960; State v. Jack, 126 Minn. 367, 148 N. W. 306; State v. White, 130 Minn. 336, 153 N. W. 602.

(60) Syndicate Printing Co. v. Cashman, 115 Minn. 446, 132 N. W. 915; State v. District Court, 113 Minn. 298, 129 N. W. 514.

8962. Object of statute and means employed—(61) State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728; Farmers Cooperative Elevator Co. v. Enge, 122 Minn. 316, 142 N. W. 328; Washed Sand & Gravel Co. v. Great Northern Ry. Co., 130 Minn. 272, 153 N. W. 610.

8963. Reference to legislative journals, debates, rules and reports of committees—Legislative debates cannot be consulted to ascertain the legislative intent. But they may be referred to as a means of ascertaining the history of the period—the environment under which the statute was enacted. United States v. Trans-Missouri Freight Assn., 166 U. S. 318; Standard Oil Co. v. United States, 221 U. S. 1. See Higgins v. Lacroix, 119 Minn. 145, 148, 137 N. W. 417.

The reports of legislative committees may be referred to in aid of construction. Northern Pacific Ry. Co. v. Washington, 222 U. S. 370.

The known policy of the legislature in regard to the subject-matter will be considered. Richardson v. Harmon, 222 U. S. 96.

(66) State v. Wagener, 130 Minn. 424, 153 N. W. 749. See 24 Harv. L. Rev. 49; 15 Col. L. Rev. 285; Note, 40 L. R. A. (N. S.) 1.

8963a. Reports of official commissions—Reports of official commissions recommending the passage of a statute may be considered in aid of its construction. United States v. Louisville & Nashville R. Co., 236 U. S. 318. See § 8961.

8964. Title of act—(71, 72) State v. Armour & Co., 118 Minn. 128, 132, 136 N. W. 565.

8965. History of statute—(73) Bender v. Fergus Falls, 115 Minn. 66, 131 N. W. 849; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805; Howley v. Scott, 126 Minn. 271, 148 N. W. 116; Washed Sand & Gravel Co. v. Great Northern Ry. Co., 130 Minn. 272, 153 N. W. 610.

(74) Howley v. Scott, 126 Minn. 271, 148 N. W. 116; Washed Sand & Gravel Co. v. Great Northern Ry. Co., 130 Minn. 272, 153 N. W. 610.

(75) Washed Sand & Gravel Co. v. Great Northern Ry. Co., 130 Minn. 272, 153 N. W. 610.

(76) Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

8968. Words how construed—Popular sense—There is no magic in words. The nature of a thing is more important than its name, and the legislature may have used an inappropriate word to express its intent. State v. Ryder, 126 Minn. 95, 147 N. W. 953.

(79) State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068; Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949.

8969. General words construed generally—Application to non-residents—Words importing a general application will not ordinarily be restricted to citizens or residents of the state. Renlund v. Commodore Mining Co., 89 Minn. 41, 47, 93 N. W. 1057; Brunette v. Minneapolis etc. Ry. Co., 118 Minn. 444, 137 N. W. 172; Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; Boeing v. Owsley, 122 Minn. 190, 200, 142 N. W. 129; Stevens v. Tilden, 122 Minn. 250, 142 N. W. 315.

8972. Rules of grammar—(91) Sibley County v. Gibbon, 115 Minn. 56, 131 N. W. 786; State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417.

8973. Singular and plural number—(92) Moore v. Carlson, 112 Minn. 433, 128 N. W. 578.

8974. Punctuation—(93) Sibley County v. Gibbon, 115 Minn. 56, 131 N. W. 786.

8975. Technical and legal terms—(94) Oppegaard v. Renville County, 120 Minn. 443, 139 N. W. 949; Williams v. Reed, 130 Minn. 256, 153 N. W. 324.

8977. Ejusdem generis—Where the particular words exhaust the genus the general words must refer to things outside the genus. United States v. Mescall, 215 U. S. 26.

(1) See Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311.

(2) State v. Bussian, 111 Minn. 488, 127 N. W. 495.

(98) Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819; State v. Chamberlain, 112 Minn. 52, 127 N. W. 444; State v. Kern, 130 Minn. 191, 153 N. W. 311.

(99) See Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 Minn. 819; State v. Bussian, 111 Minn. 488, 127 N. W. 495.

8978. Noscitur a sociis—(3) State v. Brown, 41 Minn. 319, 43 N. W. 69; State v. Armour & Co., 118 Minn. 128, 136 N. W. 565.

8979. "May," "shall," and "must"—The word "shall" is not decisive against giving a statute a retroactive construction. Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378; Harris v. Gale, 188 Fed. 712.

(4) Bender v. Fergus Falls, 115 Minn. 66, 131 N. W. 849; Kafka v. District Court, 128 Minn. 432, 151 N. W. 144.

(7) See Hanley Falls Creamery Co. v. Milton Dairy Co., 126 Minn. 226, 148 N. W. 46.

8980. Expressio unius est exclusio alterius—The maxim is only a rule of construction and not of substantive law, and serves only as an aid in discovering legislative intent when not otherwise manifest. United States v. Barnes, 222 U. S. 513.

(8) Molyneaux v. Minneapolis, 115 Minn. 188, 131 N. W. 1015.

(9) United States v. Barnes, 222 U. S. 513.

8984. In pari materia—Other statutes may be resorted to, to solve, but not to create an ambiguity. State v. Iverson, 120 Minn. 247, 139 N. W. 498.

Statutes are presumed to have been passed with deliberation, and with full knowledge of all existing ones on the same subject. State v. Klasen, 123 Minn. 382, 143 N. W. 984.

The intent of the legislature may be indicated by subsequent enactments relating to the same subject-matter. Bowling etc. Co. v. United States, 233 U. S. 528.

(15) State v. Reusswig, 110 Minn. 473, 126 N. W. 279; State v. Schmidt, 111 Minn. 180, 126 N. W. 487; Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129; State v. Fullerton, 124 Minn. 151, 144 N. W. 755;

Bond v. Penn Railroad Co., 124 Minn. 195, 144 N. W. 942; Anderson v. Le Sueur, 127 Minn. 318, 149 N. W. 472; Silberstein v. Prince, 127 Minn. 411, 149 N. W. 653; State v. Chicago etc. Ry. Co., 128 Minn. 25, 150 N. W. 172; State v. Municipal Court, 128 Minn. 225, 150 N. W. 924.

8986. Remedial statutes construed liberally—While remedial statutes are to be liberally construed violence must not be done to the plain meaning of the language used. McKinnon v. Red River Lumber Co., 119 Minn. 479, 138 N. W. 781; State v. District Court, 129 Minn. 156, 151 N. W. 910.

(18) Sorseleil v. Red Lake Falls Milling Co., 111 Minn. 275, 126 N. W. 903; State v. District Court, 128 Minn. 43, 150 N. W. 211; State v. District Court, 129 Minn. 156, 151 N. W. 910; State v. District Court, 129 Minn. 176, 151 N. W. 912.

8989. Penal statutes construed strictly—(21) State v. Armour & Co., 118 Minn. 128, 136 N. W. 565; Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746.

(23) Wardwell v. Cameron, 126 Minn. 149, 148 N. W. 110; United States v. Antikamnia Chemical Co., 231 U. S. 654.

8990. Public grants—(30) Detroit United Ry. Co. v. Detroit, 229 U. S. 39; Russell v. Sebastian, 233 U. S. 195 (the construction must be fair and reasonable). See § 3813.

8991. Statutes affecting vested rights strictly construed—Statutes authorizing a divestiture of property rights are to be strictly construed in favor of the owner. Hage v. Benner, 111 Minn. 365, 127 N. W. 3.

8995. When reasonable construction impossible—(01) State v. Reusswig, 110 Minn. 473, 126 N. W. 279.

(35) See Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899 (statute held not fatally indefinite).

8996. Provisos and saving clauses—(38) Burlington v. Crouse, 228 U. S. 459.

(40) See Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805.

PLEADING

8998. In general—(48) See §§ 3452, 3789, 6022m; Dunnell, Minn. Pl. 2 ed. § 884.

STAY OF PROCEEDINGS

8999. In general—A stay of proceedings in a criminal case may be granted to await the determination of an appeal in habeas corpus proceedings. State v. McDonald, 123 Minn. 84, 142 N. W. 1051.

Where a stay of proceedings is granted for the purpose of giving the defeated litigant the right allowed by law for correcting or reviewing the proceeding already had, such stay does not prohibit such litigant from resorting to such ancillary remedies as garnishment or attachment to secure and preserve such rights as he may have. Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975.

A stay of garnishment proceedings may be granted to await the determination of other actions or proceedings. National Surety Co. v. Hurley, 130 Minn. 392, 153 N. W. 740.

Stay of execution otherwise than by statutory proceedings. Note, 127 Am. St. Rep. 707.

(49) See Crozier v. B. F. Nelson Mfg. Co., 120 Minn. 524, 139 N. W. 353; State v. Fjolander, 125 Minn. 529, 147 N. W. 273; Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566 (application for an extension of stay properly denied).

STIPULATIONS

9004. Particular stipulations construed—(74) Lieberknecht v. Great Northern Ry. Co., 110 Minn. 457, 126 N. W. 71 (that a judgment in a particular action should control other actions); Stephenson v. Lohn, 115 Minn. 166, 131 N. W. 1018 (a colloquy of counsel on the trial held not a stipulation of facts); Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co., 128 Minn. 73, 150 N. W. 226 (for admission of ledger entries without the original entries).

9005. Vacation—Collateral attack—A stipulation is subject to collateral attack for fraud or want of authority. Gibson v. Nelson, 111 Minn. 183, 126 N. W. 731.

A judgment of dismissal entered by stipulation under a misapprehension of counsel as to its effect may be vacated. Macknick v. Switchmen's Union, 131 Minn. ——, 154 N. W. 1099.

(75) Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022; Lieberknecht v. Great Northern Ry. Co., 110 Minn. 457, 126 N. W. 71; Rase v. Minneapolis etc. Ry. Co., 118 Minn. 437, 137 N. W. 176; Rodgers v. United States & Dominion Life Ins. Co., 127 Minn. 435, 149 N. W. 671.

9005a. Not part of record—A stipulation of facts is not a part of the record unless made so by a settled case. Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075.

STOCKYARDS—See Carriers, 1363a; Railroads, 8157a.

STREET RAILWAYS

IN GENERAL

9006. Definition and nature—(81) State v. Minneapolis & St. Paul Suburban Ry. Co., 114 Minn. 70, 130 N. W. 71; State v. Minneapolis etc. Ry. Co., 122 Minn. 106, 142 N. W. 19. See Minneapolis etc. Co. v. Minneapolis, 124 Minn. 351, 145 N. W. 609 (interurban commercial electric railway held not a street railway).

9007. Charter and franchise—A franchise may be lost by a failure to file an acceptance of it within the prescribed time. A municipality cannot grant a franchise to a corporation not authorized to operate a street railway. An abutting owner may challenge the right of a corporation to operate a street railway on a street fronting his property. International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395.

The provision for a forfeiture in the franchise granted the Duluth Street Railway Company by the act of 1881 was not self-executing, but in the nature of a condition subsequent. Non-performance of the condition was waived by the municipality. The act of 1881 constitutes a valid franchise, exclusive in character. State v. Duluth St. Ry. Co., 128 Minn. 314, 150 N. W. 917.

(85) See New York Electric Lines Co. v. Empire City Subway Co., 235 U. S. 179.

9008. Use of street—Not an additional servitude—(92) State v. Minneapolis & St. Paul Suburban Ry. Co., 114 Minn. 70, 130 N. W. 71. See Note, 36 L. R. A. (N. S.) 709.

9010. Municipal regulation—Ordinances—Municipal regulation of street railways is subject to the test of reasonableness. State v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136; Id., 127 Minn. 191, 149 N. W. 195.

Ordinances of St. Paul requiring street railway companies to construct new lines sustained. State v. St. Paul City Ry. Co., 117 Minn. 316, 135 N. W. 976; State v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136; State v. St. Paul City Ry. Co., 127 Minn. 191, 149 N. W. 195.

Ordinances of Minneapolis requiring street railway companies to construct new lines and tracks and limiting the number of passengers on cars sustained. Minneapolis St. Ry. Co. v. Minneapolis, 189 Fed. 445.

The question whether public interests will be promoted to such an extent as to justify a new line or an extension of an existing line is legislative, and the determination thereof by the municipal authorities is ordinarily final, in the absence of some provision in the law for a judicial review of the same. The presumption of reasonableness is not conclusive, and the street car company is entitled to a hearing thereon in proceedings to enforce compliance with the order directing the new line to be constructed. State v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136; Id., 127 Minn. 191, 149 N. W. 195.

A conviction under an ordinance of Minneapolis against overcrowding street cars sustained. State v. Overby, 116 Minn. 304, 133 N. W. 792.

An ordinance of St. Paul requiring street railway companies to sprinkle their tracks sustained. St. Paul v. St. Paul City Ry. Co., 114 Minn. 250, 130 N. W. 1108.

An ordinance of St. Paul regulating the issuance and use of transfer checks sustained. St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

See Note, 104 Am. St. Rep. 636; 36 L. R. A. (N. S.) 235.

LIABILITY FOR NEGLIGENCE

9013. Right of way—Relative rights of parties—Life and limb are of more consequence than quick transit. Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616.

(2) State v. Minneapolis & St. Paul Suburban Ry. Co., 114 Minn. 70, 130 N. W. 71.

9014. Excessive speed—(9) George A. Hormel Co. v. Minneapolis St. Ry. Co., 130 Minn. 469, 153 N. W. 867. See Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795.

9015. Duties of motormen—In general—The duty of a motorman to exercise care is greater toward children than toward adults. Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616.

The standard of care toward passengers is higher than that toward others. Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831.

(15) Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, 128 N. W. 831; Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790.

(17) Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790.

(18) Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616.

9016. Duties of motormen at street crossings—(28) Wodham v. Fargo & Moorhead St. Ry. Co., 114 Minn. 16, 130 N. W. 23; Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302; Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790; Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795; Bartroot v. St. Paul City Ry. Co., 125 Minn. 308, 146 N. W. 1107.

9017. Sounding gong—Emergency whistle—Where a car is equipped with an emergency whistle the failure of the motorman to sound it in case of emergency may be considered as evidence of negligence. Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616.

It has been held not error under the circumstances to refuse to charge that the sounding of a whistle would have been useless if the injured person had seen the car approaching. Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616.

9018. Assumptions as to conduct of pedestrians and vehicles—It is not negligence per se for a motorman to assume that one who drives upon the tracks will not stop at a point of danger. Wodham v. Fargo & Moorhead St. Ry. Co., 114 Minn. 16, 130 N. W. 23.

(32) Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302.

9020. Headlights—(38) Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302.

9021. Injuries to children—(39) Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616 (collision at crossing with girl seven years old—girl was seen by motorman to run toward track—duty of motorman—contributory negligence—law and fact). See McDermott v. Severe, 202 U. S. 600.

9023. Collisions—In general—(01) Carlson v. Duluth St. Ry. Co., 111 Minn. 244, 126 N. W. 825. See Larson v. Duluth St. Ry. Co., 127 Minn. 328, 149 N. W. 538.

(43) Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302.

(44) Bloomquist v. Minneapolis St. Ry. Co., 113 Minn. 12, 129 N. W. 130; Wodham v. Fargo & Moorhead St. Ry. Co., 114 Minn. 16, 130 N. W. 23; Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790.

(46) Larson v. Duluth St. Ry. Co., 127 Minn. 328, 149 N. W. 538.

9023a. Collisions with automobiles and other motor vehicles—Collisions with automobiles. Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795; Bartroot v. St. Paul City Ry. Co., 125 Minn. 308, 146 N. W. 1107; Gunderson v. Minneapolis St. Ry. Co., 126 Minn. 168, 148 N. W.

61; W. S. Conrad Co. v. St. Paul City Ry. Co., 130 Minn. 128, 153 N. W. 256. See Note, 42 L. R. A. (N. S.) 1188.

Collisions with motor trucks. Coleman v. Minneapolis St. Ry. Co., 113 Minn. 364, 129 N. W. 762; Eisenmenger v. St. Paul City Ry. Co., 125 Minn. 399, 147 N. W. 430; George A. Hormel Co. v. Minneapolis St. Ry. Co., 130 Minn. 469, 153 N. W. 867.

9026. Contributory negligence—Look and listen rule—Law and fact— Miscalculation of speed or distance is not necessarily contributory negligence. Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616.

The fact that plaintiff, in driving his automobile, was violating an ordinance in turning to the left to enter an intersecting street before he had passed beyond the center of the street, is not conclusive of negligence on his part, but only a circumstance to be considered in connection with all the evidence in the case. Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795.

It is as much the duty of an automobilist to exercise reasonable care as the motorman of a street car. If he negligently attempts to pass in front of a moving street car he cannot recover. Bartroot v. St. Paul City Ry. Co., 125 Minn. 308, 146 N. W. 1107.

It is not negligent, as a matter of law, for a person to drive a vehicle along the tracks of a street railway company, though there is room to drive along other parts of the street. Larson v. Duluth St. Ry. Co., 127 Minn. 328, 149 N. W. 538.

Here, as generally, the question of contributory negligence is for the jury, unless the evidence is conclusive. Wodham v. Fargo & Moorhead St. Ry. Co., 114 Minn. 16, 130 N. W. 23; George A. Hormel Co. v. Minneapolis St. Ry. Co., 130 Minn. 469, 153 N. W. 867.

Where a driver of a vehicle was attempting to drive in front of a street car at a crossing and would probably have succeeded if he had not been stopped by a team stopping in front of him, it was held that his contributory negligence was a question for the jury. Wodham v. Fargo & Moorhead St. Ry. Co., 114 Minn. 16, 130 N. W. 23.

(01) Carlson v. Duluth St. Ry. Co., 111 Minn. 244, 126 N. W. 825.

(66) Bartroot v. St. Paul City Ry. Co., 125 Minn. 308, 146 N. W. 1107 (driver of automobile).

(67) Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616. See 7 Col. L. Rev. 221.

(68) Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795.

(76) Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302; Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 613; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795. See Coleman v.

Minneapolis St. Ry. Co., 113 Minn. 364, 129 N. W. 762; George A. Hormel Co. v. Minneapolis St. Ry. Co., 130 Minn. 469, 153 N. W. 867.

9027. Assumptions as to conduct of motorman—A passenger in a vehicle has a right to assume that a street car company will discharge its full duty to the traveling public; that it will give timely warning of the approach of its cars at street intersections, and operate its cars at a proper rate of speed, and keep them under reasonable control at points where pedestrians or vehicles are likely to emerge suddenly from side streets. Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790.

(79, 81) Bodin v. Duluth St. Ry. Co., 117 Minn. 513, 136 N. W. 302; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795.

9029. Wilful negligence or injury—(83) Bloomquist v. Minneapolis St. Ry. Co., 113 Minn. 12, 129 N. W. 130; Wodham v. Fargo & Moorhead St. Ry. Co., 114 Minn. 16, 130 N. W. 23; Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790; Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; Bartroot v. St. Paul City Ry. Co., 125 Minn. 308, 146 N. W. 1107.

9030. Sudden emergency—Distracting circumstances—(85) Larson v. Duluth St. Ry. Co., 127 Minn. 328, 149 N. W. 538.

9031. Imputed negligence—(87) Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790.

9033. Evidence—Admissibility—(91) Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790 (documents prepared by motorman for submission to defendant held admissible); Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603 (declaration of motorman immediately after the accident as to the cause thereof held admissible as part of res gestæ—declarations of bystanders in response to motorman's declaration held admissible); W. S. Conrad Co. v. St. Paul City Ry. Co., 130 Minn. 128, 153 N. W. 256 (injury to automobile—receipted bill for repairs held inadmissible on question of damages).

9033a. Evidence—Sufficiency—Evidence held sufficient to justify a recovery. Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790; Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; Pickell v. St. Paul City Ry. Co., 120 Minn. 340, 139 N. W. 616; Day v. Duluth St. Ry. Co., 121 Minn. 445, 141 N. W. 795.

SUBROGATION

9036. Nature—(94) Ætna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955.

9037. Not allowed to work injustice—(99, 1) See National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55 (right of surety to subrogation held superior to bank loaning money to principal after contract of suretyship).

9041. Voluntary payment—Intermeddlers—(9) 26 Harv. L. Rev. 261. See, as to when a bank making a loan is a volunteer, National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55.

(10) Ætna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955 (insurance company paying a judgment against the defendant held not an intermeddler).

9043. As of what date—(13) National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55.

9045. Sureties and guarantors—Surety companies are entitled to subrogation in the same cases as ordinary sureties. National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55.

A surety on the bond of a public contractor held entitled to subrogation as against a bank which had loaned money to the contractor after the execution of the bond. National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55.

9046a. Payment of taxes—One who pays taxes to protect his own rights and not as a mere volunteer or intermeddler, may be subrogated to the rights of the state or of one who has succeeded to the rights of the state. Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

9047. Subrogation allowed—Miscellaneous cases—Where a bank, acting as a collecting agent for another bank, purchased a note which it had wrongly protested, and remitted the amount of the note to the principal bank. Marine Nat. Bank v. Humphreys, 62 Minn. 141, 64 N. W. 148.

Where an insurance company paid a judgment against the defendant. Ætna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955. See National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55.

9048. Subrogation allowed—Mortgages—Where a mortgagee paid taxes after foreclosure and during the period of redemption, but failed to file and furnish the affidavit required by G. S. 1913, § 8172. Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

A judgment in an action to foreclose a mechanic's lien held to suffi-

ciently adjudge a party's right of subrogation to all the land covered by a mortgage. Baxter Sash & Door Co. v. Ornes, 130 Minn. 214, 153 N. W. 594.

(41) See Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16; 26 Harv. L. Rev. 261; Digest, § 6264.

SUBSCRIPTIONS

9055. Failure of project—Refundment—Failure of project. Right of subscribers to return of subscriptions. See Jacobson v. McCullough, 113 Minn. 332, 129 N. W. 759.

9058. Consideration—(63) Validity and enforceability of subscriptions for charity. Note, 48 L. R. A. (N. S.) 783.

SUNDAY

9064. Contracts, business, etc.—Action for services rendered on Sunday at the special request of defendant. Held that defendant could not invoke the statute to defeat a recovery. Cameron v. Conrad, 110 Minn. 531, 125 N. W. 1022.

A contract for advertising space on the curtain of a theater open on Sunday, but so conducted as not seriously to interrupt the repose or religious liberty of the community, held valid, though it was executed on Sunday. Houck v. Ingles, 126 Minn. 257, 148 N. W. 100.

The posting of a notice of election on Sunday held not to invalidate the election. Thoreson v. Susens, 127 Minn. 84, 148 N. W. 891.

Under the present statute the publication of a legal notice on Sunday may possibly be valid. See St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

An order of the Railroad and Warehouse Commission requiring a railroad company to restore a Sunday local day passenger train set aside as unreasonable under the circumstances. Special circumstances might justify an order requiring the operation of a Sunday passenger train. The running of passenger trains on Sunday is not a violation of our general statute against labor on Sunday. State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247.

9064a. Amusements—Theaters and shows—(01) State v. Chamberlain, 112 Minn. 52, 127 N. W. 444; Houck v. Ingles, 126 Minn. 257, 148 N. W. 100. See Note, 30 L. R. A. (N. S.) 465.

SUPPORT FOR LIFE—See Deeds, 2677.

SUPREME COURT

9070. Original jurisdiction—Remedial cases—That portion of G. S. 1913, § 357, which confers original jurisdiction upon the supreme court in primary election matters is valid. The relief asked in this case is not broader than the relief granted in mandamus proceedings, for mandamus will lie to compel a canvassing board to issue a certificate of election to the party entitled to it on the face of the returns, though the board has decided in favor of another. This proceeding is one of the "remedial cases" in which original jurisdiction may be conferred upon the supreme court. Hunt v. Hoffman, 125 Minn. 249, 146 N. W. 733.

9071. Jurisdiction cannot be conferred by consent—(96) State v. Bashko, 127 Minn. 519, 148 N. W. 1082.

9074. Rules of court—Rule 26 does not authorize the entry of judgment without costs or disbursements, after the expiration of twenty days from notice of the filing of the opinion or order for judgment, where the prevailing party has been prevented from causing the entry of the same within that time by an order of the court staying proceedings in the action. In cases where such stay order is entered the twenty-day period within which the prevailing party must cause judgment to be entered, to entitle him to costs or disbursements under the rule, commences to run at the expiration of the stay of proceedings. The rules of the court do not require the costs to be taxed at any particular time. Fitzpatrick v. Chicago etc. Ry. Co., 121 Minn. 370, 141 N. W. 485.

When the prevailing party, within twenty days after notice of the filing of the opinion, serves and files with the clerk a notice of taxation of costs and disbursements, his right to tax the same after such twenty days is preserved; and the other party is not entitled to enter judgment without costs and disbursements, under Rule 26. Twitchell v. Nelson, 126 Minn. 423, 148 N. W. 451, 601.

(3) Pederson v. Reeves & Co., 115 Minn. 249, 252, 132 N. W. 204 (brief not printed in type required by rule—cost of printing not allowed as a disbursement); Watre v. Great Northern Ry. Co., 127 Minn. 118, 149 N. W. 18 (where the sufficiency of the evidence to sustain the verdict is challenged, the portion of the record printed must be in substantial conformity with the settled case and not be in the nature of a bill of exceptions).

(6) Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410 (a reversal of an order denying a motion for a new trial, and granting one for a failure of respondent to serve a brief is not res judicata); Melin v. Stuart, 119 Minn. 539, 138 N. W. 281 (where notice of appeal was served August 10, and notice of trial in due time for the succeeding Oc-

tober term of court, a motion to dismiss the appeal for failure to serve paper books and points and authorities until October 15 was necessarily granted); State v. Johnson, 123 Minn. 522, 142 N. W. 1135 (motion, under Rule 13, to affirm for failure of appellant to furnish points and authorities, granted).

SURETYSHIP

IN GENERAL

9079. Construction of contracts—The rule should not be so far relaxed against a surety company as to permit the obligee to enhance his damages or commit acts in violation of the contract which directly prejudice the surety. Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426.

While the rule of strict construction does not apply to surety companies they are bound in the manner and to the extent of their obligation and no further. Fay v. Bankers Surety Co., 125 Minn. 211, 146 N. W. 359.

(29) Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424; George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12; Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067; Allen v. Eneroth, 118 Minn. 476, 137 N. W. 16; Farmers Co-operative Elevator Co. v. Enge, 126 Minn. 485, 148 N. W. 465; Fitger Brewing Co. v. American Bonding Co., 127 Minn. 330, 149 N. W. 539; Topeka v. Federal Union Surety Co., 213 Fed. 958. See National Surety Co. v. Berggren, 126 Minn. 188, 192, 148 N. W. 55; 12 Col. L. Rev. 448.

9082. Condition as to other signing—(34) See Title Guaranty & Surety Co. v. Schmidt, 213 Fed. 199.

9084. Failure of principal to sign—(37) Note, 12 L. R. A. (N. S.) 1105.

9088. Surety may pay debt—(43) See Carlson v. Smith, 127 Minn. 203, 149 N. W. 199 (taking assignment of judgment upon paying it).

9089. Surety taking security—(44) See Carlson v. Smith, 127 Minn. 203, 149 N. W. 199 (taking assignment of judgment upon paying it).

9090. Contribution between cosureties—(45) Note, 10 Am. St. Rep. 639; 24 Harv. L. Rev. 487 (apportionment in case of partially concurrent obligations).

(46) See Keener, Quasi Contracts, 401.

See Dunnell, Minn. Pl. 2 ed. § 797 (enforcement of contribution under a common count for money paid).

9092. Application of payments—(52) Columbus Digger Co. v. Rector, 215 Fed. 618.

DISCHARGE OF SURETY

9093. In general—If a creditor informs a surety that the debt is paid or settled, and thereby lulls the latter into security, inducing him to take no steps to protect himself, and the surety thus suffers damage, the creditor is estopped from thereafter proceeding against the surety. Wilkins v. Hanson, 119 Minn. 399, 138 N. W. 418 (evidence considered and held to make a case for the jury on the questions whether the creditor stated to the surety that the debt was settled, whether the surety was thereby induced to take no steps to protect himself, and whether he thereby suffered damage).

Where a party to a contract has express authority to rescind it, sureties on the contract will be discharged, if he neglects to rescind within a reasonable time. Odden v. Jamison, 129 Minn. 489, 152 N. W. 871.

(53) Note, 115 Am. St. Rep. 85.

See cases under § 9104a.

9095. Neglect to pursue principal—(58) National Citizens Bank v. Thro, 110 Minn. 169, 124 N. W. 965 (failure to pursue remedy against maker of note).

9096. Extension—(61) Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100; Farmers Supply Co. v. Weis, 115 Minn. 428, 132 N. W. 917. See J. R. Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966.

(68) Thysell v. Holm, 124 Minn. 541, 145 N. W. 164 (promise by a debtor to pay a past-due debt is not a sufficient consideration). See Note, 52 L. R. A. (N. S.) 331.

(70) Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644; Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715; State Bank v. Mutual Telephone Co., 123 Minn. 314, 143 N. W. 912.

9097. Alteration of contract—(71) Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424 (contract required written order or agreement for extra work on a building contract—extra work was done under an oral agreement—held not to release surety); Poe v. Cameron, 130 Minn. 15, 153 N. W. 129 (alteration of building contract). See Equitable Surety Co. v. United States, 234 U. S. 448 (rule inapplicable to sureties on bonds of public contractors). See § 9104a.

9099. Securities—Duty of creditor to surety in management and collection of collateral. Note, 37 L. R. A. (N. S.) 699.

(76) Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644.

See Note, 115 Am. St. Rep. 85.

9104a. Contractors' bonds—Surety companies—Liability—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 surety companies. Still, such rules are not to be so far relaxed as to permit the obligee to enhance his damages or commit acts in violation of the contract which directly prejudice the surety. Where the language of a bond is ambiguous it will be construed in favor of the insured. Lakeside Land Co. v. Empire State Surety Co., 105 Minn. 213, 117 N. W. 431 (stipulation for notice to surety company of any default of the contractor and a statement of the facts—no claim being made for damages by reason of the delay in construction, the failure to give the notice of such delay within the required time did not relieve the surety from liability for damages arising from mechanics' liens—rule of strict construction not applicable to contract of surety company—rules applicable to insurance contracts apply); Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424 (evidence justified a finding that the contractor breached his contract—payments to contractor being within the amounts agreed to be paid during construction it was immaterial that such amounts were paid without the written order of the architect—the value of extra work being duly credited no prejudice resulted to the surety because the extra work and its price were not agreed upon in writing—plaintiff could recover for liens discharged by payments made after the action was begun and before trial—plaintiff, having before the execution of the bond or contract agreed to pay more than the amount stated in the bond, cannot, as against the surety company, enhance his damages by claiming the price fixed by the written contract subsequently made—contract price held controlling so far as surety is concerned—surety companies held to stricter accountability than ordinary sureties); Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426 (allegations in a complaint on a bond of payments made "during construction" construed—recovery of damages to date of trial—in action on bond lien claimants are not necessary parties—rule of strict construction of surety's liability not applicable, but such rule should not be so far relaxed as to permit the obligee to enhance his damages or commit acts in violation of the contract which directly prejudice the surety—excess payments); George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12 (contract one of insurance—rules for the construction of such contracts stated—fact that changes and orders for extras were made orally held immaterial—notice of default of contractor held not given within a reasonable time and for that reason the surety was released); Fergus Falls v. Illinois Surety Co., 112 Minn. 462, 128 N. W. 820 (while payments to a contractor in excess of the amounts stipulated in the contract will release a surety company pro tanto, mere irregularities in the issuance of estimates upon which such payments are based will not so release it, unless actual prejudice has resulted—a secret

and unlawful agreement between the contractor and the engineer in charge to share in the profits of the contract does not release the surety —when a contract provides for the ordering of extra work, the requiring of such extras does not violate or change the contract, so as to release the surety—unless the new contracts let after the default for the completion of the original contract differ so materially from the original as to amount to a departure from it, resulting in enhanced cost, the surety is not released—although the estimates for payment during construction contain improper items, if the amount actually paid does not exceed the stipulated percentage of the amount which might in good faith be properly allowed, the surety is not discharged—in an action upon a contractor's bond, after default, when it appears that the original contractor performed extra work, its value should be added to the contract price, and the sum so found deducted from the amount the obligee was compelled to pay); Fitger Brewing Co. v. American Bonding Co., 115 Minn. 78, 131 N. W. 1067 (a limitation on the right to sue thereon, contained in a surety bond furnished for compensation and in form selected by the surety, will be construed strictly against a claim which impairs the suretyship or indemnity—where a proviso in such bond limits the right to bring suit thereon to a period of six months after the first breach of the contract secured, the breach of the contract referred to is a breach creating liability on the bond); Butts v. Pacific Surety Co., 117 Minn. 70, 134 N. W. 306 (evidence held to justify a finding that the contractor had defaulted); Allen v. Eneroth, 118 Minn. 476, 137 N. W. 16 (finding that owner did not pay contractor in excess of contract sustained—stipulation limiting payments to 80 per cent. construed—presentation of forged receipts of laborers and materialmen by contractor to owner—finding of performance of contract by owner sustained—counsel fees in defending lien suits held a proper charge against surety—burden of proof as to notice to surety of default of contractor); Christie Lithograph & Printing Co. v. American Bonding Co., 119 Minn. 11, 137 N. W. 188 (action on bond—defence that principal and surety were induced to enter into their contracts through the fraud of the plaintiff—verdict for defendant—new trial granted); Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715 (oral evidence of plans and specifications held admissible—surety not released by delay in notice of default—necessity of pleading release by extension of time to the contractor and by payment to contractor after default—reduction of verdict to amount demanded in complaint); National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55 (right of surety company to subrogation upon paying claims); Fitger Brewing Co. v. American Bonding Co., 127 Minn. 330, 149 N. W. 539 (action not barred by a limitation in the policy—surety held not released by an excess payment to the contractor nor by delay in notice of default); Poe v. Cameron, 130 Minn. 15, 153 N.

W. 129 (action by receiver for premium on policy—change in building contract held to have released surety—after release of surety there was no consideration for the premiums thereafter to become due—release of surety a good defence to action for premium—failure of principals in the bond to formally notify the surety of his discharge is not a sufficient basis for holding them liable for premiums subsequently accruing); Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259 (default of contractor—completion of building by owner—certificate of architect as to default and expenditures by owner unnecessary under the circumstances—surety not release by delay in notice of default—a provision in the bond that suit must be brought within six months after breach of the contract refers to a breach which gives a right of action on the bond, and a suit brought within six months after such right of action accrues is in time—a payment of a non-lienable claim, filed as a lien, out of funds then due the contractors and by their order, does not release the surety); Moore v. Mann, 130 Minn. 318, 153 N. W. 609 (bond construed as one of indemnity for the obligee alone and not to give a cause of action against the surety company to one doing work for the principal contractor); United States v. United States Fidelity & Guaranty Co., 236 U. S. 512 (liability of surety for interest). See §§ 4659, 6093, 6095, 6096a, 6720, 6721, 9079, 9097, 9105; Note, 5 L. R. A. (N. S.) 418; L. R. A. 1915B, 407; 24 Harv. L. Rev. 568; 29 Id. 314; 12 Col. L. Rev. 448.

9105. Fidelity bonds—(85) Gamble-Robinson Co. v. Mass. Bonding & Indemnity Co., 113 Minn. 38, 129 N. W. 131 (unreasonable delay in giving surety company notice of dishonesty of employee); Great Northern Express Co. v. National Surety Co., 113 Minn. 162, 129 N. W. 127 (bond to indemnify express company for negligence of express messenger—degree of care required of messenger—whether messenger failed to exercise due care so as to render surety liable held a question for the jury—messenger failed to keep door of car chained on the inside, which enabled robbers to enter the car, overpower him and steal a large sum of money). See § 9104a; Note, 100 Am. St. Rep. 774.

9107. Surety held not discharged—Miscellaneous cases—(91) Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424 (contractor's bond—extra work); Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715 (builder's bond—where time is not of the essence of the contract and no claim is asserted because the building was not finished on the date set, the surety is not released because the notice of default of the contractor was not given within the time stipulated in the bond, computing such time from the date fixed in the contract for the completion of the building).

ACTIONS

9108. Action by surety for reimbursement—See Note, 134 Am. St. Rep. 557.

9112. Pleading—(99) Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426 (complaint on a contractor's bond—allegation that payments made "during construction" exceeded eighty per cent of contract price held on demurrer not to show such payments to have been made before final completion of contract—breach of bond sufficiently alleged); Pulaski Hall Assn. v. American Surety Co., 123 Minn. 222, 143 N. W. 715 (release of surety by extension of time to complete building—release by payment after default—necessity of pleading such releases).

See Dunnell, Minn. Pl. 2 ed. § 888.

TAXATION

IN GENERAL

9114. Definition and nature of a tax—The word "penalty" is sometimes used in the sense of a tax. State v. Ryder, 126 Minn. 95, 147 N. W. 953.

(3) State v. Ely, 129 Minn. 40, 151 N. W. 545.

(6) See State v. Stroup, 131 Minn. —, 155 N. W. 90 (penalty provided by the Abatement Act of 1913 held not a tax).

9115. Limitations on taxing power—Legislative discretion—The power to tax inheres in the state as an attribute of its sovereignty and is not dependent upon a grant of power from the constitution. Constitutional provisions relating to taxation are not grants but limitations of power. State v. Ely, 129 Minn. 40, 151 N. W. 545.

(10) State v. Ely, 129 Minn. 40, 151 N. W. 545.

9119. Taxes must be for public purposes—(20) See State v. George, 123 Minn. 59, 142 N. W. 945.

9120. Federal property and agencies not taxable by state—Bonds of a municipality of a territory of the United States are not taxable by the state. Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516, overruling State v. Farmers & Mechanics Savings Bank, 114 Minn. 95, 130 N. W. 445, 851. See 27 Harv. L. Rev. 769.

Where an entryman on public lands has complied with all the requirements of the federal laws and is entitled to a patent he is the equitable owner of the land and the land is taxable by the state. Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, 237 U. S. 362.

9121. Interstate commerce not taxable by state—(35) State v. U. S. Express Co., 114 Minn. 346, 131 N. W. 489; State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410. See § 9159.

9123. What law governs—Vested rights—Retroactive legislation—(40) Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

(42) Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676 (R. L. 1905, § 956, relating to notice of expiration of redemption, retroactive).

9125. All property not exempted taxable—Membership in a board of trade held taxable under the general statute. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

9126. What is real property for purposes of taxation—Where mineral interests in real estate are owned separately from the interests in the surface, such mineral interests are land, taxable as such, and should be taxed separately from the surface interests. Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706.

9128. What is personal property for purposes of taxation—R. L. 1905, § 797 (G. S. 1913, § 1974), providing that "personal property shall be construed to include," and naming eleven classes of property, does not exempt from taxation or render not subject to taxation personal property not included within any of the classes named. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

9129a. Interest on delinquent taxes—As the state may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without conflicting with any provision of the federal constitution, it may in like manner provide that taxes which have already become delinquent shall bear interest from the time the delinquency commenced. State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403.

CONSTITUTIONAL REQUIREMENT OF EQUALITY AND UNIFORMITY

9132. Substantial equality sufficient—Some inequalities must always result in levying assessments and taxes. Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77.

It is enough if a law operates alike on all persons and property similarly situated. Associated Schools v. School District, 122 Minn. 254, 142 N. W. 325.

(82) Mayer v. Shakopee, 114 Minn. 80, 130 N. W. 77.

9140. Uniformity—A statute for the re-assessment of undervalued property held not to violate the constitutional requirement of uniformity. State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 806.

The classification of property for purposes of taxation rests largely in

judicial discretion. It must be reasonable and based on essential differences. G. S. 1913, § 1988, dividing property into four classes and providing for its assessment at different percentages of its full value, held not unconstitutional. State v. Minnesota Tax Commission, 128 Minn. 384, 150 N. W. 1087.

(1) Mutual Benefit Life Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572; State v. Farmers & Mechanics Savings Bank, 114 Minn. 95, 130 N. W. 445, 851, 232 U. S. 516; State v. Minnesota Tax Commission, 117 Minn. 159, 134 N. W. 643; Murray v. Smith, 117 Minn. 490, 136 N. W. 5.

9142. Held not unconstitutional—Laws 1907, c. 328, providing for the taxation of mortgages. Mutual Benefit Life Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572.

Laws 1911, c. 285, providing for the taxation of moneys and credits. State v. Minnesota Tax Commission, 117 Minn. 159, 134 N. W. 643.

Laws 1911, c. 254, authorizing special assessments for rural highways. Murray v. Smith, 117 Minn. 490, 136 N. W. 5.

Laws 1913, c. 483, dividing property into four classes and providing for its assessment at different percentages of its full value. State v. Minnesota Tax Commission, 128 Minn. 384, 150 N. W. 1087.

(35) State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839.

9143. Miscellaneous cases—The taxation of a membership in a board of trade held constitutional. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

CONSTITUTIONAL REQUIREMENT OF DUE PROCESS OF LAW

9145. In general—Laws 1897, c. 8, providing for the taxation of telegraph companies held due process of law. State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403.

A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment to the constitution, which declares no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity of the amount of it, either before that amount is determined or in subsequent proceedings for its collection. State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839.

One full opportunity to be heard satisfies the requirement of due process of law. There is no want of due process of law in the fact that there is no sale of the property. Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

(51) See Williams v. St. Paul, 123 Minn. 1, 142 N. W. 886.

DOUBLE TAXATION

9146. Constitutional prohibition—Double taxation is forbidden under the present constitution. State v. Farmers & Mechanics Bank, 114 Minn. 95, 113, 130 N. W. 445, 851; State v. Northern Pacific Ry. Co., 130 Minn. 377, 153 N. W. 850.

9147. What forms of double taxation forbidden—The taxation of the right to membership in a board of trade or stock exchange held not double taxation. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

9148. To be avoided if possible by construction—(72) Love v. Preston, 112 Minn. 459, 128 N. W. 673; State v. Northern Pacific Ry. Co., 130 Minn. 377, 153 N. W. 850.

EXEMPTIONS

9150. Construction—Effect of transfers—After a lien for taxes attaches to land it is unaffected by a subsequent transfer to a church, charitable corporation, or to a corporation which pays a gross earnings tax. Foster v. Duluth, 120 Minn. 484, 140 N. W. 129.

9151a. Public property—The property of the state and of its political subdivisions, arms, and agencies, such as cities within its borders, when used for exclusively public purposes, is not subject to taxation, or to proceedings for the assessment of taxes, or for their collection by judgment and sale. Where real property, acquired by the state or a city for exclusively public purposes, is, when so acquired, subject to a lien for unpaid taxes, all proceedings taken to enforce such lien, after the property is so acquired for public purposes, are void. Foster v. Duluth, 120 Minn. 484, 140 N. W. 129.

9152. Held exempt—Land used for a public crematory by a municipality. Foster v. Duluth, 120 Minn. 484, 140 N. W. 129.

(85) State v. District Court, 114 Minn. 287, 131 N. W. 327.

See Note, 132 Am. St. Rep. 291; 25 Harv. L. Rev. 670 (charities).

9153. Held not exempt—(89) Note, 39 L. R. A. (N. S.) 437.

(92) Note, 50 L. R. A. (N. S.) 1197.

9154. Effect of assessing exempt property—(97) Foster v. Duluth, 120 Minn. 484, 140 N. W. 129.

SITUS OF PROPERTY FOR PURPOSES OF TAXATION

9155. In general—The old rule that the situs of personal property is the domicil of the owner has yielded more and more to the law of the place where the property is kept and used. In matters of taxation the domicil of the owner is not controlling. For the purposes of taxation

the law may separate personal property from the person of an owner and give it a situs of its own. Personal property may be taxed either at the domicil of the owner or at the place where it is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax. Corporeal personal property is taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned, that is, at the domicil of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to re-loaning the money and keeping it invested as a permanent fund. State v. Probate Court, 124 Minn. 508, 145 N. W. 390.

(1–3) State v. Probate Court, 124 Minn. 508, 145 N. W. 390. See Liverpool etc. Co. v. Board, 221 U. S. 346; Note, L. R. A. 1915C, 903.

9159. Property in transit—Certain logs assessed for taxes after being brailed by a boom company, and while waiting for delivery to a steamer to be towed to another state, held not to have commenced their interstate transit until after such assessment, on May 1 of a certain year, and hence that such logs were subject to such assessment. State v. Burlington Lumber Co., 118 Minn. 329, 136 N. W. 1033.

(13) State v. Burlington Lumber Co., 118 Minn. 329, 136 N. W. 1033.

THE STATE'S LIEN FOR TAXES

9160. Purely statutory—(14) Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

9162. Duration—(19) Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293; Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

9163. Transformation—Merged in judgment—Except as provided by statute to the contrary tax liens are merged in the judgment and are finally extinguished by a valid sale. Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

9165. Priority among liens—(25) Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293; Midway Realty Co. v. St. Paul, 124 Minn. 296, 145 N. W. 24; Id., 124 Minn. 300, 145 N. W. 21; White v. St. Paul, 124 Minn. 305, 145 N. W. 25.

9166. Liens for general taxes and special assessments equal—By virtue of statute the liens of the state for general taxes and liens of municipalities for special assessments are of equal rank. G. S. 1913, § 2172; Gould v. St. Paul, 110 Minn. 324, 125 N. W. 273; Smith v. St. Paul, 116 Minn. 44, 133 N. W. 74; Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293.

An owner cannot cut out a city assessment on his property by buying a subsequent tax title. Midway Realty Co. v. St. Paul, 124 Minn. 296, 145 N. W. 24.

Chapter 200, Laws 1905, declaring local assessment liens of certain municipalities, where proceedings for the enforcement of the same are conducted independently of the delinquent tax proceedings of the state, of equal rank with the state tax lien, construed, and held to apply to assessment and general tax liens accruing the same year. General state tax or local assessment liens levied in a particular year are paramount and superior to similar liens of prior years. In the absence of a statute to the contrary, general tax and local assessment liens are merged and extinguished on the perfection of a title under the same. Where title under a state tax lien is perfected by an individual, and title under a local assessment lien is perfected by the municipality levying the assessment, both titles being so perfected in separate and independent proceedings, and the liens being under the provisions of chapter 200, Laws 1905, of equal rank, the parties become by operation of law joint owners of the property. Gould v. St. Paul, 120 Minn. 172, 139 N. W. 293; Midway Realty Co. v. St. Paul, 124 Minn. 296, 145 N. W. 24; Id., 124 Minn. 300, 145 N. W. 21; White v. St. Paul, 124 Minn. 305, 145 N. W. 25. See Note, 30 L. R. A. (N. S.) 768.

9167. Passes to purchaser at tax sale—The perpetual tax lien created by section 975, Revised Laws 1905, where for any cause the title held by a purchaser at the tax sale proves invalid, is by force of section 942 transferred to the tax title holder, and he may enforce the same, notwithstanding his failure to perfect his title under chapter 271, Laws 1905. Downing v. Lucy, 121 Minn. 301, 141 N. W. 183.

PRESUMPTIONS IN AID OF TAX PROCEEDINGS

9170. In general—(38–42) Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786. See Digest, § 3435.

9172. Facts that will not be presumed—It will not be presumed that the court in entering judgment proceeded on any other designation of a newspaper than the one on file in the clerk's office. Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

CONSTRUCTION OF TAX LAWS

9173. In general—Statutes designed to add property to the tax rolls are to be liberally construed. State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839.

A revenue statute should be construed against any intended discrimination on the part of the legislature. A privilege of exemption from

taxation is not lightly to be inferred from the failure of the taxing officers to assess a particular form of property. State v. Western Union Tel. Co., 96 Minn. 13, 104 N. W. 567; State v. McPhail, 124 Minn. 398, 145 N. W. 108.

9175. De minimis—While it is the rule that the law does not regard an error which is a mere trifle, the determination as to what is a trifle must depend upon the facts in each case, and whether or not an error amounting to a few cents will be disregarded depends to some extent upon the amount of the original tax in connection with which the error occurs. Shine v. Olson, 110 Minn. 44, 124 N. W. 452.

(75) State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728.

9177. Practical construction—(78) State v. McPhail, 124 Minn. 398, 145 N. W. 108 (held no settled practical construction).

9178. Mandatory and directory provisions—(79) Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676; Cassidy v. Souster, 115 Minn. 191, 132 N. W. 292; Downing v. Lucy, 121 Minn. 301, 141 N. W. 183; State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839.

9180. Proceedings for enforcement of delinquent real estate taxes construed strictly—(82) Shine v. Olson, 110 Minn. 44, 124 N. W. 452; Foster v. Clifford, 110 Minn. 79, 124 N. W. 632; State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

APPORTIONMENT OF TAXES—TAX DISTRICTS

9181. A legislative function—(92, 94) Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899.

9185. Special taxing districts—(2) Van Pelt v. Bertilrud, 117 Minn. 50, 134 N. W. 226; Alexander v. McInnis, 129 Minn. 165, 151 N. W. 899.

LISTING AND ASSESSMENT

9193. Constitutional right to be heard—(25) See State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403.

9194. Assessors—Appointment—Liability—(26) See Note, 51 L. R. A. (N. S.) 137.

(27) State v. Haas, 110 Minn. 111, 124 N. W. 983 (appointment of county assessor in Ramsey county—composition of appointing board).

9199. Place of listing personal property of merchant or manufacturer —Logs—(52) State v. Burlington Lumber Co., 118 Minn. 329, 136 N. W. 1033.

9201. Appeal to county board—(58) State v. Bell, 111 Minn. 295, 126 N. W. 901.

9202. Appeal to state auditor or tax commission—(59) Under the present statute the appeal is to the state tax commission instead of to the state auditor. See G. S. 1913, § 2012.

9203. List of personal property—Statutory form—Membership in a board of trade or stock exchange is properly listed under the omnibus clause. State v. McPhail, 124 Minn. 398, 145 N. W. 108.

9203a. Moneys and credits—How listed and assessed—Chapter 285, Laws 1911, providing for the taxation of money and credits, held a complete revision of prior statutes upon the subject and that it was designed by the legislature as the exclusive guide upon that subject, save as provisions of the general tax laws are therein referred to and called to the aid of the new statute, and to repeal by implication section 836, R. L. 1905, which provides for the deduction of debts from credits listed for taxation. The classification of money and credits for the purposes of taxation held not a violation of the constitution. State v. Minnesota Tax Commission, 117 Minn. 159, 134 N. W. 643.

9204. Deduction of indebtedness from credits—The statute was repealed by Laws 1911, c. 285. State v. Minnesota Tax Commission, 117 Minn. 159, 134 N. W. 643.

9205. Verified statement of companies and corporations—(86) Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516.

9206. Verified statement of banks without shares, private bankers, brokers, and stock jobbers—Section 839, R. L. 1905 (G. S. 1913, § 2016), provides for the taxation of savings banks by deducting the sum total of the deposits and accounts payable from the sum total of the assets, including personal property appertaining to the business, and the surplus, if any, is listed and assessed as credits, according to the provisions of section 835, R. L. 1905 (G. S. 1913, § 2013). The tax upon the surplus is a property tax, and not a tax upon the franchise to exist as a corporation. Office furniture belonging to a savings bank, the value of which has been taken into consideration in determining the surplus of the bank, cannot be separately taxed. State v. Farmers etc. Bank, 114 Minn. 95, 130 N. W. 445, 851, reversed in part, 232 U. S. 516.

(95) Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516.

9210. Assessment—Valuation at percentage of full value—Classification—Property is no longer assessable at its full value. Property is divided by statute into four classes and assessed at different percentages of its full value. This classification has been held constitutional. State v. Minnesota Tax Commission, 128 Minn. 384, 150 N. W. 1087.

Under Laws 1913, c. 483 (G. S. 1913, § 1988), classifying property for purposes of taxation, relator's street railway tracks, overhead feed and

trolley wires, trolley poles, and underground conduits and cables, are assessable under class 4, at 40 per cent. of true value, this class including property not enumerated in the first three; and such property does not come within "tools, implements and machinery whether fixtures or otherwise" included in class 3 and assessable at 33⅓ per cent. of true value. Under the constitution the classification for taxation purposes must be reasonable and such as is based on essential differences; and the differences between the relator's property and that included in class 3 are such as to justify the legislature in making the classification and it is not unconstitutional. State v. Minnesota Tax Commission, 128 Minn. 384, 150 N. W. 1087.

Laws 1913, c. 483 (G. S. 1913, § 1988), applies to the property within the state of telegraph companies. State v. Lord, 155 N. W. 1061.

9214. Assessment—When and how made—Real estate—In assessing any tract or lot of land the value of all structures and improvements thereon must be determined separately; but for the purpose of taxation the structures and improvements are considered a part of the realty and are assessed as such. La Paul v. Heywood, 113 Minn. 376, 129 N. W. 763; Davidson v. Franklin Ave. Investment Co., 129 Minn. 87, 151 N. W. 537.

Where mineral interests in real estate are owned separately from the interests in the surface, they are land, taxable as such, and should be taxed separately from the surface interests. Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706.

REASSESSMENT OF UNDERVALUED PROPERTY

9220a. Reassessment by state tax commission—A reassessment of certain property made by the state tax commission pursuant to Laws 1909, c. 294, sustained as against certain objections going to the regularity and sufficiency of the proceedings culminating in the same. Notice of appeal from such reassessment held sufficient. Laws 1907, c. 408, creating the state tax commission, and Laws 1909, c. 294, relating to the procedure looking to reassessments of property thereby, held valid as against certain constitutional objections. Where an appeal from a reassessment made by the state tax commission was taken under Laws 1909, c. 294, § 3, by the filing of the prescribed notice of appeal with the county auditor, but the latter failed to certify, with the copy of such notice, a copy of the reassessment appealed from to the clerk of the district court as provided by the statute, the only jurisdiction acquired by such court was to order such copy to be filed, or else to dismiss the appeal; but, upon compliance with the former, it should determine the appeal on the merits, notwithstanding the entry of a judgment, regular in form and as upon default, after the filing of the notice of appeal,

but before the trial, in the same proceeding, and based upon the reassessment. State v. Minnesota & Ontario Power Co., 121 Minn. 421, 141 N. W. 839.

ASSESSMENT OF OMITTED PROPERTY

9221. Liability for taxes unaffected by omission—When earnings within the state for any year are omitted from the annual returns of a company, and not included in the amount of gross earnings upon which the taxes for such year were based, the state may recover taxes based on such omitted earnings in an action brought for that purpose. State v. U. S. Express Co., 114 Minn. 346, 131 N. W. 489.

9226. Undervaluation—Reassessment—G. S. 1913, § 1980, providing that, if any real property is omitted in the assessment of any year or years and the property thereby escape taxation, the county auditor shall reassess the property, does not authorize a reassessment where the real estate is assessed and has paid taxes for the years in question, but where the property is undervalued in those years, because the assessing officers took no note of an improvement thereon. Davidson v. Franklin Ave. Investment Co., 129 Minn. 87, 151 N. W. 537.

LEVY AND EXTENSION OF TAXES

9240. Preparation of tax lists or duplicates by auditor—A county auditor held liable to a property owner for neglecting to place on the tax lists opposite such property the words, "Sold for taxes." Howley v. Scott, 123 Minn. 159, 143 N. W. 257.

9243. Delivery of tax lists to treasurer—(37, 38) Howley v. Scott, 126 Minn. 271, 148 N. W. 116.

PAYMENT OF TAXES

9253. Whose duty to pay—Where a lease is silent as to the payment of taxes improvements which are removable by the tenant at the end of the term are taxable to him and not to the landlord. La Paul v. Heywood, 113 Minn. 376, 129 N. W. 763.

A property owner, and his successors in interest, held bound, under the terms of a contract with an adjoining owner, to pay taxes and assessments upon a strip of the former's land set apart by the contract as an alley for the joint and equal benefit of both. This obligation was not affected by such owner's subsequent separate conveyance of the alley strip and its several assessments for local improvements; and hence the grantee's purchase thereof at the tax sale operated merely as payment of the assessment as against the owner of the other property, for whose joint benefit the alley was established. The certificate of tax sale in the

hands of such grantee held properly canceled. Endicott v. Davidson, 122 Minn. 411, 142 N. W. 805.

(78) As between vendor and vendee. Note, 43 L. R. A. (N. S.) 51.

(79) Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498 (life tenant); Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16 (assignee of mortgagee). See Note, 114 Am. St. Rep. 448 (life tenants and remaindermen or reversioners).

(81) Winters v. Ellefson, 128 Minn. 3, 150 N. W. 171.

(83) La Paul v. Heywood, 113 Minn. 376, 129 N. W. 763. See Digest, § 5399.

(84) Barnum v. White, 128 Minn. 58, 150 N. W. 227.

9255. By mortgagees or other lienors—Recovery—Where a mortgagee, after foreclosure and within the redemption period, paid the taxes but neglected to file and furnish the affidavit required by G. S. 1913, § 8172, it was held that he was entitled to be subrogated to the rights of the holder of the tax lien. Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

(87) Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

(88) See Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

(90) Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

9256. By tenant or other occupant—Where no provision is made for the payment of taxes in a lease of real estate, and the lease provides that the structures or improvements put upon the lot by the lessee are removable, and the landlord is compelled to pay the entire amount of the taxes to save the property from being sold at tax sale, an action may be maintained by him against the tenant for the recovery of that portion of the tax levied upon the improvements. La Paul v. Heywood, 113 Minn. 376, 129 N. W. 763.

9258. By a volunteer—(96) See Fritz v. O'Brien Land Co., 117 Minn. 509, 136 N. W. 301; Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

9259. Receipts for payment—A county treasurer, in failing to write or stamp the words "Sold for taxes" on a tax receipt, is not guilty of a breach of statutory duty unless the tax list furnished him by the county auditor shows that the land has been "sold for taxes." Howley v. Scott, 126 Minn. 271, 148 N. W. 116.

ACCOUNTS AND DISTRIBUTION OF FUNDS

9260. Accounts of auditor—By R. L. 1905, § 887, as amended by Laws 1905, c. 239, the auditor is required to apportion the penalties, costs, and interest received upon collection of real estate taxes between the county revenue fund and the school districts. Forbes v. Stream, 117 Minn. 484, 136 N. W. 304.

COLLECTION OF DELINQUENT PERSONAL PROPERTY TAXES

9270. Citation—Burden of proof—(21) State v. Bell, 111 Minn. 295, 126 N. W. 901; State v. Burlington Lumber Co., 118 Minn. 329, 136 N. W. 1033.

(22) State v. Bell, 111 Minn. 295, 126 N. W. 901.

9272. List of inadmissible defences—It is no defence that the property was listed in the wrong place in the county. State v. Bell, 111 Minn. 295, 126 N. W. 901.

COLLECTION OF DELINQUENT REAL ESTATE TAXES

9281. A proceeding in rem—(56, 57) See Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706.

THE DELINQUENT LIST

9287. Lands bid in for the state not included—Where land has been bid in for the state upon a delinquent tax judgment sale, such land, as long as it has not been assigned by the state or redeemed, is not to be placed on the delinquent tax list for judgment and sale for subsequent delinquent taxes; and the presumption is that the officials followed the law in this regard till the contrary clearly appears. Forbes v. Stream, 117 Minn. 484, 136 N. W. 304.

9290. Errors, irregularities or omissions not fatal—(80) Foster v. Berg, 123 Minn. 180, 143 N. W. 355.

9291. Effect as evidence—(81) State v. Johnson, 111 Minn. 255, 260, 126 N. W. 1074.

DESCRIPTION OF THE REAL ESTATE

9294. In general—A tax certificate, based upon tax proceedings in which the property is described by its government description, without mentioning a mineral interest owned separately from the surface, does not cover such mineral interest. Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706.

(86) Foster v. Cochran, 119 Minn. 206, 137 N. W. 968.

9296. Description according to plats—(97) Foster v. Cochran, 119 Minn. 206, 137 N. W. 968.

9297. Description according to government survey—A tax certificate based upon tax proceedings in which the property is described by its government description, without mentioning a mineral interest owned

separately from the surface, does not cover such mineral interest. Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706.

(99) Foster v. Cochran, 119 Minn. 206, 137 N. W. 968.

9304. At different stages of proceedings—(27) See Foster v. McClure, 121 Minn. 409, 141 N. W. 796.

9305. Held sufficient—A description of lot 6 in a designated government section as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of the same section. Foster v. Cochran, 119 Minn. 206, 137 N. W. 968.

9306. Held insufficient—(46, 47) See Foster v. McClure, 121 Minn. 409, 141 N. W. 796.

DESIGNATION OF NEWSPAPER FOR PUBLICATION OF NOTICE AND LIST

9312. Jurisdictional—(80) Foster v. Gage, 117 Minn. 499, 136 N. W. 299; Foster v. Berg, 123 Minn. 180, 143 N. W. 355; Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

9313. Evidence to show want of designation—(81) Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

(82) Foster v. Gage, 117 Minn. 499, 136 N. W. 299; Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

9316. Sufficiency of designation—A designation of a newspaper held insufficient. Foster v. Gage, 117 Minn. 499, 136 N. W. 299.

(91) G. S. 1913, § 2097.

9317. Filing certified copy of resolution—Evidence on an application to the district court to compel its clerk to correct the filing date indorsed upon the copy of the county board's resolution designating a newspaper in which to publish the delinquent tax list for a certain year considered, and held not such as to require the lower court to grant the relief demanded, so as to constitute its denial of the application an abuse of its discretion in the premises. Foster v. Brick, 121 Minn. 173, 141 N. W. 101.

The certified copy of the resolution must be filed prior to the first publication of the delinquent list. Foster v. Berg, 123 Minn. 180, 143 N. W. 355.

Evidence held insufficient to show that an original auditor's designation of a newspaper was filed in his office where the county board failed to make a legal designation. Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

(92) Foster v. Berg, 123 Minn. 180, 143 N. W. 355.

(93) Foster v. Brick, 121 Minn. 173, 141 N. W. 101.

9318. Formal defects not fatal—Statute—R. L. 1905, 914, was intended to remedy such defects and irregularities in the designation as were not necessarily fatal to the jurisdiction of the court; such as might without substantial prejudice to the rights of the property owner be corrected or disregarded. Foster v. Gage, 117 Minn. 499, 136 N. W. 299.

(99) Foster v. Gage, 117 Minn. 499, 136 N. W. 299 (statute does not cover jurisdictional defects—failure to designate newspaper not covered); Foster v. Berg, 123 Minn. 180, 143 N. W. 355 (statute does not cure jurisdictional defects such as filing a certified copy of the resolution); Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

9319. Presumptions—(3) Foster v. Gage, 117 Minn. 499, 136 N. W. 299. See Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

ANSWER

9334. Defences—In general—The statute is to be liberally construed in favor of the property owner. State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

Section 919, R. L. 1905 (G. S. 1913, § 2108), limiting the defences which may be interposed by a landowner upon the application for judgment for delinquent taxes, applies to the instalment of a ditch lien sought to be included pursuant to the provisions of the drainage laws. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

9336. Defence of unfair, unequal, partial or excessive assessment—The statute is to be liberally construed in favor of the property owner. State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

(54) See State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403; Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

9337. When prejudice must be shown—(59) See State v. Johnson, 111 Minn. 255, 126 N. W. 1074 (the owner waives only such technical objections as go merely to the regularity of the proceedings and do not affect the merits of the tax); Jacobson v. Lac Qui Parle County, 119 Minn. 14, 137 N. W. 419.

9338. List of admissible defences—(70) State v. Johnson, 111 Minn. 255, 126 N. W. 1074.

9339. List of inadmissible defences—The statutory limitation of defences applies to an application for judgment for an assessment in drainage proceedings. A change by the engineer in the starting point

of a ditch cannot be interposed as a defence. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; State v. Tuck, 112 Minn. 493, 128 N. W. 823.

JUDGMENT

9340. Statutory form must be followed—An informal entry of judgment by the clerk in drainage proceedings held not a sufficient judgment under the statute. State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

(92) See Burnside v. Moore, 124 Minn. 321, 145 N. W. 27 (use of "as" for "is" held a typographical error and harmless).

9349. Amendment—(9) See State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

9350. Interest—(11) See State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403.

9352. Entry in copy judgment book—(26) Donaldson v. Sache, 121 Minn. 367, 141 N. W. 493.

9355. Conclusiveness—(32, 38) See Foster v. Duluth, 120 Minn. 484, 140 N. W. 129 (it may always be shown that the property was not subject to taxation because it was public).

9356. Presumption of validity and regularity—(39, 40, 41) Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

9358. Evidence to show want of jurisdiction—(48) Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

9361. Collateral attack—List of defects not grounds for—(69) See Foster v. McClure, 121 Minn. 409, 141 N. W. 796.

NOTICE OF SALE

9364. Jurisdictional—Strict compliance with statute necessary—The giving of the notice is a purely ministerial duty of the auditor, calling for no discretion. Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

(2) Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

SALE

9368. Conduct of—In general—(18) Howley v. Scott, 126 Minn. 271, 148 N. W. 116 (duty of treasurer in connection with sale).

9373. Bidding in for state—Entries in copy judgment book—A tax assignment certificate is invalid, if the record of the tax sale contains no entry showing that the land had been bid in for the state. The effect of such certificate as prima facie evidence of such entry is overcome by showing by the record itself that no such entry was made. Where the

original judgment book is in evidence and the copy judgment book is not in evidence, as the law requires the same entries to be made in each, it cannot be assumed that the copy judgment, not in evidence, shows lands bid in for the state that are not so shown by the original that is in evidence. Donaldson v. Sache, 121 Minn. 367, 141 N. W. 493.

Lands bid in for the state and not redeemed or assigned within three years become the absolute property of the state. Provision is made for their annual sale by the state auditor. Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421. See Digest, § 9479.

(39, 40) Donaldson v. Sache, 121 Minn. 367, 141 N. W. 493.

9374. Who may purchase—A mortgagor may acquire a tax title against his mortgagee after the mortgage debt is paid, or after foreclosure, or after the mortgage is barred by the statute of limitations. Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100.

(47) Endicott v. Davidson, 122 Minn. 411, 142 N. W. 805. See Note, 75 Am. St. Rep. 229.

(48) Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100.

(52) Note, 116 Am. St. Rep. 367.

(53) Nordlund v. Dahlgren, 130 Minn. 462, 153 N. W. 876.

9375. Caveat emptor—(57) Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

CERTIFICATE OF SALE

9380. Contents—A tax certificate based upon tax proceedings in which the property is described by its government description, without mentioning a mineral interest owned separately from the surface, does not cover such mineral interest. Washburn v. Gregory Co., 125 Minn. 491, 147 N. W. 706.

9380a. To different parties—It is probably error for the auditor to issue two certificates of the same sale to different persons. See Telford v. McGillis, 130 Minn. 397, 153 N. W. 758.

RIGHTS OF CERTIFICATE HOLDER

9395. Before expiration of redemption period—The certificate holder has, under our present statutes, two remedies for the protection of rights acquired by his tax purchase: (1) To perfect title by the service of a notice to redeem; and (2) when the title for any reason fails, to enforce the tax lien. The interests of the owner of the land are in no way prejudiced by this result. While the lien continues indefinitely, until the tax is paid, thus incumbering the land and clouding the title, the owner may at any time relieve the situation by paying the tax. He can in no way be misled, for the records disclose the facts, and by consulting them he

may learn of the existing unpaid lien. Downing v. Lucy, 121 Minn. 301, 141 N. W. 183.

(13) Sucker v. Cranmer, 127 Minn. 124, 149 N. W. 16.

9398. Lien for purchase money and subsequent taxes—The lien is an exclusive remedy when the title fails. Foster v. Malberg, 119 Minn. 168, 137 N. W. 816.

The perpetual tax lien created by section 975, R. L. 1905, where for any cause the title held by a purchaser at the tax sale proves invalid, is by force of section 942 transferred to the tax title holder, and he may enforce the same, notwithstanding his failure to perfect title under chapter 271, Laws 1905. Downing v. Lucy, 121 Minn. 301, 141 N. W. 183.

(38, 39) Byers v. Minn. Commercial Loan Co., 118 Minn. 266, 136 N. W. 880.

CERTIFICATE AS EVIDENCE

9401. Of title—Preliminary proof necessary—(55) Donaldson v. Sache, 121 Minn. 367, 141 N. W. 493 (the effect of a certificate as prima facie evidence of entry in the copy judgment book that land was bid in for state is overcome by showing by the record that no such entry was made).

9402. Of regularity—The constitutionality of statutes making certificates prima facie evidence of the regularity and validity of prior proceedings is well settled. See Meeker v. Lehigh Valley R. Co., 236 U. S. 412.

(58, 61) Foster v. Golden Valley Land & Cattle Co., 123 Minn. 273, 143 N. W. 786.

REDEMPTION FROM SALE

9417. Amount required to redeem on sale to private purchaser—(89, 90) Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

9418. Amount required to redeem when land is bid in for the state and subsequently assigned—(95–97) Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

NOTICE OF EXPIRATION OF REDEMPTION

9421. To what sales applicable—The statute is applicable to the forfeited tax sale of 1907. Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

The rights of the purchaser of lands, forfeited to the state for nonpayment of taxes before the enactment of chapter 2, Laws 1902, and sold to him before the Revised Laws of 1905 went into effect, are governed by the law in force prior to 1902; and where a defective notice of the time to redeem has been given, such purchaser may give a new

and proper notice, and thereby perfect his title, unless redemption be made. Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

(9) Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421; Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534.

9421a. Effect of creation of new county after levy of taxes—Where a new county is formed out of territory of an existing county, notice of expiration of redemption from a tax sale of lands in such territory must be issued by the auditor of the original county, delivered for service to the sheriff of the new county, and published therein, if publication be necessary, provided the taxes for which the sale was had were levied before the petition for the formation of the new county was filed. Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273.

9422. What law governs—Vested right to notice—Where lands were bid in by the state at a tax judgment sale in 1901, under the provisions of the General Statutes of 1894, and were sold by the state at the forfeited sale in 1907, the notice of the expiration of the time for redemption is governed by R. L. 1905, § 956. The requirement by R. L. 1905, § 956, that the notice of expiration of the time for redemption shall state that the amount required to redeem shall include interest as provided by law to the day such redemption is made, is constitutional, and not an infringement upon any of the vested property rights of the owner, whose lands had been bid in for the state at a tax sale held in 1901, and sold as forfeited lands in 1907. Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

(13) Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676; Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

9423. Object and effect—The service of the notice does not vest title in the holder of the tax certificate. Whether his rights will ripen into a perfect title depends on the failure of the owner to make redemption. Foster v. Wagener, 129 Minn. 11, 151 N. W. 407.

9424. Construction of statute—Mandatory—(16) Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

(17) Shine v. Olson, 110 Minn. 44, 124 N. W. 452; Downing v. Lucy, 121 Minn. 301, 141 N. W. 183; De Laurier v. Stilson, 121 Minn. 339, 141 N. W. 293; Fortier v. Parry, 128 Minn. 235, 150 N. W. 803; Telford v. McGillis, 130 Minn. 397, 153 N. W. 758.

(18) See Shine v. Olson, 110 Minn. 44, 124 N. W. 452.

9425. Time of service—Limitations—The holder of a valid certificate of tax sale, who has not caused to be served a valid notice of expiration of the time for redemption, has no right, in an action by the owner of the land to determine adverse claims, to have a judgment that such holder has a lien on the land for the amount paid for the certificate, with

interest. Chapter 271, Laws 1905, providing that no notice of the expiration of the time of redemption shall issue or be served after the expiration of six years from the date of the sale, and that all such certificates upon which such notice shall not be issued or served shall be void and of no force or effect whatever, is not void as impairing the obligation of the contract between the holder of such certificate and the state, and certificates on which such notices were not served prior to the time said law went into effect constitute no lien upon the land. There is no distinction, as far as concerns the application and effect of chapter 271, Laws 1905, between a certificate on which no notice has been served, and a certificate on which a fatally defective notice has been served. Byers v. Minn. Commercial Loan Co., 118 Minn. 266, 136 N. W. 880.

Chapter 271, Laws 1905, limiting the time within which notice of expiration of redemption from tax sales may be given, and requiring the certificate of sale to be recorded within the time there prescribed, in default of which the certificate shall be invalid for any purpose, construed, and held, that a failure of a certificate holder to comply with the statute does not extinguish the tax lien. Chapter 271, Laws 1905, contains no clause repealing or modifying prior statutes upon the subject of the tax lien, and sections 942, 969, 972, 975, and 981, R. L. 1905, were not thereby repealed by implication. Downing v. Lucy, 121 Minn. 301, 141 N. W. 183. See Laws 1915, c. 77, providing that a failure to serve the notice shall extinguish the lien.

The limitations contained in chapter 271, Laws 1905 (G. S. 1913, § 2150), apply only to tax certificates issued before the lands became forfeited to the state and to notices of expiration of the time to redeem issued thereon. The time for giving such notices as to lands forfeited to the state remained unlimited. Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

9428. Misnomer—A notice of expiration of time for redemption from a tax sale directed to "Goodridge-Call L'b'r. Co.," the land being assessed in the name "Goodridge-Call Lbr. Co.," is sufficient. Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517.

9429. Auditor acts only on request of certificate holder—A notice which fails to state that the tax certificate has been presented to the county auditor by the holder thereof is fatally defective. De Laurier v. Stilson, 121 Minn. 339, 141 N. W. 293; Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273; Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

9430. Contents—Sufficiency—In general—The absence of the auditor's seal is fatal. Downing v. Lucy, 121 Minn. 301, 141 N. W. 183.

A notice which fails to state that the tax certificate has been presented to the county auditor by the holder thereof is fatally defective. De

Laurier v. Stilson, 121 Minn. 339, 141 N. W. 293; Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273; Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

An insufficient description of the property in the assessment book held to vitiate a notice. Foster v. McClure, 121 Minn. 409, 141 N. W. 796.

In the absence of proof of prejudice surplusage does not vitiate a notice. Notices need not be numbered and if a notice is numbered a mistake therein is not fatal. Fortier v. Parry, 128 Minn. 235, 150 N. W. 803.

Whether or not an error in a notice is material depends upon the character of the error and the particular circumstances in the case in which it occurs, viewed in the light of the rule that the statutes must be strictly complied with. Shine v. Olson, 110 Minn. 44, 124 N. W. 452.

(34) See Lohn v. Luck Land Co., 129 Minn. 367, 152 N. W. 764.

9431. Statutory form—That part of R. L. 1905, § 956, which provides a form of notice, was superseded by Laws 1905, c. 270, so that a notice on a tax sale subsequent to 1902 must conform substantially to the form prescribed by Laws 1902, c. 2, § 47. Spear v. Noonan, 131 Minn. —, 155 N. W. 107; Luck Land Co. v. Dixon, 155 N. W. 1038.

The fact that a notice contains more than the statute requires does not necessarily vitiate it. Holland v. Billings, 116 Minn. 105, 133 N. W. 399.

(40) Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676; De Laurier v. Stilson, 121 Minn. 339, 141 N. W. 293; Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

9432. Statement of amount required to redeem—A notice giving the amount required to redeem as the amount of principal and interest computed to the date of notice, and interest on that sum from the date of notice to the day of redemption, held void. Shine v. Olson, 110 Minn. 44, 124 N. W. 452. See Fortier v. Parry, 128 Minn. 235, 150 N. W. 803.

A notice which fails to state that the amount required to redeem shall draw interest, as provided by law, to the day such redemption is made, is void. Lawton v. Barker, 105 Minn. 102, 117 Minn. 249; Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

A notice under a sale in 1901 is sufficient if it states the amount required to redeem, with interest to the date of the notice. Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

A mistake in the year from which interest would run held fatal. Peterson v. St. Paul Real Estate & Invest. Co., 115 Minn. 333, 132 N. W. 273; Holland v. Billings, 116 Minn. 105, 133 N. W. 399.

A notice held to state correctly the amount required to redeem. Forbes v. Stream, 117 Minn. 484, 136 N. W. 304; Fortier v. Parry, 128 Minn. 235, 150 N. W. 803.

To redeem from a tax sale made under chapter 339, Laws 1901, the owner must pay the subsequent delinquent taxes paid by the purchaser, and a notice which does not include such taxes so paid is fatally defective. Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

A notice under the tax law of 1902, is ineffectual which fails to recite that the tax sale certificate was presented to the auditor by the holder thereof, and which includes a great number of tracts sold separately, situated in many different townships, and whereon the sheriff's return shows fees for service of over $300, without any apportionment of the same among the different tracts, so that from the notice and return it is impossible to determine the amount required to redeem any one tract. Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273.

A notice which is ambiguous and misleading is insufficient. Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

A notice must be definite and specific as to the amount required to redeem. A notice which imposes on the redemptioner the burden of determining which of two amounts stated therein as necessary to redeem is correct is insufficient. Telford v. McGillis, 130 Minn. 397, 153 N. W. 758.

It is unnecessary to state in the notice the amount required to redeem at the date of the notice, though it is proper to do so. Telford v. McGillis, 130 Minn. 397, 153 N. W. 758. See Fortier v. Parry, 128 Minn. 235, 150 N. W. 803 (proper to do so).

(41) Shine v. Olson, 110 Minn. 44, 124 N. W. 452 (notice held void because it required the redemptioner to pay interest on the amount due at the day of the redemption, instead of on the amount for which the land was sold by the state, with interest from the day of the sale to the time of redemption).

(46, 47) Fortier v. Parry, 128 Minn. 235, 150 N. W. 803 (notice sustained).

9435. To whom directed and on whom served—Under R. L. 1905, § 956 (G. S. 1913, § 2148), the notice must be served upon the person in whose name the land is assessed at the time, if he can be found in the county, and, if not, upon the persons in possession, or, if unoccupied, by publication. Held, that if the description in the assessment book, claimed to be the description of the land described in the notice, is so indefinite and uncertain as not to describe the land, the notice, served upon those in possession, does not eliminate the right of redemption. Foster v. McClure, 121 Minn. 409, 141 N. W. 796.

In proving the elimination of the owner's right to redeem from a sale of land pursuant to a tax judgment, it is necessary to show by the assessment books that, when the notice of expiration of the time of redemption issued, the land stood assessed in the name of the one to whom

the notice was directed. The recitals in the notice do not furnish the required proof. Lohn v. Luck Land Co., 129 Minn. 367, 152 N. W. 764.

Where the statute requires the notice to be directed to the person in whose name title in fee appears of record in the office of the register of deeds, a notice to the Goodridge-Call Lumber Company is of no effect, in the absence of evidence to show that the title stood of record in that name. Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517.

The provision of the statute requiring the sheriff to serve the notice within twenty days after receiving it is probably directory. Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

A service of notice on a cashier of a defunct bank held insufficient. Kimball v. Marine Nat. Bank, 112 Minn. 450, 128 N. W. 678.

(67) Note, 44 L. R. A. (N. S.) 666.

(73) Lohn v. Luck Land Co., 129 Minn. 367, 152 N. W. 764.

9436. Return of sheriff—A notice held properly returned and filed. Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

9437. Publication—Where the owner of the land, being the person in whose name it was assessed for taxation, and to whom the notice of expiration of redemption was directed, is, in fact, a resident of the county, the service of the notice by publication is a nullity. Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534.

Service by publication must be in strict conformity to the statute. Where the notice is served by publication, it must be shown that the newspaper in which it was published possessed the qualifications required by statute to entitle it to publish such notices; and the requirement that it must "be circulated in or near its place of publication to the extent of at least 240 copies" is not satisfied by showing that 240 copies are published without showing where they are circulated. Lovine v. Goodridge-Call Lumber Co., 130 Minn. 202, 153 N. W. 517.

(82) Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534 (return of sheriff not conclusive).

9438. Several tracts sold to same person—A notice which included a great number of tracts sold separately, and situated in many different townships, and whereon the sheriff's return showed fees for service of over three hundred dollars without any apportionment of the same among the different tracts, so that from the notice and return it was impossible to determine the amount required to redeem any one tract, held void. Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273.

9440. Effect of insufficient notice—New notice—(90) Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

FORFEITED SALE UNDER LAWS 1897, C. 290

9460. Unconstitutional and void in toto—(55) Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

SALES OF FORFEITED LANDS UNDER G. S. 1894, §§ 1616, 1617

9475. Deed—(75) Hasey v. Page, 131 Minn. ——, 155 N. W. 640.

9478. Amount required to redeem—(88) See Burnside v. Moore, 124 Minn. 321, 145 N. W. 27.

SALES OF FORFEITED LANDS UNDER R. L. 1905, §§ 936–939

9479. In general—The governor's deed under R. L. 1905, § 938, when valid on its face, is prima facie evidence of title in the grantee. Peterson v. St. Paul Real Estate & Invest. Co., 115 Minn. 333, 132 N. W. 273.

A tax deed not in conformity with the form prescribed by the attorney general, held void on its face. Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

The authority of the Governor of the state to execute a forfeited tax sale deed, under the provisions of section 2127, G. S. 1913, is dependent wholly upon the question whether the time of redemption from the sale has expired. The deed, when executed, is not conclusive that the time of redemption had expired, and the owner of the land may show that no notice of expiration of redemption had, in fact, been given, and therefore that the time to redeem had not expired. The return of the sheriff upon such notice that the person to whom the notice was so directed could not be found in the county is not conclusive, but may be rebutted and overcome by clear and satisfactory evidence. Where the owner of the land, being the person in whose name it was assessed for taxation and to whom the notice of expiration of redemption was directed, is in fact a resident of the county, the service of the notice by publication is a nullity. Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534.

Notice of expiration of redemption must be in conformity to R. L. 1905, § 956, even as to sales made prior to the enactment of that section. Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676.

The statute has been amended so that now the deed is executed by the chairman of the state tax commission. Laws 1915, c. 332.

(89) Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

(91) See Johnson v. Fraser, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676; Swanson v. Campbell, 129 Minn. 72, 151 N. W. 534.

TAX DEEDS

9480. Must be regular on face—(93) Peterson v. St. Paul Real Estate & Invest. Co., 115 Minn. 333, 132 N. W. 273.

REFUNDMENT UNDER G. S. 1894, § 1610

9488. History of legislation—It has always been the policy of this state to protect purchasers at delinquent tax sales and to provide them a method for reimbursement where their tax title failed. Prior to 1902 the purchaser at a delinquent tax sale might perfect his title by terminating the right of redemption, or, if for any reason his title failed he was given the right of refundment from the public treasury. The right of refundment was abused in practice and was abolished by Laws 1902, chapter 2, except in certain instances and the tax lien of the state substituted. Under the existing statutes the purchaser has two methods for the protection of his rights. He may perfect title by service of a notice to redeem, or, if his title fails for any reason, enforce the tax lien. The purpose of our various statutes relating to the tax lien is to protect not only the state but also purchasers at delinquent tax sales. Downing v. Lucy, 121 Minn. 301, 141 N. W. 183.

9490. Right to refundment or lien purely statutory—(22) Byers v. Minnesota Commercial Loan Co., 118 Minn. 266, 136 N. W. 880.

9491. Object and construction of statute—(23) State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

9492. A vested property right—(25) State v. Krahmer, 112 Minn. 372, 128 N. W. 288; State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

9493. What law governs—The right of refundment in tax proceedings, where a tax title has been adjudged invalid for defects appearing upon the face of a certificate of sale or the prior proceedings, is controlled by the statutes in force at the time of the sale or when the certificate thereof was issued. Chapter 271, Laws 1905, has no application, and a failure to comply with its provisions does not affect the right of refundment, where the tax certificate is held invalid for defects appearing upon its face or in the anterior proceedings. State v. Krahmer, 112 Minn. 372, 128 N. W. 288.

(26) State v. Chisago County, 115 Minn. 6, 131 N. W. 792. See Digest, § 9492.

9494. Who entitled to refundment—A person who acquires, by purchase at an execution sale, the title and interest in land of a tax sale purchaser, obtaining a defective tax title thereby, succeeds to such pur-

chaser's right to a refundment. A purchaser of a tax certificate, after the tax sale is declared void, is not entitled to the refundment of moneys paid for a state assignment for a subsequent year's taxes, but is entitled to refundment of taxes paid for years subsequent to the tax covered by such state assignments. State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

9495. Judgment as to specific tract essential—(32) State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

9499. Collusion—Fraud on county—Effect of judgment—Collateral attack—In proceedings to register title, to which the holder of tax certificates on the land and the county where the land was situated were parties, the tax sales on which the certificates were issued were adjudged void for reasons that entitled the holder to refundment. Held, that such judgment cannot be attacked collaterally for error or fraud, and is, as against the county, conclusive of the right to refundment. State v. Ries, 123 Minn. 397, 143 N. W. 981.

9500. Statute of limitations—The opportunity afforded by section 1697, G. S. 1894, to apply for and receive refundments, does not establish a bar by limitation against claims which might be, but are not in fact, made thereunder. Section 966, R. L. 1905 (G. S. 1913, § 2160), refers to refundments provided for in section 963, 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 is held void because of irregularity in the sale. State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

9502. Form of action immaterial—The judgment adjudging the sale void may be rendered in proceedings for the registration of title. State v. Ries, 123 Minn. 397, 143 N. W. 981.

9507. Paying amount of taxes into court—G. S. 1894, § 1610, providing that in any action to vacate a tax judgment the plaintiff shall, before a decree is entered, pay into court for the benefit of the other party all taxes, penalties, and costs paid by such party, does not apply when the tax judgment or sale is not sought to be vacated. Byers v. Minnesota Commercial Loan Co., 118 Minn. 266, 136 N. W. 880.

REFUNDMENT UNDER G. S. 1894, § 1697

9508a. Not exclusive—The opportunity afforded by section 1697, G. S. 1894, to apply for and receive refundments does not establish a bar by limitation against claims which might be, but are not in fact, made thereunder. State v. Chisago County, 115 Minn. 6, 131 N. W. 792.

RECOVERY OF TAXES PAID

9516. Taxes voluntarily paid not recoverable—(69) Note, 94 Am. St. Rep. 408.

9517. Effect of protest—(74) Note, 36 L. R. A. (N. S.) 476.

LIMITATION OF ACTIONS

9525. No limitation on right to enforce liability for taxes—Section 980, R. L. 1905, abrogated the statute of limitations as to the right of the state to enforce the assessment and collection of taxes upon all property within the state subject to taxation, including the property of express companies. State v. United States Express Co., 114 Minn. 346, 131 N. W. 489.

ACTIONS INVOLVING TAX TITLES—PLEADING AND PRACTICE

9531. Determination of purchaser's lien when tax title held invalid—Judgment—When, in an action to quiet title brought by the holder of the tax certificate, the tax title is found defective because of the insufficiency of the notice of expiration of period for redemption, it is the duty of the court, under section 969, R. L. 1905 (G. S. 1913, § 2165), to determine the amount and validity of the plaintiff's lien for taxes paid by him. Foster v. Clifford, 110 Minn. 79, 124 N. W. 632.

After it has been adjudged in an action to determine adverse claims that the notice of expiration of time for redemption had not been served, the amount which the purchaser from the state at a forfeited sale is entitled to recover, under R. L. 1905, § 972 (G. S. 1913, § 2168), is the amount paid, with interest, and subsequent taxes paid by him, and not the amount of taxes, interest, penalties, and costs which are charged against the land at the time of the purchase. In such an action, the court did not err in holding that the purchaser was not entitled to recover for taxes paid by him after the trial of the case, but before the filing of the findings of the court. Kimball v. Marine Nat. Bank, 112 Minn. 450, 128 N. W. 678.

The holder of a valid certificate of tax sale, who has not caused to be served a valid notice of expiration of the time for redemption, has no right, in an action by the owner of the land to determine adverse claims, to have a judgment that such holder has a lien on the land for the amount paid for the certificate, with interest. Byers v. Minnesota Commercial Loan Co., 118 Minn. 266, 136 N. W. 880. See Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273.

Where the purchaser at a forfeited tax sale assigned to the state the certificate of purchase issued thereon, and received a refundment of all

the money paid for such certificate, a judgment theretofore entered, quieting such purchaser's title under the certificate, was thereby rendered inoperative as between the owner of the land and the purchaser; the latter being thereafter estopped to assert any rights thereunder. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

In an action to determine adverse claims, where defendant answered claiming title absolute, the court properly allowed costs to plaintiffs although, under authority of section 2168, G. S. 1913, a lien was decreed defendant as holder of a tax certificate. Under said section the court is authorized to adjudge a lien to the holder of the tax certificate, issued upon a sale subsequent to the taking effect of the tax laws of 1902 (Laws 1902, c. 2, § 47), even though the sale and certificate be valid, and there is time and opportunity to serve a notice of the expiration of the time of redemption. In such case the lien may include taxes paid subsequent to the giving of a defective notice of redemption, whether such taxes be paid before or after they became delinquent. Culligan v. Cosmopolitan Co., 126 Minn. 218, 148 N. W. 273. See Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

(32) See Lohn v. Luck Land Co., 129 Minn. 367, 152 N. W. 764 (burden of proof to show elimination of right of redemption).

(33) Kipp v. Love, 128 Minn. 498, 151 N. W. 201 (plaintiff held not entitled to complain of neglect of court to determine amount of his lien and subsequent taxes paid).

9532. Pleading—A complaint held sufficient either under the statute authorizing a special action to test tax titles or under the general statute authorizing an action to determine adverse claims. Foster v. Clifford, 110 Minn. 79, 124 N. W. 632.

RAILROADS

9543. Commuted system does not change subject of tax—The business of common carriers considered as a whole, and embracing rights, franchises, equipment, and property of every nature, may be taxed as such. State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410.

(58) See State v. United States Express Co., 114 Minn. 346, 131 N. W. 489.

9545. System applicable to all railroads—Street railways—An interurban electric railway may be taxable on the basis of its gross earnings as to its interurban business and taxable on an ad valorem basis as to its urban business. State v. Minneapolis & St. Paul Suburban Ry. Co., 114 Minn. 70, 130 N. W. 71 (what constitutes an interurban railway within the meaning of Laws 1909, c. 454—line of defendant between St. Paul and Stillwater held an interurban railway subject to a gross earnings tax—property of defendant held partially taxable locally on an ad

valorem basis in the cities through which it passed); State v. Minneapolis & St. Paul Suburban Ry. Co., 122 Minn. 106, 142 N. W. 19 (apportionment of earnings held proper); State v. Iverson, 125 Minn. 67, 145 N. W. 607 (apportionment of proceeds of tax among municipalities by the state tax commission—state auditor may issue his warrant without any appropriation by law).

9561. Union stations—(91) See State v. Northern Pacific Ry. Co., 130 Minn. 377, 153 N. W. 850.

9562. What included in gross earnings—Where two carriers enter into an arrangement by which one becomes practically the hiring and disbursing agent of the other in the performance of duties partly owing by both, paying out for and receiving back from the other only the actual cost of the service, with no intention of gaining revenue or making a profit out of the transaction, held that, where such arrangement is made in good faith and not in fraud, subterfuge, or evasion of the obligations of either party to the state or to the public, such moneys are not subject to the gross earnings tax. Where such services are included in the freight charges of the other railway companies, which pay a gross earnings tax thereon, held, that to compel defendant to pay a tax on these same receipts would be in the nature of double taxation, exacting the commutation taxes on the same property twice, which cannot lawfully be done. Defendant and certain navigation companies agreed that defendant should employ stevedores to perform certain work, part of which it was the duty of defendant to perform; the navigation companies paying to defendant the actual cost of the labor. Defendant, in hiring the men to do the work, really acted for the boat companies as hiring and disbursing agent, paying for the actual cost of the work, making no profit, and receiving back from the boat companies only what it expended. Held that, in the absence of fraud, subterfuge, or evasion of the obligations of either party to the state or to the public, moneys received from such boat companies under such circumstances are not subject to the gross earnings tax. State v. Northern Pacific Ry. Co., 130 Minn. 377, 153 N. W. 850.

(94) State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410.

INSURANCE COMPANIES

9568. Percentage tax on premiums—An insurance company held to be a town and farmers' mutual insurance company within the exception to the statute and not subject to the 2 per cent. tax on premiums. State v. Minn. Farmers Mutual Ins. Co., 130 Minn. 384, 153 N. W. 594.

9568a. Retaliation tax on foreign companies—In an action to recover from a foreign insurance company the amount of the tax claimed to be

due under the retaliation law (chapter 420, Laws 1907), the state is the real party in interest, and the insurance commissioner is not, by virtue of his official position, incapacitated from representing the corporation for the purpose of accepting service. State v. Queen City Fire Ins. Co., 114 Minn. 471, 131 N. W. 628.

TELEGRAPH COMPANIES

9569. In general—(4) State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403 (Laws 1891, c. 8, not repealed by Laws 1897, c. 314, as regards telegraph companies—Laws 1891, c. 8, held constitutional—valuation of telegraph companies for purposes of taxation—standard of value—evidence—interest on delinquent taxes); State v. Western Union Tel. Co., 155 N. W. 1061 (Laws 1913, c. 483, applies to property of telegraph companies).

TELEPHONE COMPANIES

9570. Gross earnings tax—(5) State v. Western Union Tel. Co., 111 Minn. 21, 124 N. W. 380, 126 N. W. 403 (Laws 1897, c. 314, not invalid as discriminating in favor of telephone companies against telegraph companies—construction and application of statute).

EXPRESS COMPANIES

9570a. Gross earnings tax—Provision is made by statute for a gross earnings tax on express companies. The statute has been held constitutional. G. S. 1913, §§ 2241–2249; State v. United States Express Co., 114 Minn. 346, 131 N. W. 489, affirmed, 223 U. S. 335 (interstate commerce—receipts from money orders—limitation of actions—omitted earnings).

FREIGHT LINE COMPANIES

9570b. Gross earnings tax—Provision is made by statute for a gross earnings tax on freight line companies. The statute has been held constitutional. G. S. 1913, §§ 2250–2255; State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410. See State v. Canda Cattle Car Co., 85 Minn. 457, 89 N. W. 66.

Chapter 250, Laws of 1907, authorized the imposition of the gross earnings tax upon the refrigerator cars of defendant operated by it over the lines of different railroads; such operation of cars consisting in directing and controlling the loads, movements, routes, and destination of the cars, the railroads furnishing the motive power, and receiving the same freight rates as if the shipments were carried in like cars of the railroads, but paying defendant one cent for each mile a car is hauled. State v. Cudahy Packing Co., 129 Minn. 30, 151 N. W. 410.

INHERITANCE TAX

9571. Constitutionality—The inheritance tax statute, as amended, does not infringe the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title," nor the equality provisions of the state or federal constitution, nor the provision against impairing the obligation of contracts. State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

(6) State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

9572a. Non-residents—Conflict of laws—Reciprocal exemption—The reciprocal exemption amendment to our inheritance tax law, made in 1911 (Laws 1911, c. 209), applies only where the laws of another state impose an inheritance tax upon, "transfers of personal property of decedents," but, "exempt or do not impose a tax upon transfers of personal property of residents of Minnesota having its situs in such state"; and the laws of another state, which impose such tax only where the property passes to collateral relatives or strangers, but do impose such tax where personal property within such state, belonging to residents of Minnesota, passes by will to such collateral relatives or strangers, do not bring the property of residents of that state within such exemption. A non-resident decedent's personal property having a situs in this state is subject to the succession tax of this state, although the devolution of such property is governed by the law of the decedent's domicil. The language of our statute indicates an intention on the part of the legislature to impose a succession tax in all cases in which it has the power to impose such tax, and the statute cannot be construed as applying only where the devolution of the property is governed by our laws. The devolution of debts owed by residents of this state, whether evidenced by promissory notes or not, and of the stock of corporations of this state, and of the stock of national banks located in this state, is subject to a succession tax in this state, although the debts were owing to, and the stock was held by, non-resident decedents. State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

9572b. Transfers—Situs of debt—An inheritance tax is not a tax on property, but a tax on the right of succession thereto. Personal property is subject to the inheritance tax of the decedent's domicil, though actually situated in another state and also taxable there. State v. Probate Court, 124 Minn. 508, 145 N. W. 390; State v. Probate Court, 128 Minn. 371, 150 N. W. 1094.

A resident of this state, acting under a power of appointment in a will of his mother, transferred by will personal property actually situated in another state. Held, that the transfer was made here and taxable here. It was the exercise of the power of appointment that constituted the

transfer of the property, and not its creation. Under our inheritance tax law the appointment when made is a taxable transfer, in the same manner as though the property to which the appointment relates belonged absolutely to the donee of the power, and had been bequeathed or devised by the will. State v. Probate Court, 124 Minn. 508, 145 N. W. 390.

9573. Computation—Under chapter 288, Laws 1905, a tax upon an inheritance becomes due and payable when the beneficiary enters into actual possession and enjoyment of any portion of the bequest which exceeds in value the statutory exemption. The tax so accruing must be computed upon the value, at the time of the decedent's death, of the right to receive the amount actually paid upon the date of its payment. The rate of taxation does not increase until the value of the inheritance, exclusive of the statutory exemption, reaches the larger values named in the statute. State v. Probate Court, 112 Minn. 279, 128 N. W. 188.

See State v. Probate Court, 155 N. W. 1077.

(01) State v. Probate Court, 111 Minn. 297, 126 N. W. 107; State v. Probate Court, 112 Minn. 279, 128 N. W. 18.

MORTGAGE REGISTRY TAX

9576. In general—The statute has been sustained against various constitutional objections. Mutual Benefit Life Ins. Co. v. Martin County, 104 Minn. 179, 116 N. W. 572; State v. Farmers & Mechanics Savings Bank, 114 Minn. 95, 130 N. W. 445, 851, 232 U. S. 516; State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728; Orr v. Sutton, 119 Minn. 193, 137 N. W. 973.

The statute is not unconstitutional in requiring savings banks to pay a mortgage registry tax upon mortgages owned by them, without exempting such mortgages from taxation otherwise. State v. Farmers & Mechanics Savings Bank, 114 Minn. 95, 130 N. W. 445, 851, 232 U. S. 516.

All mortgages are taxable under the statute, including those given to secure an indebtedness of fifty dollars or less. State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728; Orr v. Sutton, 119 Minn. 193, 137 N. W. 973; Id., 127 Minn. 37, 148 N. W. 1066.

A mortgage upon real property, upon which the registry tax imposed by chapter 328, Laws 1907, has not been paid, though erroneously recorded by the register of deeds, furnishes no sufficient legal basis in the mortgagee for the redemption from the foreclosure of a prior mortgage upon the same property, as against the holder of the title under that foreclosure. The record of such a mortgage, being prohibited by the statute and thereby declared invalid for any purpose, is not evidence of the fact that it was duly recorded, or of the validity of the instrument. A certificate upon the back of such a mortgage, made by the county

treasurer, before the same was recorded, that the mortgage was not subject to the tax, held not to conclude the holder of the title to the property under the prior foreclosure. Orr v. Sutton, 119 Minn. 193, 137 N. W. 973; Id., 127 Minn. 37, 148 N. W. 1066.

Failure to pay the mortgage tax does not make the mortgage a nullity, but upon its existence the statute superimposes a state of dormancy whereby its enforcement is held in absolute abeyance until the performance of the statutory conditions precedent to its complete operation; and hence where the tax had not been paid at the time of the service of a notice to terminate an executory contract of sale of land, which, by virtue of section 1 of the statute, was subject to the tax, such notice was totally inoperative to divest or otherwise affect the vendee's equitable estate in the land, and, furthermore, derived no vitality or effect whatever from the subsequent payment of the tax. First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132.

Where parties through mutual mistake or ignorance, have failed to insert in a deed, given to secure a debt, the fact that it is so intended or the amount of the debt, or both, and there is no intent or purpose to evade the mortgage tax, the instrument may be reformed so as to conform to the provision of chapter 328, Laws 1907. Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721. See Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455; Mason v. Fichner, 120 Minn. 185, 139 N. W. 485.

The statute is silent as to who shall pay for the tax. It is not the legal duty of the mortgagee to pay it. A loan for which the borrower pays the maximum interest and also the mortgage registry tax is not usurious. Lassman v. Jacobson, 125 Minn. 218, 146 N. W. 350.

Where an executory contract for the sale of land is pleaded in the complaint and admitted in the answer, it is not material in determining the rights of the parties between themselves whether the registration tax has been paid. Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

TELEGRAPHS AND TELEPHONES

9584. Rights in roads and streets—A telephone company held liable for a wilful injury to the wife of an abutting owner while she was attempting to prevent the erection of telephone poles in the boulevard in front of her home by jumping into a hole dug for a pole. Souther v. Northwestern Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571.

The license conferred by R. L. 1905, § 2927 (G. S. 1913, § 6247), to construct and maintain a telephone line in a road or street, is not exclusive of the rights of the abutting landowner, and the rights of each must be so exercised as not unnecessarily to impinge upon, interfere with, or impede those of the other. St. Paul Realty & Assets Co. v. Tri-State Telephone & Telegraph Co., 122 Minn. 424, 142 N. W. 807.

A contract authorizing a telephone company to construct a telephone plant in the city of Thief River Falls, reserving to the city a right to purchase it, construed and held a franchise, and invalid under the city charter because no advertisement for bids had been made before awarding the contract. Arpin v. Thief River Falls, 122 Minn. 34, 141 N. W. 833.

The city of Brainerd granted a franchise to a telephone company to construct and operate a telephone line within the city and to use and occupy the streets of the city for that purpose. The company constructed a line up to the city limits, thence extending it into the city over the poles and lines of another telephone company and into the exchange thereof and under and by virtue of a contract with such company by which the control and operation of the line, and the right to fix charges for services was surrendered to it. Held, that this was not a compliance with the contract with the city and that the city was justified in declaring the franchise abandoned and forfeited. State v. Brainerd, 126 Minn. 90, 147 N. W. 712.

A house-mover held properly restrained by injunction from interfering with the electric wires of an electric light and power company. Edison Electric Light & Power Co. v. Blomquist, 110 Minn. 163, 124 N. W. 969, 125 N. W. 895.

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. Collar v. Bingham Lake Rural Tel. Co., 155 N. W. 1075.

9586. Duty to serve all impartially—A refusal by a rural telephone company to serve certain persons held neither arbitrary nor unreasonable. State v. Hawk Creek Telephone Co., 120 Minn. 395, 139 N. W. 711.

9587. Telegrams as evidence—A telegram held inadmissible as an admission against interest, where it appeared that the purported sender was in a state of coma from a paralytic stroke, so that it was impossible for her to have caused a message to be sent. Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

9588. Telephone messages as evidence—One who answers a telephone call from the place of business of the person called for, and undertakes to respond as his agent, is presumed to have authority to speak for him in respect to the general business there carried on and conducted, and further evidence of identification of the person responding to the call is not necessary to the admissibility of the conversation thus held. The rule is otherwise where it is sought to charge a particular individual with an admission or conversation over the telephone. In such case the individual must be identified. Gardner v. Hermann, 116 Minn. 161, 133 N. W. 558. See Digest, §§ 1738, 3245, 8506; Note, 110 Am. St. Rep. 742; 6 L. R. A. (N. S.) 1180.

9590. Failure to send messages—Damages—(41) Kolliner v. Western Union Tel. Co., 126 Minn. 122, 147 N. W. 961 (common-law rule applied to contract made in Montana—loss of time and expenses of a business trip not recoverable—nothing in message to apprise company of the nature and purpose of the trip). See Note, 10 Am. St. Rep. 778, 117 Id. 286; 24 Harv. L. Rev. 411.

(42) See Note, 49 L. R. A. (N. S.) 206, 300, 305, 308, 327, 337, 343.

9591a. Wrongful disclosure—Effect of illegal transactions of addressee as a defence to an action against a telegraph company for wrongful disclosure of the contents of a message. 28 Harv. L. Rev. 640.

9593. Limiting liability—(46, 47) See 28 Harv. L. Rev. 561.

9594. Negligence—Defective and unsafe poles, wires, etc.—Injury to trees—A recovery against a telephone company sustained where the plaintiff was injured while riding on the top of a box car by coming in contact with a wire of the company strung across the tracks of a railroad. Gobershock v. McLeod County Tel. Co., 115 Minn. 529, 131 N. W. 1133.

A recovery against a telephone company sustained where the plaintiff was driving a threshing outfit on a country road and the smokestack of the engine came in contact with the wires of the company, suspended over the road so low as to obstruct travel thereon, whereby

plaintiff sustained personal injuries. Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693.

A telephone company, having the right to construct and maintain a line upon the boulevard of a public street, must exercise due care not to injure trees growing thereon and upon the adjacent property. St. Paul Realty & Assets Co. v. Tri-State Telephone & Telegraph Co., 122 Minn. 424, 142 N. W. 807.

(50) Note, 36 L. R. A. (N. S.) 279.

TENANCY IN COMMON

9600. Right to rents and profits—Statute—(66) Recovery under common count for money had and received. See Dunnell, Minn. Pl. 2 ed. § 769.

(67) Note, 52 Am. St. Rep. 924.

9601. Improvements—(70) Note, 52 Am. St. Rep. 924.

9602. Conversion by cotenant—Sale—(72) Note, 100 Am. St. Rep. 649.

9604. Reimbursement of cotenant for outlays—Contribution—Lien for reimbursement. Note, 35 Am. St. Rep. 416.

(77) Van Brunt v. Gordon, 53 Minn. 227, 54 N. W. 1118 (taxes and rent); Oswald v. Pillsbury, 61 Minn. 520, 63 N. W. 1072 (taxes and rent). See, as to recovery under common count for money paid, Dunnell, Minn. Pl. 2 ed. § 797.

See Note, 1915B, 961.

9605. Sale or mortgage of common property—Effect of deed by one cotenant purporting to convey a parcel in severalty to a third party. Note, 47 L. R. A. (N. S.) 573.

9606. Leases between cotenants—Contracts as to use of property—Cotenants may make any agreement they choose in respect to the use by each other of the common property, but such agreements do not constitute a partition thereof, unless they provide or contemplate that title to specific portions thereof shall vest in such cotenants in severalty. Hunt v. Meeker County Abstract & Loan Co., 128 Minn. 207, 150 N. W. 798.

9607. Purchase by cotenant of outstanding lien or title—The general rule is inapplicable to a bona fide public sale under judicial process or power in a trust deed. Starkweather v. Jenner, 216 U. S. 524.

9609. Actions between cotenants—(89) See Johnson v. Stone, 111 Minn. 228, 233, 126 N. W. 720.

See Note, 50 Am. St. Rep. 839.

9610. Actions by cotenant against strangers—(94) Note, 6 L. R. A. (N. S.) 710.

(96) Rowland v. McLaughlin Bros., 110 Minn. 398, 125 N. W. 1019.

See Dunnell Minn. Pl. 2 ed. § 60n.

TENDER

9612. Necessity—(97) Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289.

9613. Place—(99) Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820.

9615. Medium of tender—Whether Canadian coin is a legal tender in this state is an open question. Konkle v. St. Paul City Ry. Co., 119 Minn. 177, 137 N. W. 738.

(7) Note, 36 L. R. A. (N. S.) 232.

9618. Keeping good—Deposit in court—Defendants, having tendered payment of the full amount called for in a written contract, and, after its refusal, having paid the full amount into court, cannot attack the judgment rendered therefor on the ground that the full amount was not then due. Moriarty v. Maloney, 121 Minn. 285, 141 N. W. 186.

(16) See Orr v. Sutton, 127 Minn. 37, 148 N. W. 37.

9620a. Effect—Tender never discharges an obligation. It simply excuses the person owing it from the consequences of failure to make payment at the time the contract requires. Marcus v. National Council, 127 Minn. 196, 149 N. W. 197.

Defendants, having tendered payment of the full amount called for in a written contract, and, after its refusal, having paid the full amount into court, cannot attack the judgment rendered therefor on the ground that the full amount was not then due. Moriarty v. Maloney, 121 Minn. 285, 141 N. W. 186.

9621a. Law and fact—A tender by a banker with whom a debtor had deposited the amount of a claim held insufficient as a matter of law. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

The sufficiency of a tender held properly submitted to the jury and its finding held justified by the evidence. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

THEATERS AND SHOWS

9622. Regulation—Under the charter of the city of St. Paul, the power to license and regulate the exhibition of shows of all kinds, including theaters and moving picture shows, is with the common council, is a legislative power, and cannot be delegated to the city clerk. Certain ordinances passed by the common council considered, and held not to be an exercise of its legislative or discretionary power to license and regulate all shows and theaters, and that the council still retained the power to license and regulate such shows and theaters, including the power to grant or refuse a license in a particular case. State v. Redington, 119 Minn. 402, 138 N. W. 430.

See Note, 110 Am. St. Rep. 525.

9622a. License—Revocation—The charter of the city of Minneapolis gives to the mayor the power to revoke any license issued by authority of the city council. The licensee of a theater arranged to exhibit the photoplay "The Birth of a Nation," and the mayor notified him that if he did so his license would be revoked. The power of the mayor to revoke a license is not an absolute power. It cannot be used capriciously, or arbitrarily, or oppressively, but only in the exercise of an honest and reasonable discretion. The exercise of the discretion of the mayor with respect to the revocation of licenses cannot be subject to judicial control. The court will merely inquire whether a fair legal discretion was exercised. The facts in this case fairly called for the exercise of the discretion of the mayor, and the courts should not direct or enjoin his action. Bainbridge v. Minneapolis, 131 Minn. ——, 154 N. W. 964.

9623a. Liability for negligence and other torts—One who invites the public to places of amusement, such as theaters, shows, and exhibitions must exercise a high degree of care for the safety of their patrons. As to stairways, platforms, walks and other structures the duty is somewhat similar to that of common carriers to their passengers. Wells v. Minneapolis Baseball & Athletic Assn., 122 Minn. 327, 142 N. W. 706. See § 6988.

Liability of proprietor for tort of servant committed for his own purposes. See Penas v. Chicago etc. Ry. Co., 112 Minn. 203, 212, 127 N. W. 926.

9623b. Tickets of admission—A ticket to a place of entertainment for a specified period does not create a right in rem. Marrone v. Washington Jockey Club, 227 U. S. 633.

THEORY OF CASE—See Appeal and Error, 401–408; Pleading, 7528a.

TIME

9625. Computation—Statute—The statute is inapplicable to the computation of time expiring on Thanksgiving Day. Where the time for perfecting an appeal expires on that day an appeal perfected on the following day will be dismissed. Lucke v. Gas Traction Co., 129 Minn. 522, 151 N. W. 273.

See Note, 78 Am. St. Rep. 372.

9627. Computing time "from" a date—(51) See Lawver v. Great Northern Ry. Co., 97 Minn. 36, 105 N. W. 1129 ("since" means "after," "from the time of").

9627a. At the end of a specified time—Where a contract provides that one may or shall do a thing at the end of a specified time he ordinarily has a reasonable time thereafter to do the thing. Davis v. Godart, 131 Minn. ——, 154 N. W. 1091.

9629. Fractions of day—Acts in sequence—Presumption—Acts required to be done in sequence may usually be done on the same day, and where they are so done it will be presumed, in the absence of evidence to the contrary, that they were done in such order as to render them valid. Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

(54) Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

(55) Note, 1 L. R. A. (N. S.) 835.

9630. Reasonable time—Law and fact—(58) Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534; Villmont v. Grand Grove, 111 Minn. 201, 126 N. W. 730; George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 296, 128 N. W. 12; Stebbins v. Northern Holt Co., 114 Minn. 187, 130 N. W. 849; Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148; Davis v. Godart, 131 Minn. ——, 154 N. W. 1091.

(59) Gamble-Robinson Co. v. Mass. Bonding & Ins. Co., 113 Minn. 38, 129 N. W. 131.

TORTS

9631. Definition and nature—Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility? It is submitted that the second of these alternatives is that which has been accepted by our law. Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence, or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse. Salmond, Torts, 2 ed. 9.

(65) See Justice Holmes, 8 Harv. L. Rev. 1; 10 Id. 471; Pollock, Torts, 8 ed. c. 1.

9633. Arising out of contract—(67) Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143. See East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181.

9633a. General test of reasonableness—The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946.

9634. Effect of bad motive—(69) See Dunshee v. Standard Oil Co., 152 Iowa, 618, 132 N. W. 371; 8 Harv. L. Rev. 1; 26 Id. 740; 27 Id. 153.

9635. Wilful injury—(70) See Buck v. Latham, 110 Minn. 523, 126 N. W. 278 (purchasing note and bringing action thereon with the malicious purpose of oppressing defendant); Souther v. N. W. Telephone Co., 118 Minn. 102, 136 N. W. 571 (wilful injury to woman attempting to prevent the erection of telephone poles in a boulevard in front of her home); Parks v. Byrne, 120 Minn. 519, 138 N. W. 952 (malicious interference with a lawful right to abide in a home selected by plaintiff and his wife); Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63 (maliciously making false charges against an employee to secure his discharge); Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790 (fair competition in business is a justification); Christensen v. Plummer, 130 Minn. 440, 153 N. W. 862 (malicious discharge of school teacher); 8 Harv. L. Rev. 1; 26 Id. 741; 28 Id.

511; 9 Col. L. Rev. 455; 29 Harv. L. Rev. 344 (landlord maliciously persuading his tenants not to deal with plaintiff).

(72) 8 Harv. L. Rev. 1; 26 Id. 741.

9636. Use of one's property—Property rights must be so exercised as not unnecessarily to impinge upon, interfere with, or impede those of another. St. Paul Realty & Assets Co. v. Tri-State Telephone & Telegraph Co., 122 Minn. 424, 142 N. W. 807.

9637. Interference with contract relations of others—One who wrongfully interferes or intermeddles with the contract relations between two others, and thereby prevents one of them from carrying out the contract, which results in loss to the other, is liable for such loss. Mealey v. Bemidji Lumber Co., 118 Minn. 427, 136 N. W. 1090 (interference with logging contract preventing performance by plaintiff—complaint sustained—defendant's wrongful interference held a question for the jury); Twitchell v. Nelson, 126 Minn. 423, 148 N. W. 451, 601; Id., 131 Minn. ——, 155 N. W. 621.

Actual or implied malice is an essential element to the right of action for the wrongful interference by a third person with the contract relations between others. When the person so interfering in such relations, causing a breach of the contract, has knowledge of facts which, if pursued by reasonable inquiry, will disclose such relations and the rights of the parties in respect thereto, and he fails to make the inquiry, the law will presume knowledge thereof precisely as though he made the inquiry and impute to him bad faith. In such case a showing of actual notice is unnecessary. Twitchell v. Nelson, 131 Minn. ——, 155 N. W. 621.

The malicious interference with the contract relations of others, causing a breach of the contract by one of the parties, is a tort. Faunce v. Searles, 122 Minn. 343, 142 N. W. 816 (maliciously procuring the discharge of plaintiff as a superintendent of schools).

Maliciously making a false charge against an employee to his employer for the purpose of securing his discharge is actionable. Heffernan v. Whittlesey, 126 Minn. 163, 148 N. W. 63.

(77) See Davis v. Condit, 124 Minn. 365, 144 N. W. 1089 (an affianced husband has no cause of action against one responsible for the seduction of his affianced wife, or for the alienation of her affections, or for her debauching, making proper the breach by him of the marriage contract); Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790 (competition in business); 25 Harv. L. Rev. 60; Note, 97 Am. St. Rep. 923; 21 L. R. A. 233; 16 L. R. A. (N. S.) 746; 28 Id. 615.

9637a. Interference with home—A wrongful interference with the right to occupy premises as a home is an actionable wrong. Parks v. Byrne, 120 Minn. 519, 138 N. W. 952.

9638. Necessary consequences of lawful act—Whenever one, by command or authorization of law, does a thing from which another sustains injury, he is without liability to the latter, who must endure, uncompensated, what thus befalls him. Fish v. Chicago, G. W. R. Co., 125 Minn. 380, 389, 147 N. W. 431.

(78) Heiberg v. Wild Rice Boom Co., 127 Minn. 8, 148 N. W. 517.

(01) Buck v. Latham, 110 Minn. 523, 126 N. W. 278.

9638a. Asserting rights by force—Taking the law into one's own hands—As a general rule one cannot take the law into his own hands and assert his rights by force. See Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571; Evertson v. McKay, 124 Minn. 260, 144 N. W. 950; Digest, § 3784.

9639. Threats to commit an injury—(79) See Parks v. Byrne, 120 Minn. 519, 138 N. W. 952.

9640. Causing fright—(80) Ominsky v. Charles Weinhagen & Co., 113 Minn. 422, 129 N. W. 845 (evidence held to justify finding that fright and nervous shock, resulting from an accident, caused the particular ailment for which damages were awarded). See Parks v. Byrne, 120 Minn. 519, 138 N. W. 952 (threats causing fear—interference with right to reside in a home); Conley v. United Drug Co., 218 Mass. 238, 105 N. E. 975 (one who from fright caused by an explosion faints and falls to the floor and thereby sustains a physical injury may recover); Note, 3 L. R. A. (N. S.) 49; 22 Id. 1073; 45 Id. 433; 77 Am. St. Rep. 859; 41 Am. L. Reg. (N. S.) 141; 27 Harv. L. Rev. 394 (liability for threatening letters causing suicide).

9642a. Defence that plaintiff was doing illegal act—The fact that plaintiff, when injured, was doing an unlawful act which contributed directly and proximately to his injury, is sometimes a defence. See Street v. Chicago etc. Ry. Co., 124 Minn. 517, 145 N. W. 746; Digest, § 7027.

9643. Parties to actions—Joinder—Joint and several liability—All persons interested in a single cause of action may join in an action to recover thereon though their interests are distinct and severable. Carlton County Farmers Mut. Fire Ins. Co. v. Foley Bros., 111 Minn. 199, 126 N. W. 727.

Where a single injury is suffered in consequence of the wrongful acts of several persons, all who contribute directly to cause the injury are jointly or severally liable though there was no conspiracy or joint concert of action between them. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 40, 142 N. W. 930, 1136; Twitchell v. Nelson, 131 Minn. —, 155 N. W. 621.

A plaintiff may join joint tortfeasors even though the liability of one is statutory and the liability of the other rests on the common law. Chicago etc. Ry. Co. v. Dowell, 229 U. S. 102.

The liability of one of several tortfeasors is not both joint and several, but is joint or several at the election of the plaintiff, and, if he has recovered a joint judgment, he is not entitled also to a several judgment against one of the same persons. Reynolds v. New York Trust Co., 188 Fed. 611.

(84) Malmsted v. Minneapolis Aerie, 111 Minn. 119, 126 N. W. 486; Almquist v. Wilcox, 115 Minn. 37, 39, 131 N. W. 796; Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20; Bigelow v. Old Dominion etc. Co., 225 U. S. 111. See Dunnell, Minn. Pl. 2 ed. § 65.

(85) Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461 (overruling Trowbridge v. Forepaugh, 14 Minn. 133, 100); Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 139 N. W. 289, 618; Jackson v. Orth Lumber Co., 121 Minn. 461, 141 N. W. 518; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 40, 142 N. W. 930; Petcoff v. St. Paul City Ry. Co., 124 Minn. 531, 144 N. W. 474; Kimball v. Chicago etc. Ry. Co., 128 Minn. 95, 150 N. W. 379. See Dunnell, Minn. Pl. 2 ed. § 65.

(86) Chicago etc. Ry. Co. v. Dowell, 229 U. S. 102.

(87) The Trowbridge case has been overruled. Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461.

See Dunnell, Minn. Pl. 2 ed. §§ 54–66.

TOWNS

9648. Organization—Boundaries—The board has no authority, in the absence of legislative grant of power, to extend the boundaries of a town organized by it beyond the boundary line of the county. When a congressional township, divided by county lines is organized by the county board of one of the counties the territory beyond the county line does not become a part of the town. Farley v. Boxville, 113 Minn. 203, 129 N. W. 381.

9649. Division—Effect on debts—Apportionment—(7) Farley v. Boxville, 113 Minn. 203, 129 N. W. 381 (Laws 1907, c. 273, and Laws 1909, c. 492, held inapplicable to facts of case).

9653. Liability for acts of officers—The town is not liable where its officers act as agents of the law and not as agents of the town. State Bank v. Vlaar, 124 Minn. 78, 144 N. W. 458.

(15) See Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452.

9654. Contracts—Limit of debts—(18) See Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452; §§ 6717, 6720.

9656. Town orders—Mandamus is a proper remedy to compel the treasurer of a town to pay valid orders issued by the board of supervissors, and the validity of such orders may be determined in such proceeding. State v. Clark, 116 Minn. 500, 134 N. W. 129.

9657. Claims against towns—Filing—(25) Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452.

9658. Liability for negligence—While the town itself is not liable for the negligence of its officers in repairing a highway, the officers themselves are liable. Tholkes v. Decock, 125 Minn. 507, 147 N. W. 648. See Note, 52 L. R. A. (N. S.) 142; 15 Col. L. Rev. 82.

9659. Town board—In allowing claims against the town the board acts judicially. Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452.

The board has charge of all affairs of the town not by law committed to other officers. State v. Clark, 116 Minn. 500, 134 N. W. 129.

9659a. Town treasurer—Payment of illegal claims—A town treasurer, who pays out the money of his town upon orders issued in payment of illegal claims, presented to and allowed by the town board, knowing all the facts disclosing the illegality of the claims, is liable in an action by the town for a return of the money, notwithstanding the fact that the orders may have been fair on their face. Buyck v. Buyck, 112 Minn. 94, 127 N. W. 452.

9660a. Elections—Town elections are governed by special statutes. The Australian ballot system does not apply. Johnson v. Slapp, 127 Minn. 33, 148 N. W. 593 (in a contest for the office of town clerk, and a contest for the office of town supervisor, tried together, held, upon an examination of the evidence and a construction of certain ballots, that in each contest the contestant and contestee received an equal number of votes).

TRACKAGE CHARGES—See Carriers, 1205e.

TRADE-MARKS AND TRADE-NAMES

9667. Definition and nature—(40) Northwestern Knitting Co. v. Garon, 112 Minn. 321, 128 N. W. 288 (a trade-mark is a distinctive name, word, emblem, or device indicating the origin or proprietorship of a particular article of trade or commerce—trade-marks and trade-names distinguished). See Note, 1 L. R. A. (N. S.) 704.

(41) Note, 85 Am. St. Rep. 83.

9670. Trade-name—Unfair competition—A "trade-name" is a word or phrase by which a business or enterprise, or specific articles of merchandise from a specific source, are known to the public, and when applied to merchandise is generic or descriptive, and hence not susceptible of appropriation as a trade-mark. A trade-mark is protected by courts of equity on the theory of an absolute property right in the holder, and without reference to questions of fraud or damage, while fraud or damage, express or implied, is essential to entitle the holder to protection in the use of a trade-name. Northwestern Knitting Co. v. Garon, 112 Minn. 321, 128 N. W. 288.

Plaintiff was incorporated in 1887 under the name of "Northwestern Knitting Company," and has since been engaged in an extensive business of knitting articles of underwear and disposing of the same to dealers throughout the United States, conducting all its business under its corporate name at the city of Minneapolis. About fifteen years after the establishment of plaintiff's business defendant opened a factory at Duluth for the manufacture of knit sweaters and a heavy article of knit underwear, adopting the name "Northwestern Knitting Mill." He did not know of the existence of plaintiff at the time, and plaintiff did not learn of his presence in the same field for several years; but, immediately upon learning that defendant was operating under the particular name, plaintiff gave notice of its prior adoption of the same and demanded that defendant discontinue its use. This he refused to do, and insists upon the right to use the same. Held, that by its prior adoption of the name, and its continued use for a long series of years, plaintiff acquired trade-name rights therein, and is entitled to protection under the doctrine of unfair competition. Defendant's use of the name is likely to cause confusion in the trade, deceive the public, and to substantially prejudice the rights of plaintiff. Though defendant adopted the name in ignorance of plaintiff, and without any intention of diverting its trade, his continuance in its use after notice of plaintiff's prior rights is presumptively fraudulent. Fraud is presumed in such case, and need not be affirmatively shown. The product of the parties is of the same gen-

eral class. Northwestern Knitting Co. v. Garon, 112 Minn. 321, 128 N. W. 288. See 8 Col. L. Rev. 245.

A person may lose the right to use his own name as a trade-name, except in such form, or in such combination with other words, as will distinguish his business and product from that of a competitor whose business or product are already generally known by such name. One having the exclusive right to use a trade-name can transfer such right to another only when coupled with a transfer of some property or business with which the name has become identified. One person cannot exclude another from using a particular name as a trade-name unless he has made actual prior use of such name as his own trade-name. If the name of a corporation has become established as the trade-name of another before its use as such by the corporation, the corporation may be enjoined from using it as a trade-name, except in such form as will fairly distinguish it from the name already in use. No one can acquire the exclusive right to use the name of the place where his business is located, nor the exclusive right to use words properly descriptive of the nature of the business; but where he establishes a trade-name containing such geographical name and such descriptive words, if a competitor subsequently desires to use the same name and the same or similar descriptive words in his own trade-name, he must put them in such form, or combine them with other words in such manner, that his trade-name will be fairly distinguishable from the trade-name first in use. Rodseth v. N. W. Marble Works, 129 Minn. 472, 152 N. W. 885.

(47, 48) Rodseth v. N. W. Marble Works, 129 Minn. 472, 152 N. W. 885.

TRADE SECRETS

9673. Property—Injunction—(52) See 24 Harv. L. Rev. 69; Note, 133 Am. St. Rep. 759.

TRADE UNIONS

9674. Labor unions—Strikes—Agreement not to work—Members of a labor union may agree not to work for certain persons except under certain conditions, when not prevented by a contractual or public duty. Injunction against enforcement of a rule of an association of musicians not to accept employment in theaters except under certain conditions held properly denied. Rule held not ultra vires. Scott-Stafford Opera House Co. v. Minneapolis Musicians Assn., 118 Minn. 410, 136 N. W. 1092. See § 1566; 28 Harv. L. Rev. 696.

Workmen may go on a strike and may use legitimate means to induce other workmen to join them or to refrain from taking the positions vacated by them; but they may not go to the extent of intimidating, coercing, or terrorizing such other workmen, and may be enjoined from doing so. Minnesota Stove Co. v. Cavanaugh, 131 Minn. ——, 155 N. W. 638.

9674a. Contracts not to be a member—A criminal complaint against a master under R. L. 1905, § 5097, for requiring a servant to agree not to remain a member of a labor union, held not to state an offence, the statute being held unconstitutional in part. State v. Daniels, 118 Minn. 155, 136 N. W. 584, following Adair v. United States, 208 U. S. 161. See also Coppage v. Kansas, 236 U. S. 1. The Adair and Coppage cases have been very justly and severely criticised. See 42 Am. L. Rev. 164; 28 Harv. L. Rev. 496.

TRANSFER CHECKS—See Carriers, 1238.

TREATIES

9675a. Most favored nation clause—Query whether the "most favored nation clause" in a treaty between the United States and a foreign nation carries the benefit of a provision of a consular convention between the United States and another country, conferring upon the representatives of the parties thereto the right to administer upon the estates of their deceased nationals. Articles 14 of the treaty between the United States and Sweden, proclaimed March 20, 1911, purports to give to the consuls of the parties thereto the right to administer upon the estates of their deceased nationals only "so far as the laws of each country will permit," and hence any right thereby conferred upon a foreign consul, under the "favored nation clause," with respect to the administration of the estate of one of his deceased nationals dying in Minnesota, is ex-

pressly subject to the conditions imposed by the laws of this state. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

9677a. Consular conventions—Consular conventions are not in the same class with reciprocity treaties. Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

TRESPASS

TRESPASS TO PERSONALTY

9680. Election of remedies—Waiving tort—(64) See Dunnell, Minn. Pl. 2 ed. §§ 183–194.

TRESPASS TO REALTY

9684. What constitutes—Entering premises of another to reclaim personal property thereon. See Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571.

Taking possession by force. See Souther v. N. W. Tel. Exchange Co., 118 Minn. 102, 136 N. W. 571.

A wrongful interference with the right to occupy premises as a home is an actionable wrong. Parks v. Byrne, 120 Minn. 519, 138 N. W. 952.

One who enters upon the land of another under a permit to cut certain timber becomes a trespasser by cutting timber not included in the permit. State v. Brooks-Scanlon Lumber Co., 128 Minn. 300, 150 N. W. 912.

9685. Silence of owner—Estoppel—(81, 82) Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421. See Digest, § 3209.

9686. Presumptively wilful—(84) Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

9687. Parties plaintiff—Title—Plaintiff was the record owner. The fact that he had not paid the taxes on the property, or that he had not redeemed from tax sales thereof on which the state was the purchaser, did not prevent his maintaining an action against a stranger for cutting and removing timber on the land. Helmer v. Shevlin-Mathieu Lumber Co., 129 Minn. 25, 151 N. W. 421.

See Dunnell, Minn. Pl. 2 ed. §§ 54–60.

9688. Possession of plaintiff—(01) Jacksonville etc. Ry. Co. v. Griffin, 33 Fla. 602, 15 So. 336; Cherry v. Lake Drummond etc. Co., 140 N. C. 422, 53 S. E. 138; Russell v. Meyer, 7 N. D. 335, 75 N. W. 262; Dunnell, Minn. Pl. 2 ed. § 55.

9689. Defences—Justification—(95) See 10 Col. L. Rev. 372.

9690. Waiving tort and suing on implied contract—(96) Jones v. Bradley Timber & Railway Supply Co., 114 Minn. 415, 131 N. W. 494 (when timber is wrongfully taken from land the owner may waive the trespass and maintain replevin or trover).

9692a. Burden of proof—In an action for trespass in removing a fence defendant pleaded as a defence that the fence was within a public highway and that he removed it by virtue of his authority as a public officer. Held, that the defendant had the burden of proving that the fence was within the highway. Danielson v. Kyllonen, 111 Minn. 47, 126 N. W. 404.

9694. Damages—A "permanent injury" to real property, as distinguished from a temporary or continuing injury, is one of such a character, and existing under such circumstances, that it will be presumed to continue indefinitely. A "temporary or continuing injury" is one that may be abated or discontinued at any time. Worden v. Bielenberg, 119 Minn. 330, 138 N. W. 314.

A verdict for three hundred dollars for trespass by a municipality in wrongfully opening a street lost by adverse possession held not excessive. Record v. Farmington, 126 Minn. 488, 148 N. W. 296.

Where a trespass results in the destruction of a building with consequent interruption of a going business, the loss of future profits, if they are reasonably certain and proved with reasonable exactitude, forms a proper element for consideration in awarding compensatory damages. Weinman v. De Palma, 232 U. S. 571.

(11) Worden v. Bielenberg, 119 Minn. 330, 138 N. W. 314 (excavation in street near plaintiff's property).

(12) Heath v. Minneapolis etc. Ry. Co., 126 Minn. 470, 148 N. W. 311 (sand cast by rains from a railroad embankment upon adjoining lands). See Digest, § 2530.

(20) Note, 37 L. R. A. (N. S.) 912.

(21) 27 Harv. L. Rev. 496.

9696. Treble damages for certain forms of trespass—Statute—A wilful trespass upon land, as defined by section 8090, G. S. 1913, committed by a servant within the scope of his employment warrants treble damages against the master, even though the act was without the master's knowledge or consent. In an action for treble damages for cutting timber, where the complaint charges wilful and wanton trespass and the answer contains a general denial, with what may be construed as an admission of some cutting without lawful authority from plaintiff, it was error to exclude evidence tending to show the cutting by defendant's servant to have been casual or involuntary and to instruct the jury

to return treble damages. Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

(28–30) Helppie v. Northwestern Drainage Co., 127 Minn. 360, 149 N. W. 461.

TRIAL

IN GENERAL

9697. Definition—(31) See Carpenter v. Winn, 221 U. S. 533.

NOTICE OF TRIAL AND NOTE OF ISSUE

9700. Notice of trial—Service of notice of trial by mail is complete when the notice is properly mailed. When a paper served by mail actually comes to the hands of the person to be served within the time required for personal service, the service is good, though the mailing was after the time prescribed by law. Hoff v. N. W. Elevator Co., 120 Minn. 224, 139 N. W. 153.

CALENDAR

9704a. Striking case from calendar upon removal—Where a case has been removed to the federal court it is proper to strike it from the calendar. Ewert v. Minneapolis & St. L. R. Co., 128 Minn. 77, 150 N. W. 224.

SUPERVISORY POWERS OF COURT

9706. In general—The management of the jury rests very largely in the discretion of the trial court. Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507.

The powers of a trial judge should not be unduly circumscribed. It is desirable that rules of practice and procedure should have some elasticity. The administration of the law is a practical matter, and much must be left to the judgment and discretion of the trial judge. State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

It is the right and duty of the trial judge to prevent counsel from continually interjecting remarks during the examination of witnesses by counsel of the adverse party. Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812; Faunce v. Searles, 122 Minn. 343, 142 N. W. 816.

(55) Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

LAW AND FACT—PROVINCE OF COURT AND JURY

9707. In general—What inferences are to be drawn from the facts in evidence is, within reasonable limits, a question for the jury. Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539.

(61) See McGrath v. Northern Pacific Ry. Co., 121 Minn. 258, 266, 141 N. W. 164.

9709. Construction of writings—The construction of a written contract is ordinarily a matter of law for the court, to be determined solely upon a consideration of its terms; but when the meaning of a writing, by itself, is affected with uncertainty, the intention of the parties may be ascertained by extrinsic evidence, parol or otherwise, and such intention, so ascertained, will be taken to be the meaning expressed in their written contract, if it be one which may be distinctly derived from a fair interpretation of the words used. In such a case, if the extrinsic facts and the inferences to be drawn therefrom are free from dispute, the construction of the contract is exclusively a question for the court; but otherwise the question of the intention of the parties to the contract must be submitted to the jury with proper instructions. T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316.

(69) State v. Giantvalley, 123 Minn. 227, 143 N. W. 780.

(70) T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316; Johnson v. Carlin, 115 Minn. 430, 132 N. W. 750; Park Rapids Lumber Co v. Ætna Ins. Co., 129 Minn. 328, 152 N. W. 732.

(78) T. R. Foley Co. v. McKinley, 114 Minn. 271, 131 N. W. 316.

OPENING AND CLOSING CASE

9712. Right to open and close—(87) Bandler v. Bradley, 110 Minn. 66, 124 N. W. 644; State v. Nelson, 116 Minn. 424, 133 N. W. 1010; Lockway v. Modern Woodmen, 121 Minn. 170, 141 N. W. 1 (held not error to deny defendant the right to the closing argument to the jury, it having the burden of proof on the only issue in controversy).

9713. Scope and effect of opening—(91) See Gunderson v. Minneapolis St. Ry. Co., 126 Minn. 168, 148 N. W. 61 (misconduct of counsel in promising to prove what he did not expect to be able to prove).

RECEPTION OF EVIDENCE

9714. Preliminary questions as to admissibility of evidence—(94) Paine v. Crane, 112 Minn. 439, 128 N. W. 574; Gila Valley Ry. Co. v. Hall, 232 U. S. 94.

9714a. Court should not comment on credibility of witnesses—While the trial court has a wide discretion in the conduct of the trial, it must not invade the province of the jury by making comments, insinuations, or suggestions indicative of belief or unbelief in the integrity or credibility of witnesses. Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

9716. Reopening case—(4) Rase v. Minneapolis etc. Ry. Co., 116 Minn. 414, 133 N. W. 986 (motion to reopen case more than three months after filing of findings properly denied); Wilson v. Danderand, 124 Minn. 120, 144 N. W. 460; Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

9717. Offer of evidence—A ruling of the court sustaining an objection to any evidence under a complaint or answer, as the case may be, on the ground that the pleading objected to does not state a cause of action or defence, need not be followed by an offer of evidence in support of the allegations of the pleading. The objection goes to the sufficiency of the pleading, and not to the competency or relevancy of the evidence. Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

When a written instrument is offered and received in evidence, and the indorsements thereon are treated by the trial court as having also been received, the fact that the record does not affirmatively show that the indorsements were formally mentioned in connection with the offer of the instrument will not justify this court in rejecting them, as not in evidence. Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792.

A ruling of the trial court excluding a document cannot be reviewed when the document is not in the record and there is no other testimony to show its materiality. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

The general rule requiring an offer of evidence does not apply to the cross-examination of an adverse witness or party. Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102.

An offer must be fairly and not technically construed. A general offer must be considered in connection with the pleadings of the party making it. It is not error to reject proof offered by a party contrary to the admissions of his pleadings. Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870.

(5) Foley v. Hoy, 113 Minn. 186, 129 N. W. 215; Lee v. H. N. Leighton Co., 113 Minn. 373, 376, 129 N. W. 767; Gutmann v. Klimek, 116 Minn. 110, 133 N. W. 475; Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854; Svenson v. Lindgren, 124 Minn. 386, 145 N. W. 116; Ruder v. National Council, 124 Minn. 431, 145 N. W. 118; Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806; McCoy v. City Nat. Bank, 128 Minn. 455, 151 N. W. 178.

(6) National Citizens Bank v. Thro, 110 Minn. 169, 124 N. W. 965; Miller v. Natwick, 110 Minn. 448, 125 N. W. 1022; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Argall v. Sutor, 114 Minn. 371, 131 N. W. 466; Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466; Gutmann v. Klimek, 116 Minn. 110, 133 N. W. 475; Larson v. Anderson, 122 Minn. 39, 141 N. W. 847; State v. Mueller, 122 Minn. 91, 141 N. W. 1113;

Svenson v. Lindgren, 124 Minn. 386, 145 N. W. 116; Ruder v. National Council, 124 Minn. 431, 145 N. W. 118; Buck v. Buck, 126 Minn. 275, 148 N. W. 117; Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457.

(8) Boos v. Minneapolis etc. Ry. Co., 127 Minn. 381, 149 N. W. 600.

9719. Limiting number of witnesses—(12) See Note, 116 Am. St. Rep. 514.

9721. Granting a view—Granting a view is discretionary with the trial court. Counsel desiring it must make a timely request for it. Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113.

9722. Experiments in presence of jury—(21) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161; Landro v. Great Northern Ry. Co., 117 Minn. 306, 135 N. W. 991.

9722a. Allowing jury to take papers to jury room—Held not error to refuse to allow a letter in evidence to be taken into the jury room, the letter being read to the jury instead. Ruder v. National Council, 124 Minn. 431, 145 N. W. 118.

OBJECTIONS AND EXCEPTIONS—IN GENERAL

9723. Definition and nature—An exception to a statement by the court that it was inclined to hold that the right of peremptory challenge of a juror did not exist was not a ruling on the question; no particular juror having been challenged. Fink v. United American Fire Ins. Co., 114 Minn. 177, 130 N. W. 944.

OBJECTIONS AND EXCEPTIONS TO EVIDENCE

9728. Necessity—(36, 37) Paine v. Crane, 112 Minn. 439, 128 N. W. 574.

9735. Objection to admission of any evidence under complaint—A ruling of the court sustaining an objection to any evidence under a complaint or answer, as the case may be, on the ground that the pleading objected to does not state a cause of action or defence, need not be followed by an offer of evidence in support of the allegations of the pleading. The objection goes to the sufficiency of the pleading, and not to the competency or relevancy of the evidence. Reynolds v. McNamara, 115 Minn. 418, 132 N. W. 748.

(45) See Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512.

9737. Evidence admitted subject to future ruling—(48, 49) Gourd v. Morrison County, 118 Minn. 294, 136 N. W. 874; Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186.

9738. Necessity of repeating objections—Where a chart offered in evidence was objected to as incompetent, irrelevant, and immaterial and because no proper foundation had been laid, and the objection was over-

ruled, it was not waived by permitting a witness to be examined with reference to it without further objection. Erdman v. Watab Rapids Power Co., 112 Minn. 175, 127 N. W. 487, 128 N. W. 454.

A bona fide attempt must be made to keep out the challenged testimony. Drew v. Carroll, 120 Minn. 478, 139 N. W. 953.

(50) Drew v. Carroll, 120 Minn. 478, 139 N. W. 953; W. S. Conrad Co. v. St. Paul City Ry. Co., 130 Minn. 128, 153 N. W. 256.

9739. Grounds of objection must be specified—The object of an objection to the admission of evidence is to enable the court to rule intelligently thereon, and if it is not sufficiently specific for such purpose, and is overruled, the correctness of the ruling cannot be reviewed in this court. Where, however, the objection is sustained, the burden is on the appellant to show that the ruling is erroneous on its merits. Paine v. Crane, 112 Minn. 439, 128 N. W. 574. See Larson v. Anderson, 122 Minn. 39, 141 N. W. 847.

Certain objections to hearsay evidence held sufficient. W. S. Conrad Co. v. St. Paul City Ry. Co., 130 Minn. 128, 153 N. W. 256. See Paine v. Crane, 112 Minn. 439, 128 N. W. 574; Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296; Larson v. Anderson, 122 Minn. 39, 141 N. W. 847.

(52) Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296 (objection that evidence was immaterial and irrelevant insufficient to raise the point that it was hearsay).

(54) Willard v. St. Paul City Ry. Co., 116 Minn. 183, 133 N. W. 465 (general rule especially applicable to expert testimony—the objection that no foundation was laid for a witness is too general to raise the point that the question did not assume the truth of the evidence on which the opinion of the witness was sought).

9740. Objection that evidence is incompetent, irrelevant, and immaterial generally insufficient—The general objection that evidence is incompetent, irrelevant and immaterial is insufficient to raise the point that instruments grew out of an illegal transaction. Babcock v. Canadian Northern Ry. Co., 117 Minn. 434, 136 N. W. 275.

The general objection that certain documents prepared by defendant's motorman, offered in evidence by plaintiffs, were immaterial and incompetent, and not impeaching, held not to raise the question whether the documents were privileged communications between defendant and its employee. Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790.

An objection that a question is incompetent, irrelevant, and immaterial does not raise the point that it is improper as calling for an opinion of the witness on the whole issue in the case. Thoreson v. Susens, 127 Minn. 84, 148 N. W. 891.

(56) Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790; Larson v. Anderson, 122 Minn. 39, 141 N. W. 847.

STRIKING OUT EVIDENCE

9742. In general—The supreme court does not approve the practice of striking out material evidence as not responsive to the question asked. But it will not reverse a case for error in this regard where the party assigning error might have elicited the evidence by another question. Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843.

A motion to strike out all the evidence as to a particular defence is sometimes made to test the sufficiency of the defence as a matter of law. See Matz v. Martinson, 127 Minn. 262, 149 N. W. 370.

The rule that a motion must be made to strike out improper evidence, in order to raise the question on appeal does not apply where proper objection to its introduction was made before it was received. Christenson v. Madson, 128 Minn. 213, 150 N. W. 213.

(79) See Jelos v. Oliver Iron Mining Co., 121 Minn. 473, 141 N. W. 843.

9743. When motion must be made—It is ordinarily too late after the witness has been fully cross-examined and other witnesses have testified. Johnson v. Quinn, 130 Minn. 134, 153 N. W. 267.

9746. When discretionary with trial court—(87) Sturm v. Northwest Mills Co., 114 Minn. 420, 131 N. W. 472 (answer of witness fairly responsive); Cole v. Minneapolis etc. Ry. Co., 117 Minn. 33, 134 N. W. 296 (it is not error to refuse to strike out an offer to prove certain facts, objection to the offer having been sustained); Travelers Indemnity Co. v. Fawkes, 120 Minn. 353, 139 N. W. 703; Drew v. Carroll, 120 Minn. 478, 139 N. W. 953.

9749a. Restoring evidence stricken out—Where evidence which has been fully heard by the jury has been ordered stricken out after both parties have rested their case, it is not error to restore it again, provided the evidence was competent, and this is the effect of an instruction to the jury that the evidence was proper for them to consider in arriving at their verdict. This rule is limited in its operation to cases where testimony is stricken after the case is closed. Zakrzewski v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 966.

DISMISSAL OR NONSUIT

9750. In general—(95) See Slocum v. N. Y. Life Ins. Co., 228 U. S. 364 (nonsuit and demurrer to evidence at common law defined).

9758. Time of motion—The trial judge may, upon a calendar motion, determine the validity of an instrument, executed by plaintiff, purporting

to release defendant from liability and directing a dismissal of the action, if all the parties consent to the procedure and voluntarily submit to the court the issue involved. Mah-Eng-Aunce v. Anundsen, 110 Minn. 488, 126 N. W. 136.

When counsel in his opening statement to the jury makes a deliberate concession as to the facts, and chooses to abide by it after his attention is called to its effect, the court may act upon the facts conceded and grant defendant's motion for dismissal if, with such facts conceded, there can be no recovery under the complaint. St. Paul Motor Vehicle Co. v. Johnston, 127 Minn. 443, 149 N. W. 667.

9760. Error in denying motion cured by subsequent evidence—(24) Carson v. Dawson, 129 Minn. 453, 152 N. W. 842; Busack v. Johnson, 129 Minn. 364, 152 N. W. 757.

DIRECTING A VERDICT

9764. In general—Although there is oral testimony to prove an alleged fact upon the existence of which a litigant's cause of action or defence depends, still, if the admitted physical facts demonstrate to a certainty its non-existence, the court properly directs the verdict. Larson v. Swift & Co., 116 Minn. 509, 134 N. W. 122.

Error in denying a directed verdict for defendant is cured if the plaintiff subsequently makes out a cause of action. Weide v. St. Paul, 126 Minn. 491, 148 N. W. 304.

Restrictions were placed on the right of a court to direct a verdict by Laws 1913, c. 245. These restrictions were removed by Laws 1915, c. 31. Weide v. St. Paul, 126 Minn. 491, 148 N. W. 304; Matz v. Martinson, 127 Minn. 262, 149 N. W. 370; Hedine v. Northwestern Knitting Co., 127 Minn. 369, 149 N. W. 541; Blakeley v. J. Neils Lumber Co., 128 Minn. 465, 151 N. W. 182; Zimmerman v. Chicago & N. W. Ry. Co., 129 Minn. 4, 151 N. W. 412; Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532; Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259; Jones v. St. Paul, 130 Minn. 260, 153 N. W. 516.

(29) Webber v. Axtell, 110 Minn. 52, 124 N. W. 453; Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307; Clay County v. Olson, 123 Minn. 437, 143 N. W. 970 (held no error in directing a verdict where there was no conflict in the evidence and each party requested a directed verdict, and there was no request by defendants to have a particular issue submitted).

(38) Knudson v. Great Northern Ry. Co., 114 Minn. 244, 130 N. W. 994 (that view of the evidence most favorable to the plaintiff must be accepted); Arnold v. Dauchy, 115 Minn. 28, 131 N. W. 625 (id.).

9766. When motion may be made—(43) St. Paul Motor Vehicle Co. v. Johnston, 127 Minn. 443, 149 N. W. 667. See Independent School District v. School District, 130 Minn. 19, 153 N. W. 113; Digest, § 9758.

9767. Grounds of motion must be specified—(48) See Bartels v. Chicago & N. W. Ry. Co., 118 Minn. 250, 136 N. W. 759.

9769. Waiver—At the close of the evidence the defendant moved for an instructed verdict. The court, without ruling on the motion, offered to dismiss the action for a given reason. Defendant's attorney thereupon stated that he desired to get a verdict from the jury upon a certain issue. The court submitted that issue to the jury under proper instructions. Held, that the defendant thereby abandoned its motion for a directed verdict. Independent School District v. School District, 130 Minn. 19, 153 N. W. 113.

(53) Church of the Immaculate Conception v. Curtis, 130 Minn. 111, 153 N. W. 259. See Clay County v. Olson, 123 Minn. 437, 143 N. W. 970.

REQUESTS FOR INSTRUCTIONS

9771. Object of statute—(58) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987.

9771a. Duty of court to mark requests—Failure of the court to mark requested instructions as given or refused is not reversible error, where counsel completes final argument to the jury before calling the court's attention to the omission. Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

9773. Drafting requests—Court not required to correct—It is not the duty of the court to redraft and correct requests. State v. Schueller, 120 Minn. 26, 138 N. W. 937.

9774. Duty to give—When properly refused—It was not error to refuse to give requested instructions as to right of recovery in case certain conduct of the parties was found; the court having given the jury the correct definition whereby to determine whether such conduct constituted negligence, and having stated the effect of negligence upon the verdict. Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

It is proper to refuse a requested instruction which singles out a particular witness and charges as to his credibility. Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626. See Digest, § 9787.

(62) Gamble-Robinson Commission Co. v. Whitaker, 116 Minn. 79, 133 N. W. 167; State v. McPherson, 114 Minn. 498, 131 N. W. 645; Peters v. Tackaberry, 117 Minn. 373, 135 N. W. 805; Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Bauer v. Great Northern Ry. Co., 128 Minn. 146, 150 N. W. 394.

(63) Mortenson v. Hotel Nicollet Co., 118 Minn. 29, 136 N. W. 306; Doran v. Chicago etc. Ry. Co., 128 Minn. 193, 150 N. W. 800.

(65) State v. Schueller, 120 Minn. 26, 138 N. W. 937.

(67) Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

(68) Senro v. Chicago & N. W. Ry. Co., 115 Minn. 110, 131 N. W. 1011; Johnson v. Scott, 119 Minn. 470, 138 N. W. 694.

(69) Duer v. Gagnon, 129 Minn. 517, 152 N. W. 880.

(72) Burke v. Chicago & N. W. Ry. Co., 131 Minn. —, 154 N. W. 960.

9776. Giving requests with disparaging comment—(75) Peterson v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 1093.

9777. Denial of requests covered in general charge harmless error—(76) Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987; Blomquist v. Minneapolis Furniture Co., 112 Minn. 143, 127 N. W. 481; Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300; Baldinger v. Camden Fire Ins. Co., 121 Minn. 160, 141 N. W. 104; Obert v. Otter Tail Co., 122 Minn. 20, 141 N. W. 810; Petterson v. Butler Bros., 123 Minn. 516, 144 N. W. 407; Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806; Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434; Gronlund v. Cudahy Packing Co., 127 Minn. 515, 150 N. W. 176; Klemik v. Henricksen Jewelry Co., 128 Minn. 490, 151 N. W. 203; Burke v. Chicago etc. Ry. Co., 131 Minn. —, 154 N. W. 960.

9778. General charge in language of court preferable—(77) Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856.

9779. Objections and exceptions—Since Laws 1901, c. 113, the rule that exceptions must be specific is not to be applied with strictness. Peters v. Tackaberry, 117 Minn. 373, 135 N. W. 805.

INSTRUCTIONS

9781. In general—Examples not drawn from the evidence and abstract rules of law should be avoided. Lacey v. Minneapolis St. Ry. Co., 118 Minn. 301, 136 N. W. 878.

It is improper to instruct the jury wholly to disregard the arguments of counsel. Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116.

(2) Minneapolis etc. Traction Co. v. Enggren, 111 Minn. 373, 127 N. W. 391.

(83) State v. Christianson, 131 Minn. —, 151 N. W. 1095.

(91) State v. Almos, 122 Minn. 479, 142 N. W. 801; State v. Jones, 126 Minn. 45, 147 N. W. 822; Gran v. Gran, 129 Minn. 531, 152 N. W. 269; State v. Christianson, 131 Minn. —, 151 N. W. 1095.

(93) Larkin v. Minneapolis, 112 Minn. 311, 127 N. W. 1129.

(94) Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549.

9783. Defining the issues—(6) Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930 (issues insufficiently defined—new trial granted).

(8) See § 9783a.

See Digest, §§ 7174–7179.

9783a. Reading pleadings to jury objectionable—As a general rule it is objectionable practice for the court to read the pleadings to the jury as a part of its charge. Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517; Korby v. Chesser, 98 Minn. 509, 108 N. W. 520; Savino v. Griffin Wheel Co., 118 Minn. 290, 136 N. W. 876; Quirk v. Consumers Power Co., 127 Minn. 526, 149 N. W. 193; Peery v. Illinois Central R. Co., 128 Minn. 119, 150 N. W. 382.

9784. Reviewing the evidence—It is not improper to direct the attention of the jury to the testimony and surrounding circumstances bearing upon the different issues of the case; but, where the evidence is direct, not involving any legal presumptions, and its application to the issues is not difficult, the court is not required to call attention to particular facts and their probative effect. It is not error for the court in its discretion to refuse to instruct the jury to consider whether certain inferences may not be drawn from any particular state of facts, the evidence being fairly before the jury for their consideration after argument by counsel. Bolstad v. Armour & Co., 124 Minn. 155, 144 N. W. 462.

It is proper for the court to comment on the fact that material and available evidence was not produced. Peterson v. Chicago etc. Ry. Co., 131 Minn. ——, 154 N. W. 1093.

(10) Senro v. Chicago & N. W. Ry. Co., 115 Minn. 110, 131 N. W 1011; Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300.

(12) Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549; Gran v. Gran, 129 Minn. 531, 152 N. W. 269. See Digest, § 9787.

9785. Expressing an opinion on the issues—An expression of opinion by the court upon disputed questions of fact is not reversible error, if the issue of fact is clearly submitted to the jury for its determination; but the court may not give to the jury an improper rule of law for their guidance in determining the facts. Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

(13) Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

9786. Instructions as to credibility of witnesses—(18) Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772; Lewis v. Chicago, G. W. R. Co., 124 Minn. 487, 145 N. W. 393.

(19) Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011; Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148; Havel v. Minneapolis

& St. L. R. Co., 120 Minn. 195, 139 N. W. 137; Sina v. Carlson, 120 Minn. 283, 139 N. W. 601; Rademacher v. Pioneer Tractor Mfg. Co., 127 Minn. 172, 149 N. W. 24; Cole v. Johnson, 127 Minn. 291, 149 N. W. 466.

(20) State v. Schueller, 120 Minn. 26, 138 N. W. 937; Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145; Eckart v. Kiel, 123 Minn. 114, 143 N. W. 122; State v. Sugarman, 126 Minn. 477, 148 N. W. 466 (questioning the wisdom of giving this abstract instruction—if given at all it should be given in the approved form—knowledge of falsity essential—new trial granted for error in this regard).

(21) See Digest, §§ 9787, 10307.

(26) State v. Christianson, 131 Minn. ——, 154 N. W. 1095.

9787. Improper to charge as to credibility of particular witnesses—The rule that special reference in the charge of the court to a particular witness, with the admonition to consider his interest in the result of the action, is error does not apply, where the court in such connection names practically all the witnesses so interested. Moe v. Paulson, 128 Minn. 277, 150 N. W. 914.

(27) State v. Amos, 122 Minn. 479, 142 N. W. 801; Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N. W. 626; Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549; Moe v. Paulson, 128 Minn. 277, 150 N. W. 914; State v. Sailor, 130 Minn. 84, 153 N. W. 271. See Digest, § 10307.

9788. Instructions as to the burden of proof—A failure to charge as to the burden of proof is not error in the absence of a timely request. Moe v. Paulson, 128 Minn. 277, 150 N. W. 914.

Where certain proof makes out only a prima facie case of negligence it is error to charge that it raises a "strong" presumption of negligence. Presley Fruit Co. v. St. Louis etc. Ry. Co., 130 Minn. 121, 153 N. W. 115.

9789. Cautionary instructions—Held not error to refuse to admonish the jury that an indemnity insurance company is entitled to the same consideration in courts of justice that is accorded to individuals. While it is entirely proper in any case to remind the jury of their solemn duty, and to urge them to give even and impartial consideration to the evidence and determine the issues fairly, it is not absolutely necessary to specially refer to the character of one of the parties, or one interested in the action, for the purpose of removing from the jury a possible prejudice. Presumptively there is no such prejudice; but if it exists in any particular case, and is acted upon by the jury, the trial court will administer the proper relief for such misconduct. Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856.

If evidence introduced is admissible only against a part of the defendants the court should caution the jury to limit it accordingly. State v. Newman, 127 Minn. 445, 149 N. W. 945.

It is not improper to caution the jury to rely on their own recollection and belief as to the evidence rather than on the statements of counsel in relation to the evidence. Meagher v. Fogarty, 129 Minn. 417, 152 N. W. 833.

(33) It is not error not to give such cautionary instructions. Woxland v. N. W. Consolidated Milling Co., 113 Minn. 440, 129 N. W. 856.

9790. Additional instructions—Requests of jurors—Absence of counsel—The court may properly refuse requests of jurors for additional instructions not pertinent to the issues. Ruder v. National Council, 124 Minn. 431, 145 N. W. 118.

Additional instructions may be given in open court to the jury upon their return into court, although counsel for one or both of the parties is not present. If one be present, he may, in the absence of counsel for the opposite party, make any suggestions to the court which would be proper if counsel on the other side were present. Humphrey v. Monida & Yellowstone Stage Co., 115 Minn. 18, 131 N. W. 498.

(39) Strite Governor Pulley Co. v. Lyons, 129 Minn. 372, 152 N. W. 765. See Digest, § 9819.

9792. Instructions unobjected to become law of case—A charge unobjected to does not necessarily become the law of the case binding on the parties when it is such that giving it may be assigned as error under G. S. 1913, § 7830. A verdict may be sustained, though inconsistent with the evidence as applied to the charge, if upon the whole record, which indicates that the case has been completely tried, as a matter of law no other verdict can be sustained. Kruta v. Lough, 131 Minn. —, 154 N. W. 514.

(42) Kleis v. Travelers Ins. Co., 118 Minn. 422, 136 N. W. 1101; Denoyer v. Railway Transfer Co., 121 Minn. 269, 141 N. W. 175; Dobrowoloske v. Parpala, 121 Minn. 455, 141 N. W. 803; Bertram v. Bemidji Brewing Co., 123 Minn. 76, 142 N. W. 1045; Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104; Quinn v. St. Paul Boiler & Mfg. Co., 128 Minn. 270, 150 N. W. 919; Kruta v. Lough, 131 Minn. —, 154 N. W. 514. See George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 292, 128 N. W. 12 (charge of court, though not excepted to, held not law of case).

9794. Construction on appeal—(46) State v. McGrath, 119 Minn 321, 138 N. W. 310; Dodge v. Martin County, 119 Minn. 392, 138 N. W. 675; Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549.

9796. Withdrawal—Instructions to disregard prior instructions—Curing error—Confusing statements in a charge as to the forms of verdict to be used in certain cases are without prejudice, if subsequently the court correctly and clearly instructs the jury how it should proceed, and

under what circumstances each form of verdict should be used. Strite Governor Pulley Co. v. Lyons, 129 Minn. 372, 152 N. W. 765.

9797. Objections and exceptions to instructions—In general—Where exception is taken to a particular statement in a charge, and the court thereupon modifies the charge to meet the objection raised, and no exception is taken to the modification so made, it will be considered that the modification was acceptable. Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307.

The rule that exceptions to a charge of the court must be specific, and made before the jury retires, was intended to direct the attention of the court to the particular alleged error in the charge, so that it might be corrected if the judge was of the opinion that he had inadvertently erred. In the application of this rule it was uniformly held that a general exception to the refusal of the court to give several requested instructions was insufficient, because not sufficiently specific. The reason of the rule ceased upon the enactment of Laws 1901, c. 113, and where exceptions taken on the trial are relied on as the basis of assignments of error they ought to be construed with greater liberality than they were before the reason for the rule ceased. Peters v. Tackaberry, 117 Minn. 373, 135 N. W. 805.

Where a party makes specific objections to instructions on the trial he cannot shift his position on appeal and raise other objections. Stuhr v. Wright County Tel. Co., 119 Minn. 508, 138 N. W. 693.

To raise objection on appeal to the trial court's reading the pleadings to the jury objection must be made on the trial. Peery v. Illinois Central R. Co., 128 Minn. 119, 150 N. W. 382.

(57) Petruschke v. Kamerer, 131 Minn. ——, 155 N. W. 205.

9798. Indefinite or verbally inaccurate instructions—Necessity of objections—Rule of Steinbauer v. Stone—The general rule does not apply to a failure to define the issues sufficiently. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

Where the offence is defined by statute and this definition is given to the jury, if defendant desires a more specific statement as to the elements of the offence he should make a request therefor. State v. O'Hagan, 124 Minn. 58, 144 N. W. 410.

The rule has been held inapplicable to an instruction which virtually directed the jury to disregard the arguments of counsel. Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116.

An instruction fundamentally wrong, or which has the effect of preventing a verdict for a substantial amount on a cause of action well pleaded and proven, may be assigned as error on a motion for a new trial, even though at the trial the attorney states that he has no exception to the charge. It is otherwise with inaccuracies of expression,

failure to instruct on every hypothesis, or inadequate treatment of some phase of the controversy. Sasson v. Haegle, 125 Minn. 441, 147 N. W. 445.

The general rule does not apply where the court suggests to the jury that there is a controlling issue in the case when there is in fact no such issue and no evidence thereon. Anderson v. Wormser, 129 Minn. 8, 151 N. W. 423.

(66) Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282; Minneapolis etc. Traction Co. v. Enggren, 111 Minn. 373, 127 N. W. 391; Johnson v. MacLeod, 111 Minn. 479, 127 N. W. 497, 1120; Neiman v. Channellene Oil & Mfg. Co., 112 Minn. 11, 127 N. W. 394; Treacy v. Power, 112 Minn. 226, 127 N. W. 936; Larson v. Barlow, 112 Minn. 246, 127 N. W. 924; Blomquist v. Minneapolis St. Ry. Co., 113 Minn. 12, 129 N. W. 130; Gruber v. German Roman Catholic Aid Soc., 113 Minn. 340, 129 N. W. 581; Farris v. Koplau, 113 Minn. 397, 129 N. W. 770; Ludwig v. Preferred Accident Ins. Co., 113 Minn. 510, 130 N. W. 5; Johnson v. Finch, Van Slyck & McConville, 115 Minn. 252, 132 N. W. 276; Isackson v. Lovell, 115 Minn. 481, 132 N. W. 918; Brown v. Andrews, 116 Minn. 150, 133 N. W. 568; Ferber v. State Bank, 116 Minn. 261, 133 N. W. 611; State v. Henriksen, 116 Minn. 366, 133 N. W. 850; Torkelson v. Minneapolis & St. L. R. Co., 117 Minn. 73, 134 N. W. 307; Moore v. Fisher, 117 Minn. 339, 135 N. W. 1126; Shattuck v. Estate of Shattuck, 118 Minn. 60, 136 N. W. 409; Timmerman v. Whiting, 118 Minn. 398, 137 N. W. 9; State v. Smith, 119 Minn. 107, 137 N. W. 295; Johnson v. Forrestal, 119 Minn. 202, 137 N. W. 1095; Reynolds v. Great Northern Ry. Co., 119 Minn. 251, 138 N. W. 30; Jones v. Magoon, 119 Minn. 434, 138 N. W. 686; Gee v. Great Northern Ry. Co., 119 Minn. 438, 138 N. W. 684; Siverton v. Moorhead, 119 Minn. 467, 138 N. W. 674; Johnson v. Scott, 119 Minn. 470, 138 N. W. 694; Jacobson v. Great Northern Ry. Co., 120 Minn. 52, 139 N. W. 142; Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603; Peaslee v. Railway Transfer Co., 120 Minn. 347, 139 N. W. 613; Ahrens v. Chicago etc. Ry. Co., 121 Minn. 335, 141 N. W. 297; Sembum v. Duluth & Iron Range R. Co., 121 Minn. 439, 141 N. W. 523; Faunce v. Searles, 122 Minn. 343, 142 N. W. 816; Hagen v. Chicago etc. Ry. Co., 123 Minn. 109, 143 N. W. 121; Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322; Robinson v. Great Northern Ry. Co., 123 Minn. 495, 144 N. W. 220; Gillespie v. Great Northern Ry. Co., 124 Minn. 1, 144 N. W. 466; Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434; Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445; Ebeling v. International Harvester Co., 125 Minn. 466, 147 N. W. 441 (statement of text cited with approval); Bork v. Keller Mfg. Co., 126 Minn. 203, 148 N. W. 113; Buck v. Buck, 126 Minn. 275, 148 N. W.

117; Chase v. Tingdale Bros., 127 Minn. 401, 149 N. W. 654; Mahr v. Forrestal, 127 Minn. 475, 149 N. W. 938; Moe v. Paulson, 128 Minn. 277, 150 N. W. 914; Cady v. Twin City Taxicab Co., 129 Minn. 70, 151 N. W. 537; State v. Provencher, 129 Minn. 409, 152 N. W. 775; Tyra v. Cheney, 129 Minn. 428, 152 N. W. 835; McGray v. Cobb, 130 Minn. 434, 152 N. W. 262; Illinois Central R. Co. v. Skaggs, 240 U. S. 66.

(66) Likum v. Porter, 131 Minn. ——, 154 N. W. 1070.

(67) Minneapolis etc. Traction Co. v. Enggren, 111 Minn. 373, 127 N. W. 391.

(68) The doctrine of Robertson v. Burton, 88 Minn. 151, 92 N. W. 538 is not to be extended. Likum v. Porter, 131 Minn. ——, 154 N. W. 1070.

(70) Melges Bros. Co. v. Duluth Brewing & Malting Co., 118 Minn. 139, 136 N. W. 401.

(71) Ebeling v. International Harvester Co., 125 Minn. 466, 147 N. W. 441.

ARGUMENT OF COUNSEL

9799. In general—A prosecuting attorney in a criminal case is not bound to make his argument to the jury colorless, or argue both sides of the case, if defendant is represented by counsel, and he may present forcibly the state's side of the case. He is not, however, justified in thrusting his personality into the case and expressing his opinion that the defendant is guilty, or stating as a fact anything except what the evidence tends to prove, or which he expects in good faith to prove. If he violates this rule, he is guilty of misconduct. State v. Clark, 114 Minn. 342, 131 N. W. 369; State v. Johnson, 114 Minn. 493, 131 N. W. 629; State v. La Bar, 131 Minn. ——, 155 N. W. 211. See Digest, § 7102.

Arguments of counsel are a matter of right, and while they may be restrained within proper limits, the jury cannot be instructed to disregard them altogether. Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116.

It is improper for a prosecuting attorney to use opprobrious epithets toward the accused. State v. Brand, 124 Minn. 408, 145 N. W. 39.

(74) See State v. Brand, 124 Minn. 408, 145 N. W. 39.

(81) See Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116 (improper to instruct jury wholly to disregard arguments of counsel).

9800. Objections—Instructions to disregard—A general request to instruct the jury to disregard the remarks of counsel is properly refused where some of the remarks were proper. State v. Brand, 124 Minn. 408, 145 N. W. 39.

(82) Graseth v. N. W. Knitting Co., 128 Minn. 245, 150 N. W. 804; Wadman v. Trout Lake Lumber Co., 130 Minn. 80, 153 N. W. 269.

(84) Gibson v. Iowa Central Ry. Co., 115 Minn. 147, 131 N. W. 1057; Ferber v. State Bank, 116 Minn. 261, 133 N. W. 611; Langdon v. Minneapolis St. Ry. Co., 120 Minn. 6, 138 N. W. 790; State v. Brand, 124 Minn. 408, 145 N. W. 39; State v. Lucken, 129 Minn. 402, 152 N. W. 769; Wadman v. Trout Lake Lumber Co., 130 Minn. 80, 153 N. W. 269; Price v. Minnesota, D. & W. Ry. Co., 130 Minn. 229, 153 N. W. 532; Petruschke v. Kamerer, 131 Minn. ——, 155 N. W. 205.

INTERROGATORIES TO THE JURY

9802. Discretionary with court—The discretion extends to the character of the questions sought to be submitted, so long as they are pertinent to some branch of the case. McKinley v. Macbeth, 113 Minn. 148, 129 N. W. 216, 389.

Although by agreement a suit in ejectment and an action to remove a cloud were merged for the purpose of trying one determinative issue, it was not error to refuse a request that the jury find specially on that issue, where the court instructed the jury to predicate the general verdict solely on the one issue tried. Lunschen v. Peterson, 120 Minn. 288, 139 N. W. 506.

(90) Ziegler v. Suggit, 118 Minn. 74, 136 N. W. 411; Kling v. Thompson-McDonald Lumber Co., 127 Minn. 468, 149 N. W. 947; Zuponcic v. Val Blatz Brewing Co., 131 Minn. ——, 154 N. W. 790.

9803. Character—Pertinency—(96) McKinley v. Macbeth, 113 Minn. 148, 154, 129 N. W. 216, 389 (parties held not concluded by answers to certain questions not pertinent to the issues).

9806. Answers compulsory—(99) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161 (jurors should be required to answer the interrogatories or give some good reason for their inability to do so); Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975.

9808. Judgment notwithstanding the general verdict—A special verdict, which does not determine the non-existence of a fact upon which the general verdict must depend, either under the issues as made by the pleadings, or the course of trial, neither controls nor is inconsistent with the general verdict. Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145.

(6) Pelowski v. J. R. Watkins Medical Co., 120 Minn. 108, 139 N. W. 289, 618; Kreatz v. McDonald, 123 Minn. 353, 143 N. W. 975.

(7) See Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145.

9809. Judgment on findings—Plaintiff held not to have waived his right to a general verdict, or consented to a special finding of the jury

and a reservation of the cause for trial and decision by the court. Blied v. Barnard, 116 Minn. 307, 133 N. W. 795.

CONDUCT AND DELIBERATIONS OF JURY

9811. Allowing jury to take pleadings to jury room—(21) See § 9783a; 5 Mich. L. Rev. 71.

9812. Keeping jury out—Urging agreement—(26) 10 Col. L. Rev. 272. See Note, 105 Am. St. Rep. 569.

VERDICT

9813a. Right to a general verdict—In an action at law, in which a jury trial is a matter of right, either party is entitled to a general verdict under proper instructions of the trial court, and it is error, in the absence of consent of parties, to direct the jury to answer special questions and not to return a general verdict; the court reserving the cause for trial and decision by the court. Blied v. Barnard, 116 Minn. 307, 133 N. W. 795.

9813b. Five-sixth verdict—The statute allowing a five-sixth verdict applies to an action in a state court under the federal Employer's Liability Act. Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260, 148 N. W. 106; Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, 150 N. W. 385.

It is the province of the trial court to determine when a jury has given sufficient consideration to a case to justify receiving a verdict not unanimous, and such determination will not be reversed, unless it appears that the trial court abused its discretion, or that the requirements of the law were not complied with. The length of time devoted to meals and sleep while the jury are deliberating upon their verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time. Hurlburt v. Leachman, 126 Minn. 180, 148 N. W. 51.

Record held not to show that a five-sixth verdict was returned without a full twelve hours' deliberation. Armstrong v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 1075; Daly v. C. E. Falk & Co., 131 Minn. —, 154 N. W. 1081.

9815. Must cover all the issues—Presumption—(32) Boyd v. Duluth, 126 Minn. 33, 147 N. W. 710.

(33) Meyer v. Keating Land & Mtg. Co., 126 Minn. 409, 148 N. W. 452. See Johnson v. Church of St. Charles, 126 Minn. 338, 148 N. W. 281 (verdict for contract price for instalation of a heating plant held to establish that the plant was so constructed as to fulfil the requirements of the contract as to heating capacity).

9817. Definiteness—Informality—A verdict assessing damages in a certain sum, with interest at 6 per cent., is not uncertain or ambiguous, when the record shows the date from which such interest should be computed. Trustees v. Chicago etc. Ry. Co., 119 Minn. 181, 137 N. W. 970.

(39) Howard v. Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557 (verdict held sufficiently definite as to interest); Trustees v. Chicago etc. Ry. Co., 119 Minn. 181, 137 N. W. 970 (an ambiguous use of the word "only" held not fatal, and to refer to one of the defendants and not to the amount of the recovery).

(42) Sonnesyn v. Hawbaker, 127 Minn. 15, 148 N. W. 476.

See Digest, § 2483.

9819. Presence of counsel and parties unnecessary—(48) Strite Governor Pulley Co. v. Lyons, 129 Minn. 372, 152 N. W. 765. See Digest, § 9790.

9820. In open court—Presence of judge—(50) 6 Col. L. Rev. 59.

9823. Sending jury back to correct verdict—(55) Strite Governor Pulley Co. v. Lyons, 129 Minn. 372, 152 N. W. 765.

9829. Amendment by court—Courts possess the power to correct formal or clerical errors in a directed verdict and the judgment based thereon, so that the record will truly set forth the actual decision given, and may do so after the verdict is recorded, and after the expiration of the time to appeal from the judgment. Schloss v. Lennon, 123 Minn. 420, 144 N. W. 148.

SPECIAL VERDICTS

9832. Effect of failure to cover all the issues—(91) See Schmitt v. Standard Brewing Co., 111 Minn. 501, 127 N. W. 189.

TRIAL BY COURT

ISSUES TO THE JURY

9838. How far discretionary with court—(9) Grattan v. Rogers, 110 Minn. 493, 126 N. W. 134; Green v. Hayes, 120 Minn. 201, 139 N. W. 139; Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532; Lewis v. Murray, 131 Minn. ——, 155 N. W. 392.

9838a. Time of submission—Issues may be submitted after the commencement of the trial, though good practice ordinarily requires the submission before the trial begins. Nesland v. Eddy, 131 Minn. ——, 154 N. W. 661.

9843. Dismissal of action—Directing verdict—(22) Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532.

9844. Mode of trial when issues are submitted—(25) See Grattan v. Rogers, 110 Minn. 493, 126 N. W. 134.

9845. Conclusiveness of findings—Withdrawal of issues—New trial—(27) Lewis v. Murray, 131 Minn. ——, 155 N. W. 392.

(28) Morgan v. Albert Lea, 129 Minn. 59, 151 N. W. 532; Lewis v. Murray, 131 Minn. ——, 155 N. W. 392. See Grattan v. Rogers, 110 Minn. 493, 126 N. W. 134.

FINDINGS

9849. When necessary—In proceedings for the registration of title to land findings should be made as in an ordinary action. Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100.

It is neither necessary nor proper to make findings on a motion for judgment on the pleadings. State v. Barlow, 129 Minn. 181, 151 N. W. 970.

(38) See Digest, § 7794 (21).

(39) Andrus v. Dyckman Hotel Co., 126 Minn. 417, 148 N. W. 566.

(45) Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820; Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25.

(46) Fryberger v. Anderson, 125 Minn. 322, 147 N. W. 107.

9851. Nature of facts to be found—(49) Hayes v. Hayes, 119 Minn. 1, 137 N. W. 162; Wunder v. Turner, 120 Minn. 13, 138 N. W. 770; Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

(50) Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343; Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

(51) Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

9852. Sufficiency of particular findings—Certain general findings in an action to foreclose a mechanic's lien held sufficient though they might well have been made more specific. Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975.

A finding that checks were indorsed and delivered to the plaintiff imports everything necessary to pass the legal title from the indorser to the indorsee. A finding of "ownership" in express terms is in such case not necessary to support a judgment. Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178.

Where the findings followed the language of the complaint and the complaint was held sufficient, it was held that the findings were sufficient on the principle that the greater includes the less. Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

A general finding of the amount due for services is sufficient. It is not necessary to make a specific finding upon each item claimed by plaintiff. Moriarty v. Maloney, 121 Minn. 285, 141 N. W. 186.

A party is sometimes entitled to findings more specific than the

ultimate facts pleaded. Sandstone Spring Water Co. v. Kettle River Co., 122 Minn. 510, 142 N. W. 885.

A finding that a thing was "sold, assigned and transferred" to a person signifies that he purchased it for a consideration. Carlson v. Smith, 127 Minn. 203, 149 N. W. 199.

A finding as to an assignment of a claim held sufficient. Charles Betcher Lumber Co. v. Erickson, 131 Minn. —, 154 N. W. 1072.

See §§ 2905a, 3841a, 5703b, 8057a, 10081.

9854. Effect of finding a fact as a conclusion of law—(65) Ostroot v. Northern Pacific Ry. Co., 111 Minn. 504, 127 N. W. 177; Pavelka v. Pavelka, 116 Minn. 75, 133 N. W. 176; Harris v. Hanson, 119 Minn. 20, 137 N. W. 166. See International Lumber Co. v. American Suburbs Co., 119 Minn. 77, 137 N. W. 395.

9856. Must cover all the issues—(69) Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216.

9857. Basis for judgment—Judgment not justified by findings—(70) Kenny & Anker v. Duluth Log Co., 128 Minn. 5, 150 N. W. 216.

9859. Effect of finding only evidentiary facts—An evidentiary finding is sufficient in the absence of a specific assignment of error. Gibbs v. Minneapolis Fire Dept. Relief Assn., 125 Minn. 174, 145 N. W. 1075.

(75) Citizens State Bank v. E. A. Tessman & Co., 121 Minn. 34, 140 N. W. 178 (finding that checks were indorsed and delivered to plaintiff is a sufficient finding that he was the owner); Sinclair v. Fitzpatrick, 127 Minn. 530, 149 N. W. 1070.

9860. Construction—Findings are to be construed in the light of the entire record, including the evidence. Clark v. Clark, 114 Minn. 22, 129 N. W. 1052; Sprague v. Stroud, 114 Minn. 64, 129 N. W. 1053.

OBJECTIONS TO FINDINGS—AMENDMENT

9865. Indefinite findings—If findings of fact are so uncertain that it is impossible to tell, by reference to the pleadings, what the court intended to find, they are not sufficient to sustain a judgment; but if such intention can be ascertained by reference to the pleadings, the objection that the findings are not sufficiently specific cannot be raised for the first time on appeal, the remedy being a motion to make them more specific. Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

In order to determine the prejudicial effect of errors properly assigned, the whole record may be examined, and if, in the light thereof, the findings appear indefinite and uncertain on a vital issue, the judgment should not be allowed to stand. First State Bank v. C. E. Stevens Land Co., 119 Minn. 209, 137 N. W. 1101.

(88) Anderson v. Donahue, 116 Minn. 380, 133 N. W. 975; Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

(89) Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

9866. Failure to find on material issues—Mistrial—Motion for additional findings—The court may refuse to find as requested and find otherwise on its own motion. But the duty to find on all the issues is imposed upon the court by the statute, and, if this is not done, there is a mistrial, in cases where the attention of the court is called to such omission. A motion for particular findings as to material issues on which the court has failed to make findings requires the court to make findings on such issues as he may find the facts to be, although the motion to make the particular findings is denied. First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291.

Where the trial court refuses to make a finding on a material issue the supreme court may remand the case with directions to the trial court to make a finding thereon in conformity with the trial court's view of the evidence. A new trial of all the issues is not necessary. Foltmer v. First Methodist Episcopal Church, 127 Minn. 129, 148 N. W. 1077.

Error in refusing to make additional findings is harmless if they would not have changed the conclusion of law if made. Hoban v. Hudson, 129 Minn. 335, 152 N. W. 723.

(1) Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186; Hayes v. Hayes, 119 Minn. 1, 137 N. W. 162; Wunder v. Turner, 120 Minn. 13, 138 N. W. 770; Moriarty v. Maloney, 121 Minn. 285, 141 N. W. 186; Sandstone Spring Water Co. v. Kettle River Co., 122 Minn. 510, 142 N. W. 885.

(90) Borgstrom v. Haverty, 112 Minn. 500, 128 N. W. 824; Orr v. Sutton, 127 Minn. 37, 148 N. W. 37.

(93) First Nat. Bank v. Towle, 118 Minn. 514, 137 N. W. 291; Orr v. Sutton, 127 Minn. 37, 148 N. W. 37; Foltmer v. First Methodist Episcopal Church, 127 Minn. 129, 148 N. W. 1077.

(96) Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

(97) Brewer v. Hartman, 116 Minn. 512, 134 N. W. 113.

(98) Kent v. Costin, 130 Minn. 450, 153 N. W. 874.

(99) Palmer v. Mutual Life Ins. Co., 121 Minn. 395, 141 N. W. 518.

9873. Amendment of findings—Whether a court may vacate its findings and the judgment entered thereon after the time to appeal from the judgment has expired, and make other findings and order a judgment at variance with its original decision, is an open question. State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

Held no error in amending findings of fact where the evidence was sufficient to sustain the amendment. Moriarty v. Maloney, 121 Minn. 285, 141 N. W. 186.

Amendments involving findings of evidentiary matters are properly denied. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156. See Digest, § 9866 (1).

An ex parte application to make new and amended findings after the remand of a case held properly denied. Hunt v. Meeker County Abstract & Loan Co., 130 Minn. 530, 152 N. W. 866.

9874. Amendment of conclusions of law—(28) See State v. Lindberg, 120 Minn. 147, 139 N. W. 286.

TROVER—See Conversion.

TRUST DEEDS—See Assignments for the Benefit of Creditors, 596a; Garnishment, 3960a; Wills, 10203.

TRUSTS

IN GENERAL

9875. Definition—Classification of trusts as express, resulting, and constructive. 27 Harv. L. Rev. 437.

Precatory trusts. Note, 106 Am. St. Rep. 499; 37 L. R. A. (N. S.) 646.

9876. Following trust property or its proceeds—Election of remedies—A trustee cannot mingle the trust estate with his own and deny to the cestui que trust the option of following the joint affairs and availing himself of the proceeds the trustee may have realized from his improper conduct. Treacy v. Power, 112 Minn. 226, 127 N. W. 936.

The beneficiary of a constructive trust may elect either to follow the property with a mere charge or lien or may pursue the res as such. Where, in an action to impress property with a constructive trust, the original existence of the trust is established, the burden of proving a waiver thereof by an election to follow the property with a mere lien, or by acceptance of a return of the misappropriated funds, is upon the defendant. The evidence of an election against a constructive trust by the beneficiary's receiver must be clear and convincing; and where such election is predicated upon the acts and conduct of the receiver, it must appear that he acted with full knowledge of the facts, or the equivalent thereof, as distinguished from mere notice. Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

Where a wife holding a fund belonging to her and her husband fraudulently converted it into realty without the husband's consent, it was held that the husband had an election to follow the fund in its new form and have a judgment declaring him a half owner of the realty.

Having elected such remedy the court could not refuse to give him such relief and to elect for him a remedy in the form of a personal judgment against the wife, secured by a lien on the realty. Cisewski v. Cisewski, 129 Minn. 284, 152 N. W. 642.

(34) Cisewski v. Cisewski, 129 Minn. 284, 152 N. W. 642. See Note, 32 Am. St. Rep. 125.

(36) Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861; Cisewski v. Cisewski, 129 Minn. 284, 152 N. W. 642. See 25 Harv. L. Rev. 744.

EXPRESS TRUSTS

9877. Definition—(40) See 27 Harv. L. Rev. 437; Note, 34 Am. St. Rep. 189.

9878. Abolished except as authorized by statute—(41) Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805.

9885. Beneficiaries must be certain—(51) Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805 (a gift of a bond to an individual trustee, in trust to pay the income thereof, or, in case of its payment or sale, to pay the income of the investment of the proceeds, "to and for the benefit of the Young Men's Christian Association of the City of Minneapolis, a corporation of the state of Minnesota, the same to be received and used by said corporation in perpetuity in carrying out its purposes of providing boys and young men, members of the association, with education along industrial lines," held not invalid for indefiniteness in the designation of the beneficiary; the corporation being the beneficiary, notwithstanding that it was to receive the profits of the trust upon a condition as to its use). See § 10277; 5 Harv. L. Rev. 389.

9886. For what purposes authorized—In an action brought by an administrator to set aside the transfer of personal property made by the intestate in anticipation of death, held, the evidence justified the court in finding that the property was transferred to a third party in trust to pay the expenses and debts of the intestate after his death, and to distribute the balance among the members of his family; that the wife and children acquiesced in this disposition of the property; and, ample provision having been made by the order of the trial court for the payment of the creditors, the record furnishes no ground for grievance on the part of the administrator. Ober v. Brewster, 113 Minn. 388, 129 N. W. 776.

Under R. L. 1905, § 3249, subd. 5 (G. S. 1913, § 6710), a perpetual trust in personalty may be created for the purposes therein designated, subject to the control of the district court as thereby specified. A conveyance of land in trust "to convert the same into personalty at the earliest practical moment when such conversion can be made without a sac-

rifice of the value" thereof, the rents, and, after such sale, the income from the proceeds, to be held in trust for a lawful purpose in perpetuity, held valid. Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805.

While one may not by his own act preserve to himself the enjoyment of his own property in such manner that it shall not be subject to claims of creditors or to his own power of alienation, a testator may bestow his own property in that manner upon one to whom he wishes to secure beneficial enjoyment without being subject to the claims of assignees or creditors of the latter. Shelton v. King, 229 U. S. 90.

(54) See Cushing v. Hurley, 112 Minn. 83, 127 N. W. 441; Ober v. Brewster, 113 Minn. 388, 129 N. W. 776; Note, 5 L. R. A. (N. S.) 355.

(56) See Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

(57) Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805.

(58) Moore v. Bettingen, 116 Minn. 142, 133 N. W. 561 (statute inapplicable to assignment for benefit of creditors); Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805. See Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

9887. What constitutes—(60) Macklanburg v. Griffith, 115 Minn. 131, 131 N. W. 1063; Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

9891. Revocation—Termination—The fact that a trust deed contains no power of revocation is not fatal to its validity. The absence of such a provision is a mere item of evidence or circumstance bearing on the issue whether the deed was the deliberate act of the grantor and of his mental capacity to execute the deed. Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

Termination of trusts. Note, 100 Am. St. Rep. 101.

9893. Jurisdiction of courts—Supervisory power—The provisions of subdivision 5 of G. S. 1913, § 6710, concerning the powers of the district court, become operative only after the creation of the trust, and do not affect the validity of its creation. They are ample, however, to keep the trust within the bounds contemplated by the statute. Young Men's Christian Assn. v. Horn, 120 Minn. 404, 139 N. W. 805.

An order granting leave to the trustee to mortgage a part of the property for the purpose of raising funds to pay claims, and the order of the court making such mortgage take precedence of plaintiff's notice of lis pendens, held authorized by the application therefor. Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

A clause in a trust deed held not invalid as an attempt to exclude the supervisory power of the courts over the administration of the

trust in matters of substance, but to relate to matters of mere detail in the management of the affairs. Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

RESULTING TRUSTS

9895. In general—(74) See 27 Harv. L. Rev. 439.

RESULTING TRUSTS IN FAVOR OF CREDITORS

9898. Payment of consideration for grant to another—Statute—(99) See Whitman v. Gorman, 126 Minn. 141, 147 N. W. 958.

IMPLIED TRUSTS

9912. Definition—(31) See 27 Harv. L. Rev. 449.

9914. Bona fide purchasers protected—Heirs—An heir takes subject to an implied trust. Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

CONSTRUCTIVE TRUSTS

9915. Definition—(35) See 27 Harv. L. Rev. 448.

9916. In general—The trust is not created by the court but is merely declared by the court to have arisen when a certain state of facts is shown. The court may or may not enforce the trust, according to the equities of the parties when its aid is sought; but the trust itself is a creature of equity; born of and contemporaneous with the wrongful acts upon which it is based. A constructive trust in land is an estate in land and passes and descends as such. Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

If two or more are joint owners of an option to purchase land, and jointly interested in the venture of exploring it for mineral deposits and exercising the option to purchase the land if such deposits are found, each of such joint owners sustains a confidential and fiduciary relation to the others so jointly interested in the common venture, so that, if one of them obtains the title to the land within the time of the option, upon payment of a less sum than stated in the option, and with intention to defraud the others of their rights, and such others refrain from protecting the option by tender on his false assurance that the title was taken and is held in trust for them, equity will impress a trust in their favor upon the land. Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820.

Where the president and manager of a trust company appropriated a portion of its funds, taking the same in the form of a loan, but without the knowledge or approval of the board of directors, and applied the same upon the purchase price of real property, taking the title in his own name and for his own personal use and benefit, a pro tanto construc-

tive trust arose in favor of the trust company. Proof of a balance due the trustee ex maleficio from the beneficiary upon general account does not of itself affect the existence of the trust. Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

(37) Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820; Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861; Arnold v. Smith, 121 Minn. 116, 140 N. W. 748; Cisewski v. Cisewski, 129 Minn. 284, 152 N. W. 642. See Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (property obtained by theft); Note, 115 Am. St. Rep. 774; 24 Harv. L. Rev. 672.

(38) Note, 39 L. R. A. (N. S.) 906.

9917. Breach of fiduciary duties—(41) Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861. See Digest, §§ 9916, 9920, 9921, 9934.

9918. Non-performance of void oral trust—(42) See 27 Harv. L. Rev. 460.

9919. Preventing will or deed—See Note, 106 Am. St. Rep. 94; 28 Harv. L. Rev. 237.

9920. Purchase by agent—(47) See Digest, §§ 200, 1144.

9921. Purchase on joint account—Title in one—(49) Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108. See Digest, § 4949.

9923. Murderer inheriting from his victim—It is now definitely settled in this state that a murderer inheriting from his victim cannot be charged as a trustee ex maleficio. Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292. See 24 Harv. L. Rev. 227; 27 Id. 280.

9924. Bona fide purchasers—Transferees with notice—An heir takes subject to a constructive trust. See Irvine v. Campbell, 121 Minn. 192, 141 N. W. 108.

TRUSTEES

9927a. Control of court—Payment of legacies—Trustees having the power to exercise discretion will not be interfered with by a court of equity, at the instance of the beneficiaries, so long as they are acting bona fide. A court will rarely require a testamentary trustee to anticipate the time of the payment of legacies. Shelton v. King, 229 U. S. 90. See Digest, § 9893.

9931. Liability for negligence—Investments—Liability on investments. Note, 132 Am. St. Rep. 372; 44 L. R. A. (N. S.) 873; 45 Id. 411.

Liability for money deposited in bank. Note, 45 L. R. A. (N. S.) 1.

Control of court over discretionary investments. 28 Harv. L. Rev. 216.

9934. Purchase of trust estate—One who holds the position of an administrator is incapable of acquiring for his own use an interest in the estate, and if he attempts to do so equity impresses a constructive trust

upon the title so acquired, regardless of whether such acquisition was accomplished innocently, or even without knowledge of the fact that the property belonged to the estate, or was tainted with actual fraud. Findings of the trial court, in an action by a devisee to impress a trust upon the subject of the devise in the hands of the defendant, who had acquired the same subsequently to his discharge as administrator of the estate, that the defendant acted throughout the transactions leading up to his acquisition of title with knowledge that the land belonged to the estate, that he participated therein, and that his acts were done with a view of acquiring the plaintiff's interest in the land, held sustained by the evidence. The plaintiff was entitled to recover from the defendant the value, not only of a portion of the land impressed with the trust which the defendant had conveyed to another, but also of the remaining interest in the land devised to her, which the defendant never acquired, but which had passed to third persons, and thus been lost to her, through the defendant's wrongful acts. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

(65) Arnold v. Smith, 121 Minn. 116, 140 N. W. 748; Magruder v. Drury, 235 U. S. 106. See Note, 136 Am. St. Rep. 789.

(67) See Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

(72, 73) Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

9936. Conveyances—(76) See Note, 19 Am. St. Rep. 266.

9941. Liability for interest on funds—If trust property is lost to the beneficiary through the fraud of the trustee the latter is liable for interest on the value of the property. Arnold v. Smith, 121 Minn. 116, 140 N. W. 748.

9942. Employment of counsel—(91) Fryberger v. Anderson, 125 Minn. 322, 147 N. W. 107 (one of two trustees made application for an allowance for services as attorney for the trustees—order denying application sustained—trust agreement forbade the trustees to incur any expense in connection with the trust, except upon order of a judge of the district court or the consent of all the beneficiaries).

9943a. Liability to third parties—Liabilities incurred in the administration of trusts. Rights and remedies of persons to whom such liabilities are incurred. 28 Harv. L. Rev. 725.

9944. Compensation—Reimbursement—(94) See 24 Harv. L. Rev. 725.

9944a. Distribution of trust funds—In an action by the plaintiffs, trustees under a trust agreement, against the beneficiaries, to determine the proper distribution of certain money and lands, the subject of the trust, resulting from the settlement of certain litigation, the evidence is examined, and it is held that it supports the findings of the court and that

the court adopted the proper basis of distribution. Fryberger v. Anderson, 122 Minn. 97, 142 N. W. 1. See Fryberger v. Anderson, 125 Minn. 322, 147 N. W. 107.

9945. Accounting—Effect of decree—Action to vacate decree—A decree allowing the account of a trustee is conclusive in the absence of fraud. Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

A decree allowing an interlocutory account of a trustee does not pass upon items of expenditure which are made after its entry, and upon a claim presented after its entry, when such matters were not in fact referred to in the account, and not in fact litigated, even though the facts out of which the claim arose occurred before entry of the decree. Representations as to such matters are not material in an action to set aside the decree. The correctness of items of collection reported in the account filed is settled by the decree allowing it. Appellant offered to prove various small discrepancies in the account. No reason appeared why they could not have been presented on the hearing on the account. Held no error. Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

An action will lie to vacate a decree allowing the accounts of a trustee on the ground of fraud, but to justify such relief the fraud must be material and the proof clear. Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 106 (degree of proof—representations as to transactions subsequent to allowance of account—clerical errors in a statement of account—incorrect general allegations in petition for allowance of account—effect of allowance of account—the correctness of items of collection reported in the account filed is settled by the decree allowing it—weight given findings on appeal).

Where a trustee is authorized by the trust agreement to redeem land from a foreclosure sale, to sell such land, and to retain from the proceeds of sale the amount paid for the redemption, and other sums, paying the balance to the cestui que trust, and such trustee makes the redemption, and makes a sale of the land, but refuses to account to the cestui que trust, the measure of damages is the amount of such balance of the proceeds, with interest from the time of the sale. Macklanburg v. Griffith, 115 Minn. 131, 131 N. W. 1063.

(4) Wann v. N. W. Trust Co., 120 Minn. 493, 139 N. W. 1061.

(97) See Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582 (action against administrator of thief for accounting).

9946. Death of trustee—Trust vests in district court—(5) See Note, 130 Am. St. Rep. 508.

UNDUE INFLUENCE

9949. Definition—(12) Howard v. Farr, 115 Minn. 86, 131 N. W. 1071; Slingerland v. Slingerland, 115 Minn. 270, 132 N. W. 326; Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

9950a. Burden of proof—The burden of proving undue influence is ordinarily on him who asserts it and he carries this burden throughout the trial. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

9951a. Evidence—Sufficiency—Evidence held insufficient to justify a finding that an assignment of a mortgage by a husband to his wife was obtained by undue influence. Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812.

Evidence held to justify a finding that a trust deed was not obtained by undue influence. Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

Evidence held to justify a finding that a deed from a parent to a child with a condition for the support of the parent was obtained by undue influence. Wortz v. Wortz, 128 Minn. 251, 150 N. W. 809.

See Digest, §§ 1191, 2677, 10241.

9952. Law and fact—(18) Howard v. Farr, 115 Minn. 86, 131 N. W. 1071 (evidence held not to make a prima facie case); McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306; McDonnell v. Chicago etc. Ry. Co., 130 Minn. 125, 153 N. W. 255 (evidence held insufficient to require submission to jury).

UNFAIR COMPETITION

9953. Right of competition not unlimited—(19) See State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527; Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930; Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790; Dunshee v. Standard Oil Co., 152 Iowa, 618, 132 N. W. 371; 25 Harv. L. Rev. 269; 27 Id. 139 (price cutting); 27 Id. 374.

9954. Interference with business of another—Misrepresentations as to his business—Threats—Competition in trade is lawful. One man may seek the business of a competitor, and may tell the trade not to buy of his competitor, so long as he indulges in no threat, coercion, misrepresentation, fraud or other harassing means. Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790.

The laws of competition do not countenance misrepresentation of the business or goods of a competitor. The trader is not a free lance. Fight he may, but as a soldier, not as a guerrilla. The right of competition

rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of these laws. But the weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

(20) See Buck v. Latham, 110 Minn. 523, 126 N. W. 278; Dunshee v. Standard Oil Co., 152 Iowa, 618, 132 N. W. 371; 25 Harv. L. Rev. 296; 27 Id. 153, 374.

See Digest, § 9670.

9954a. Unfair discrimination in price of petroleum—Statute—(01) State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

9955a. Measure of damages—Damages may be recovered for injury to plaintiff's business, its reputation, standing and good-will. The damages must be reasonable in amount and proved with reasonable certainty. The jury should be cautioned against allowing damages that are speculative and conjectural. When it is certain that damages have accrued to plaintiff from defendant's wrongful acts the plaintiff will not be denied a recovery of any damages whatever, solely because of uncertainty as to the amount of damages sustained. Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N. W. 930.

UNITED STATES

9956a. Territories—Status of territories and the power of Congress over them defined. State v. Farmers & Mechanics Savings Bank, 114 Minn. 95, 130 N. W. 445, 851 (reversed in part, 232 U. S. 516).

9956b. Claim against United States—Disability of federal officers—Federal officers are disabled by statute to act as counsel for or to aid in prosecuting claims against the United States, within two years after leaving the service. Van Metre v. Nunn, 116 Minn. 444, 133 N. W. 1012.

USE AND OCCUPATION

9957. When action lies—In a lease of a storeroom the lessor reserved the right of entry into the basement by means of the stairway in the rear of the room. Having subsequently occupied a part of the room for the storage of goods, the lessee, or his assignee, may maintain an action for the reasonable value thereof; the lease being silent upon the subject. Efron v. Stees, 113 Minn. 242, 129 N. W. 374.

Between vendor and purchaser. 29 Harv. L. Rev. 340.

(26) Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128; Hayes v. Moore, 127 Minn. 404, 149 N. W. 659. See Weaver v. Miss. & Rum River Boom Co., 28 Minn. 542, 11 N. W. 113; Woodward, Quasi Contracts, § 284.

9958. Pleading—(29) Hackney v. Fetsch, 123 Minn. 447, 143 N. W. 1128 (complaint construed as one for a tort and not for use and occupation). See Dunnell, Minn. Pl. 2 ed. § 901.

USURY

9961. Definition and nature—(36) Temple v. Davis, 115 Minn. 328, 132 N. W. 257; Lassman v. Jacobson, 125 Minn. 218, 146 N. W. 350. See, upon the subject in general, Note, 46 Am. St. Rep. 178.

9964. Knowledge and intent—Presumption—The knowledge or intent of parties is immaterial. If they contract for forbidden interest, though without moral wrong, not knowing that there is a usury law to violate, they are subject to the penalties of usury. Green v. N. W. Trust Co., 128 Minn. 30, 150 N. W. 229.

(45) Nelson v. Satre, 111 Minn. 60, 126 N. W. 399.

9968. Bonus or commission to agent of lender—(54) See 10 Col. L. Rev. 348.

9971. Bonus or commission to lender—(64) Nelson v. Satre, 111 Minn. 60, 126 N. W. 399.

9972. Expenses incident to loan—Payment of mortgage registry tax—A loan for which the borrower paid the maximum interest, and in addition paid the mortgage registry tax upon the mortgage given to secure the same, held not usurious. Lassman v. Jacobson, 125 Minn. 218, 146 N. W. 350.

9979. Discounting commercial paper—(74) Note, 43 L. R. A. (N. S.) 211.

9979a. Selling bonds below par—Where a telephone company borrows money for its corporate purposes, secured by mortgage on the whole or part of its property and franchises, and its bonds or notes are issued for the loan so secured, bearing interest at the rate of not exceeding 6 per cent., section 2902, R. L. 1905 (G. S. 1913, § 6224), applies. It is not usury, in the absence of an intent to evade the usury law, if the bonds or notes are sold at less than their par value, or if the lender discounts the same, although the result be an agreement to pay more than the lawful rate of interest. Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 133 N. W. 91.

9981. Sale of property as a cover for usury—(77) See Temple v. Davis, 115 Minn. 328, 132 N. W. 257.

9993. Burden of proof—(7) Temple v. Davis, 115 Minn. 328, 132 N. W. 257.

9996. Evidence—Sufficiency—Evidence held to justify a finding that a transaction was usurious. Nelson v. Satre, 111 Minn. 60, 126 N. W. 399.

(15) Temple v. Davis, 115 Minn. 328, 132 N. W. 257.

VAGRANCY

9997. Definition—(21) G. S. 1913, § 9030. See Note, 137 Am. St. Rep. 940.

VENDOR AND PURCHASER

THE CONTRACT

9998. In general—An agreement to sell implies an agreement to convey. Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

The words "agrees to convey" are apt words to indicate an executory contract, but they are not conclusive. Ordinarily, a contract is deemed executory when something remains to be done or agreed upon in the future, or when it depends upon some contingency or future act of one of the parties. But when it appears that the intention of the parties, gathered from the language of the entire contract construed in the light of the surrounding circumstances, was that nothing further was to be done under the contract to render it complete and binding, the contract is deemed an executed one, and not executory. And this intention may be found, notwithstanding a conveyance was to be made in the future. Coates v. Cooper, 121 Minn. 11, 140 N. W. 120.

(26) Haarala v. Mickelson, 120 Minn. 276, 139 N. W. 504 (finding that a transaction was a sale and not a gift held not justified by the

evidence); Coates v. Cooper, 121 Minn. 11, 140 N. W. 120 (a contract held to transfer the title presently and not to be an executory contract); Twitchell v. Cummings, 123 Minn. 270, 143 N. W. 785 (instrument held a lease and not a contract of sale); Chapman v. Propp, 125 Minn. 447, 147 N. W. 442 (a contract, whereby the first party sold and delivered a stock of merchandise and agreed to make a future cash payment, and the second party, as consideration, agreed to convey, nine months after the cash payment was made, certain land, the rents and profits of which went to the first party from the date of the contract, held not an option contract, but one for the sale of land which could not be canceled or forfeited for failure to perform except by service of the statutory notice).

9998a. Conditions precedent—A right or interest in land which depends upon a condition precedent does not vest until or unless the condition is performed, though it is or becomes for any reason impossible of performance. Hobart v. Kehoe, 110 Minn. 490, 126 N. W. 66.

9998b. Mutual and dependent covenants—A contract for the purchase of land construed, and held, that a covenant by the vendor to sell and convey upon payment of the purchase price was implied. In such a contract, the covenant by the vendee to pay the purchase price on a day named, and the covenant of the vendor to convey, are mutual and dependent covenants, and the vendor is not entitled to a reasonable time in which to perfect title in himself after the day provided in the contract for the payment of purchase price. The vendee in such a contract is entitled, upon payment of the purchase price, to the deed of the vendor, and, if the latter has no title, is not obliged to accept a deed from a stranger to the contract, but may treat the contract as breached by the vendor, and rescind. Time is of the essence of such a contract. Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

10000. Offer and acceptance—A party to whom an offer of contract is made must either accept it wholly or reject it wholly. A proposition to accept on terms varying from those offered is a rejection of the offer and a substitution in its place of the counter proposition. It puts an end to the negotiation so far as the original offer is concerned. The original offer thereby loses its vitality and is no longer pending; hence the party who has submitted the counter proposition cannot, at his own option, revive and accept the original offer which he has once virtually rejected. In order to give the rejected offer any new vitality, there must be a renewal of it, or renewed assent to it, by the party who made it. In a case within the statute of frauds, the agreement to deal on the basis of the rejected offer must be in writing. Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127.

An accepted offer to sell land for part cash and part deferred payment secured by a mortgage, but which specifies no time of payment of the mortgage debt, does not constitute a complete contract which can be specifically enforced. Where an offer of sale of real estate specifies no place where papers shall be passed and consideration paid, it is implied that this shall take place at the residence of the vendor. Where the acceptance of the offer is coupled with a condition, that the deed be sent to a designated bank at a place other than the vendor's residence, and that collection of the consideration be made through the agency of such bank, it imposes conditions not contained in the offer, and is in effect not an acceptance of the offer but a rejection of it. Rahm v. Cummings, 131 Minn. ——, 155 N. W. 201.

(29) Miller v. Miller, 125 Minn. 49, 145 N. W. 615. See Wright v. Waite, 126 Minn. 115, 148 N. W. 50.

(30) Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127.

See Digest, §§ 1740, 8499.

10001. Parties—A contract by the holder of the fee title to real property, and the holder of the life estate, to convey the property, including both estates, held a joint contract to be enforced as to both or not at all. Richardson v. Kotek, 123 Minn. 360, 143 N. W. 973.

10002. Consideration—(38, 40) See Gregory Co. v. Shapiro, 125 Minn. 81, 145 N. W. 791.

10005a. Option of vendee to return land within specified time—In a contract for the sale of lands, providing that if the vendee "desires to relinquish the land at the end of one year from date of this contract" the vendor will return him the purchase money paid, with interest, the vendee has a reasonable time after the expiration of the year in which to offer back the land and receive his money. Davis v. Godart, 131 Minn. ——, 154 N. W. 1091.

10006. Agreement as to discharge—Forfeiture of instalments paid—Termination—A contract held by its terms to terminate at the expiration of the time within which the vendors agreed to tender a valid title to the land. Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640.

A contract providing for payment of the purchase price in instalments may provide that upon default all payments previously made shall be forfeited. True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

10008. Construction—(55) Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502 (covenant by vendor to sell and convey upon payment of the purchase price implied); Coates v. Cooper, 121 Minn. 11, 140 N. W. 120 (a contract held to transfer the title presently and not to be an executory

contract); Alexander v. Ward, 126 Minn. 340, 148 N. W. 123 (vendee agreed to resell and apply proceeds to payment of purchase price); Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903 (land subject to lease—contract gave vendee possession "by assignment of lease"—right to crops—liability for plowing and breaking—deductions for payments made by vendor); Davis v. Godart, 131 Minn. —, 154 N. W. 1091 (option to vendee to relinquish land "at the end of one year from date of this contract").

10009. **Alteration**—(56) See Hubachek v. Estate of Brown, 126 Minn. 359, 148 N. W. 121.

10010. **Evidence of contract—Sufficiency**—Evidence held to justify a finding that an oral agreement for the sale and purchase of land was not made as claimed by the defendant. Ferguson v. Trovaten, 116 Minn. 19, 133 N. W. 73.

10013. **Assignment**—Where the purchaser under an executory contract for the purchase of land assigns, without the joinder of his wife, his interest thereunder for a certain consideration, part of which is paid in cash, and by the terms of the assignment it is provided that, in case of "disagreement," the portion of the price so paid shall be returned to the assignee, a subsequent demand by the assignee upon the assignor for a perfect title by warranty deed from the assignor and his wife, and the refusal of such demand by reason of the wife's refusal to join in the deed, constitutes a "disagreement"; and hence specific performance cannot be had against the assignor upon his subsequent acquisition of the legal title from his vendor. Kasal v. Hlinka, 118 Minn. 37, 136 N. W. 569.

Plaintiff seeks to have rescinded for fraud his own contract for the purchase of land, and also three other contracts assigned to him by other vendees. By assuming in the assignments the obligations of the other vendees under the contract or on the notes given for deferred payments, plaintiff, though having knowledge of the fraud, did not preclude himself from claiming the right to have such contracts rescinded, or the transfer of the notes enjoined. The assignments to plaintiff by the other vendees do not purport to assign the bare right to sue in equity for a rescission, and are not void as against public policy. Such assignments were valid, though construed to include the right to sue in equity for a rescission. An assignment by a vendee of a contract for the purchase of real estate and of all of his rights thereunder includes the rights of the vendee to all remedies, legal or equitable, that he may have against the vendor, and, among others, the right to have the contract rescinded for fraud. Cornell v. Upper Michigan Land Co., 131 Minn. —, 155 N. W. 99.

10016. Options—The mere fact that the owner of land here, who has within this state given an option to sell, conveys the same during the life of the option to a resident of an adjoining state, whose residence and place of business therein is readily ascertained and easily accessible, does not extend the time within which the option must be exercised, nor waive the tender of the purchase price within the stated time. Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820.

Where a lease contains an option to purchase the property, the obligations assumed under the lease constitute a sufficient consideration for the option. An option for the purchase of a particular parcel of land at a specified price per acre is not void for uncertainty as the acreage can be determined by measurement, and the price is payable at the time the option is exercised. Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387.

(65) Gamble v. Garlock, 116 Minn. 59, 133 N. W. 175. See Chapman v. Propp, 125 Minn. 447, 147 N. W. 442 (held not an option but a contract to convey); Wright v. Waite, 126 Minn. 115, 148 N. W. 50 (exclusive agency to sell not amounting to an option to purchase); First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

See Digest, § 5404; Note, 118 Am. St. Rep. 592.

THE DEED

10017. By whom—(67) Buswell v. O. W. Kerr Co., 112 Minn. 388, 128 N. W. 459; Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502; Schlemmer v. Nelson, 123 Minn. 66, 142 N. W. 1041.

10019. Merger of contract in deed—Waiver of conditions precedent—The contract and preliminary negotiations are admissible to prove fraud. Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118.

A deed executed by the vendor and accepted by the vendee in performance of an executory contract for the sale of land is presumed to express the final agreement of the parties, and conditions precedent to the right of either party to require performance of the contract, which are not reserved in and continued by the terms of the deed, are, in the absence of fraud or mistake, deemed waived. Whether this presumption is prima facie or conclusive is unsettled. Hubachek v. Estate of Brown, 126 Minn. 359, 148 N. W. 121.

(70) Bunkers v. Peters, 122 Minn. 130, 141 N. W. 118. See 28 Harv. L. Rev. 719.

THE TITLE

10022. Marketable title required in absence of special agreement—Waiver—(01) Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071.

(78) See Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071.

10023. Special agreements—(85) Buswell v. O. W. Kerr Co., 112 Minn. 388, 128 N. W. 459; Johnson-Van Sant Co. v. Martens, 113 Minn. 486, 129 N. W. 859.

10024. What is a marketable title—A title that may involve the purchaser in litigation to remove apparent or real defects appearing upon the face of the record is not one which the vendee will be compelled to accept. The question is, not whether a court would on the facts disclosed adjudge the title good, but whether, without the aid of a specific decision, the title is so far free from doubt that a reasonable person, acting in good faith, would accept it. The question must be considered from the standpoint of the intending purchaser, and not from the viewpoint of the court. Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640.

In general, the opinion of an attorney will not be received in evidence upon the question whether a certain title is or is not marketable; but, when it appears that all of the facts upon which the opinion was based are before the court, the admission of the opinion is not necessarily prejudicial error. Buswell v. O. W. Kerr Co., 112 Minn. 388, 128 N. W. 459.

Effect of presumption of death from absence in rendering title marketable. Cerf v. Diener, 210 N. Y. 156, 104 N. E. 126; 27 Harv. L. Rev. 768.

Effect on marketability of title of the presumption that a woman of advanced years will not have children. 27 Harv. L. Rev. 286.

(86) Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640; Note, 4 L. R. A. (N. S.) 1170; 38 Id. 1; 132 Am. St. Rep. 991.

(87) Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640; Cerf v. Dierner, 210 N. Y. 156, 104 N. E. 126.

(96) Hubachek v. Maxbass Security Bank, 117 Minn. 163, 134 N. W. 640.

10025. Held to render title defective—A vendor's lien. Buswell v. O. W. Kerr Co., 112 Minn. 388, 128 N. W. 459.

A reservation of a right of way in a deed executed by a railroad company, though not utilized as such for more than twenty years. Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071; Id., 116 Minn. 190, 133 N. W. 480.

An easement acquired by a city for a street in condemnation proceedings. Smith v. Mellen, 116 Minn. 198, 133 N. W. 566.

A failure of a guardian to give a sale bond, as required by the statutes of North Dakota. Hubachek v. Maxbass Security Bank, 117 Minn. 163. 134 N. W. 640.

(97) See Nixon v. Marr, 190 Fed. 913.

See Digest, § 2382.

10026. Held not to render title defective—The fact that it does not affirmatively appear in a deed executed by a man without the signature of a wife that he was unmarried. Judd v. Skidmore, 33 Minn. 140, 22 N. W. 83.

The existence of a county ditch across the land. Meyers v. Eames, 111 Minn. 362, 126 N. W. 1102.

The existence of a rural highway across the land. Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878.

10027. When vendor must have title—Where there was a reservation of a right of way in a deed executed by a railroad company, the procurement of a deed of release from the company a year and a half after notice of the defect in title, did not conclusively prove that the vendors were ready, willing and able to deliver a perfect title within a reasonable time after notice. Dosch v. Andrus, 116 Minn. 190, 133 N. W. 480.

Where the contract provides, expressly or impliedly, that the vendor shall sell and convey upon payment of the purchase price, the covenant of the vendor to convey and the covenant of the vendee to pay the purchase price are mutual and dependent covenants and the vendor is not entitled to a reasonable time in which to perfect title in himself after the day provided in the contract for the payment of the purchase price. Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

Where land is sold, the price to be paid in instalments, and a deed is to be delivered upon payment of the last instalment, the vendor undertakes to furnish a clear title on payment of the last instalment. It is not a breach of contract that the land was incumbered when the contract was made. In the absence of fraud or of insolvency of the vendor, the existence of such an incumbrance does not bar the vendor from recovering instalments prior to the last, nor from canceling the contract for non-payment of such instalment. True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

(16) Meyers v. Eames, 111 Minn. 362, 126 N. W. 1102; Schlemmer v. Nelson, 123 Minn. 66, 142 N. W. 1041; True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948. See Buswell v. O. W. Kerr Co., 112 Minn. 388, 128 N. W. 459.

PERFORMANCE—IN GENERAL

10033. Time as essence of contract—(26) Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502; Blied v. Barnard, 120 Minn. 399, 139 N. W. 714; True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

10034. Time to perfect title—A contract for the purchase of land construed, and held, that a covenant by the vendor to sell and convey upon payment of the purchase price was implied. In such a contract, the covenant by the vendee to pay the purchase price on a day named, and

the covenant of the vendor to convey, are mutual and dependent covenants, and the vendor is not entitled to a reasonable time in which to perfect title in himself after the day provided in the contract for the payment of the purchase price. The vendee in such a contract is entitled, upon payment of the purchase price, to the deed of the vendor, and, if the latter has no title, is not obliged to accept a deed from a stranger to the contract, but may treat the contract as breached by the vendor, and rescind. Time is of the essence of such a contract. Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

Where a party gave a bond to perfect a title within a specified time and also gave a chattel mortgage to secure the performance of the bond, it was held that time was of the essence of the agreement, and that a perfection of the title after the time stipulated did not discharge the mortgage. Blied v. Barnard, 120 Minn. 399, 139 N. W. 714.

See cases under § 10027.

10036. Tender—If a party to an executory contract renounces it, tender of performance by the other party is generally unnecessary; but, in order that such other party may recover damages for a breach, he must show ability to perform on his part. Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071.

(42) International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

10037. Preparation and delivery of deed—(52) Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

10037a. Place—If the agreement does not specify where the consideration shall be paid and the deed delivered, it is implied that it shall be done at the residence of the vendor. Rahm v. Cummings, 131 Minn. —, 155 N. W. 201.

10039. Waiver—Extending time of performance—A finding that there was no oral agreement extending the time of performance, held justified by the evidence. Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

The acceptance of one instalment payment after it becomes due does not, as a matter of law, waive prompt payment of subsequent instalments. True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

(01) Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071.

10040. Payment of purchase price—Time—The time of payment is presumptively at the time of the conveyance. Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

In case of fraud on the part of the vendor damages for the fraud cannot be applied upon the purchase price unless the vendee so elects, and

they do not operate as payment thereon until he has made such election. International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

The obligation of payment on one side and delivery of the deed and possession on the other are concurrent and dependent, in the absence of an agreement to the contrary. Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502; Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287.

(59) Haarala v. Mickelson, 120 Minn. 276, 139 N. W. 504.

10041. Abstracts of title—(60) Horn v. Butler, 39 Minn. 515, 40 N. W. 833 (agreement to furnish abstract showing good title—action to recover part payment—plaintiff held entitled to judgment on the pleadings); Howe v. Coates, 97 Minn. 385, 107 N. W. 397 (contract calling for an abstract of title construed). See Colliton v. Warden, 111 Minn. 435, 127 N. W. 1 (contract for a loan—failure to furnish abstract in time to permit examination of title); Digest, § 10023; Note, 43 L. R. A. (N. S.) 44.

ABANDONMENT

10043. In general—(62) Western Land Securities Co. v. Daniels-Jones Co., 113 Minn. 317, 129 N. W. 587.

RIGHTS AND LIABILITIES OF PARTIES

10044. Legal title in vendor—(67) Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287; Barnes v. Alexander, 232 U. S. 117 (if the vendor subsequently acquires the legal title he holds it as a trustee for the vendee).

10045. Interest of vendee—Under a contract for the sale of lands by the terms of which the vendee pays part of the purchase price, and covenants to pay the deferred payments and taxes and assessments, and has the right of possession, and enters and makes improvements, the vendee has an equitable title to which the wife's statutory marital right attaches; and this is so though the contract provides that the vendor should convey to the vendee's assignees, upon the surrender of the contract, regardless of any agreement or relation between the vendor and others taking from or through him. The plaintiff, the wife of the vendee in such a contract, sued the defendant, the vendor, upon the death of her husband, claiming that her husband and the defendant had conspired to defraud her of her marital right by canceling the contract in which the vendee was in default and conveying directly to a purchaser whom the vendee had secured. Held, that if the plaintiff could maintain an action at law to recover damages she must show that the lands had passed to innocent purchasers. Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 222.

(73–81) Kasal v. Hlinka, 118 Minn. 37, 136 N. W. 569; Wellington v. St. Paul etc. Ry. Co., 123 Minn. 483, 144 N. W. 222. See 13 Col. L. Rev. 369.

10046. Right to possession—Ejectment—Unless otherwise agreed the vendor retains the right to the possession until the purchase money is paid, or other conditions fulfilled, and may maintain ejectment against a third party. Berndt v. Berndt, 127 Minn. 238, 149 N. W. 287.

10046a. Right to crops—Where an executory contract of sale by its terms gave possession to the vendee "by assignment of lease," it was held that the vendee was entitled to the crops for that year, and that parol evidence was inadmissible to prove a contrary agreement. Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

10049. Interest, taxes, etc.—A deed, pursuant to a contract for the delivery thereof, dated December 22, 1906, was executed and tendered by the grantor, this plaintiff, to the grantee therein before the taxes for that year became due and payable. It was not then accepted, because the grantee objected to the title, but was left, at defendant's request, in a bank, which was to deliver it upon receipt of the purchase price. While so held and before delivery, the taxes became due. In this action, brought by the grantor, after delivery of the deed, for the balance of the purchase price, against the party to whom the grantor had contracted to deliver the same, held, such party cannot offset against the purchase price the taxes for 1906, paid by it without plaintiff's implied or express direction. Fritz v. O'Brien Land Co., 117 Minn. 509, 136 N. W. 301.

VENDOR'S LIEN

10051. In general—Distinctions—Superiority of vendor's lien to statutory interest of spouse. Note, 52 L. R. A. (N. S.) 540.

(94) See Haarala v. Mickelson, 120 Minn. 276, 139 N. W. 504 (finding that a transaction was a sale and not a gift and that it gave rise to a vendor's lien, held not justified by the evidence).

10055. Not assignable—Rights of creditors of vendor—Right of creditor of vendor to benefit of lien. Note, 47 L. R. A. (N. S.) 186.

10057. Waiver—Taking security—(4) See Note, 137 Am. St. Rep. 185.

10057a. Limitation of actions to enforce—See 25 Harv. L. Rev. 744.

FRAUD

10059. As to title—(7) Miller v. Bricker, 117 Minn. 394, 136 N. W. 14.

10060. As to value and situation of land—A misrepresentation of the location, with reference to a suburban street, of platted lots, involves a material matter; and where the location of such lots is shown on the plat by the government subdivision only, their location with reference to the city limits or suburban street is not a matter so readily ascertainable that a purchaser is not justified in relying on the representation made in reference thereto by the seller. Ballard v. Lyons, 114 Minn. 264, 131 N. W. 320.

The fact that the purchaser saw the land is strong but not conclusive evidence that he was not deceived. Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430.

A fraudulent representation that land is tillable is actionable. Petrie v. Clarke, 126 Minn. 119, 147 N. W. 1097.

(10) See Brown v. Andrews, 116 Minn. 150, 133 N. W. 568; Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775; Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430; Petrie v. Clarke, 126 Minn. 119, 147 N. W. 1097; International Realty and Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895; Digest, § 3479.

10061. As to quantity of land—(12) Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118.

10062. As to character of land—(14) Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775 (representations as to soil, crops and buildings); Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710 (representations that land was free from stones and had a certain number of fruit trees planted on it); Petrie v. Clarke, 126 Minn. 119, 147 N. W. 1097 (representation that land was tillable). See Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430; and cases under §§ 3479, 10060.

10065a. As to taxes—Fraudulent misrepresentations as to the amount of yearly taxes on the land held actionable. Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

10067. Reliance on misrepresentations—The vendor is not relieved of liability for fraudulent representations as to the amount of taxes on the lands by the fact that the vendee might have consulted the official tax records. Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387.

The fact that the vendee saw the land is strong but not conclusive evidence that he was not deceived. Rudolphi v. Wright, 124 Minn. 24, 144 N. W. 430.

(21) Schmeisser v. Albinson, 119 Minn. 428, 138 N. W. 775. See § 10060.

(22) See Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710.

(23) See Zimmerman v. Burchard-Hulburt Invest. Co., 111 Minn. 17, 126 N. W. 282.

10068. Evidence—Sufficiency—(25) Meyers v. Eames, 111 Minn. 362, 126 N. W. 1102 (evidence held not to show fraud); Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387; Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710; Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118; Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469; Petrie v. Clarke, 126 Minn. 119, 147 N. W. 1097.

BONA FIDE PURCHASERS

10070. Definition—The essential elements of a bona fide purchase of real property are (1) the payment of a valuable consideration; (2) good faith, without purpose to take an unfair advantage of third persons; and (3) absence of notice, actual or constructive, of outstanding rights of others. Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899.

Heirs are not bona fide purchasers. Wellendorf v. Wellendorf, 120 Minn. 435, 139 N. W. 812. See North Star Land Co. v. Taylor, 129 Minn. 438, 152 N. W. 837.

10072. What is a valuable consideration—(30) See United States v. Brannan, 217 Fed. 849 (burden of proof—recital in deed of a valuable consideration not evidence thereof).

10073. Notice—In general—A vendee cannot rely on the assurance of the vendor that an outstanding interest has terminated or been canceled. If he knows of such interest he must make reasonable investigation. Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899.

A purchaser is only chargeable with such knowledge as a reasonable inquiry would disclose. A failure to make inquiry when inquiry is a duty may be regarded as an intentional avoidance of the truth which it would have disclosed. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

(01) Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899; Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965; Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387.

(32) Kipp v. Love, 128 Minn. 498, 151 N. W. 201.

10074. Notice from title deeds—(34) Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899.

10074a. Mortgage to record owner—A mortgage given to the record owner of the property by one who is a stranger to the title is not

notice of an unrecorded deed from the record owner to the mortgagor. Crowley v. Norton, 131 Minn. ——, 154 N. W. 743.

10075. Notice from possession—The court will not speculate in cases of this character upon what might happen or be discovered if inquiry were made, but will presume, in the absence of evidence conclusively showing the contrary, that upon inquiry the true situation and claims of the possessor would be made known. The rule applies with particular force to those dealing in lands with actual knowledge of the possession of some third person. Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

Possession of a party wall held not to be such as to give notice of an unrecorded deed of the possessor. Fire Proof Storage Co. v. St. Paul Bethel Assn., 118 Minn. 47, 136 N. W. 407.

Where a vendor, instead of conveying directly to the vendee, conveys to a third party who is actually residing upon the land, and such third party conveys to the vendee, an existing judgment against such third party does not become a lien as against the vendee, as whatever interest vested in such third party through such deed forthwith became his homestead. Where the vendor held the title as security only, and the equitable owner was in possession of the property, but the records failed to disclose any interest in such equitable owner, and both the vendor and the equitable owner informed the purchaser that the vendor was the owner and that the equitable owner was merely his tenant, and in reliance thereupon the purchaser paid the full purchase price and received and recorded his title deeds, without any knowledge of the interest of such equitable owner or of a judgment which was in fact a lien thereon, the purchaser took the title free and clear from the lien of such judgment. Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720.

A tenant's possession is notice of his landlord's rights in the premises, and one who claims as a good-faith purchaser under that situation must be charged with such information as an inquiry of the landlord would have elicited. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965. See 12 Col. L. Rev. 549.

The general rule that actual possession and occupancy of land is notice to third persons of the rights and interests therein of the person so in possession has a qualified application, where the possessor stands by and participates in a sale of the land by the holder of the legal title, and fails to give the purchaser notice of rights which are not disclosed by the record, or are not apparent from an inspection of the premises. In such case, if the possessor be a tenant, his silence will estop him from subsequently insisting upon the right to remove fixtures placed by him upon the land, under an agreement for removal, where such fixtures are in nature and character apparently permanent

improvements, and such as ordinarily may be found attached to and a part of real property. As to fixtures of that character, the purchaser is under no legal obligation to make inquiry of the tenant in possession, where the latter participates in the negotiations for the sale, is cognizant of the terms thereof, and asserts no rights in or to the same. A gasolene engine and equipment placed upon a farm by a tenant for use in pumping water from a well, and under agreement for removal, is not prima facie a permanent improvement, and a purchaser of the farm is under legal obligation to inquire of the tenant respecting his rights thereto. Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714. See Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445.

(35) Hivanen v. Duluth & Iron Range R. Co., 113 Minn. 282, 129 N. W. 510; Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Riley v. Pearson, 120 Minn. 210, 139 N. W. 361; Sassen v. Haegle, 125 Minn. 441, 147 N. W. 445 (rights of tenant to fixtures); Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387; Nesland v. Eddy, 131 Minn. —, 154 N. W. 661. See Note, 13 L. R. A. (N. S.) 49.

(36) Goswitz v. Jefferson, 123 Minn. 293, 143 N. W. 720; Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387. See Locke v. Hayter, 123 Minn. 367, 143 N. W. 917 (where upon inquiry of the possessor he asserts a specific claim his possession is not notice of others).

(39) See Digest, § 6160.

10076. Constructive notice of unrecorded conveyance—(42) Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899. See Digest, § 8302.

10079a. Held bona fide purchasers or the reverse—Evidence held to justify a finding that one was a bona fide purchaser. Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398; Quinn v. Johnson, 117 Minn. 378, 135 N. W. 1000; Locke v. Hayter, 123 Minn. 367, 143 N. W. 917; Pierce v. Babler, 129 Minn. 421, 152 N. W. 836.

Evidence held to justify a finding that one was not a bona fide purchaser. Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899; White v. Hewitt, 119 Minn. 340, 138 N. W. 421; Nesland v. Eddy, 131 Minn. —, 154 N. W. 661.

10080. Pleading—See Dunnell, Minn. Pl. 2 ed. § 903.

10080a. Burden of proof—Fraudulent misrepresentations being proved in an action to rescind, the defendant, who claims title from the one guilty of the fraud, has the burden of showing himself a bona fide purchaser without notice. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

10081. Findings—A finding that during all the time involved the land was in the actual possession of plaintiff's tenant, held equivalent to a finding of constructive notice of plaintiff's possession and rights. Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

REMEDIES OF VENDOR

10082. Election of remedies—Where the vendee breached the contract by refusing to pay over money received from a resale of the land, it was held that the vendor was entitled to recover damages for the conversion of the money and to have the contract canceled. Alexander v. Ward, 126 Minn. 340, 148 N. W. 123.

(49) See Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67.

10083. Action for breach of contract—Damages—The measure of damages is the difference between the contract price and the actual or market value of the land at the time of the breach, and not the difference between the contract price and the cost of the land to the vendor. Wilson v. Hoy, 120 Minn. 451, 139 N. W. 817.

Action to recover stipulated damages. The stipulated damages being held a penalty, the plaintiff was allowed to recover his actual damages. Damages awarded held not excessive. Blunt v. Egeland, 114 Minn. 113, 130 N. W. 249.

Evidence held not to sustain a finding as to the amount of damages suffered by the vendor. Wilson v. Hoy, 120 Minn. 451, 139 N. W. 817.

(52) Wilson v. Hoy, 120 Minn. 451, 139 N. W. 817.

10084. Action for purchase price—Action for purchase price. Defence that defendant was induced to enter into the contract through the fraudulent misrepresentations of plaintiff as to the location of the land. Evidence held to justify findings for the plaintiff. Anderson v. White, 117 Minn. 402, 135 N. W. 1006.

10087. Action to rescind or cancel for default—(66) Alexander v. Ward, 126 Minn. 340, 148 N. W. 123. See Digest, § 10091.

10088. Action to rescind for fraud—See § 1188.

10089. Ejectment—(80) McClane v. White, 5 Minn. 178 (139, 146); Note, 107 Am. St. Rep. 722.

10090. Rescission by notice at common law—Stipulations for notice—In the absence of a statute, the parties to a land contract may in their contract provide for the character of the notice of cancelation required to terminate it. A stipulation in a land contract that notice of cancelation should be directed to the vendee at a post office named, "which shall constitute a good and sufficient notice and service thereof," is valid. True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

10091. Rescission by notice under statute—The statute is not unconstitutional as applied to an executory contract made and to be performed in this state for the sale of land in another state. Selover, Bates & Co.

v. Walsh, 226 U. S. 112. See True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

By the amendment of 1915 the statute is inapplicable to contracts for the sale or conveyance of land in another state or in a foreign country. Laws 1915, c. 200.

The proceeding authorized by the statute is in legal effect a foreclosure of the vendee's equity of redemption, and the statute must be followed strictly. Hage v. Benner, 111 Minn. 365, 127 N. W. 3; First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132.

The proceeding under the statute is in effect a statutory foreclosure of the contract. The statute is absolute and at the end of the prescribed time all rights under the contract cease. International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

Service on the vendee named in the contract held proper where it was not shown that the vendor had notice of an assignment of the contract. Hage v. Benner, 111 Minn. 365, 127 N. W. 3.

A service of notice on a bankrupt, during the interval between the adjudication of bankruptcy and the appointment of the trustee in bankruptcy, held valid. Christopherson v. Harrington, 118 Minn. 42, 136 N. W. 289.

Failure to pay the mortgage tax provided for by Laws 1907, c. 328, does not make the mortgage a nullity, but upon its existence the statute superimposes a state of dormancy whereby its enforcement is held in absolute abeyance until the performance of the statutory conditions precedent to its complete operation; and hence where the tax had not been paid at the time of the service of a notice to terminate an executory contract of sale of land, which, by virtue of section 1 of the statute, was subject to the tax, such notice was totally inoperative to divest or otherwise affect the vendee's equitable estate in the land, and, furthermore, derived no vitality or effect whatever from the subsequent payment of the tax. First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132.

Under the statute a copy of the notice, with proof of its service, and an affidavit showing non-compliance with the terms of the notice, may be recorded, and are prima facie evidence of the facts recited therein. First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132.

A contract, whereby the first party sold and delivered a stock of merchandise and agreed to make a future cash payment and the second party, as consideration, agreed to convey, nine months after the cash payment was made, certain land, the rents and profits of which went to the first party from the date of the contract, is held not an option contract, but one for the sale of land which could not be canceled or forfeited for failure to perform except by service of the statutory notice. Chapman v. Propp, 125 Minn. 447, 147 N. W. 442.

Where the vendor has given the statutory notice to terminate the contract for non-payment of overdue instalments, and the time limited by statute for making such payment has expired, the vendee cannot reinstate the contract by thereafter electing to apply his claim for damages in discharge of such instalments. International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

(01) Hage v. Benner, 111 Minn. 365, 127 N. W. 3.

(91) First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132; Chapman v. Propp, 125 Minn. 447, 147 N. W. 442. See Laws 1915, c. 200.

(92) Chapman v. Propp, 125 Minn. 447, 147 N. W. 442.

(93) Finnes v. Selover, Bates & Co., 114 Minn. 339, 131 N. W. 371; True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948 (contract to sell land in Washington held not a Minnesota contract within the statute though it required the approval of the land commissioner of the defendant in St. Paul); Selover, Bates & Co. v. Walsh, 226 U. S. 112.

REMEDIES OF VENDEE

10092. Election of remedies—When the vendee discovers the fraud he has an election either to rescind the contract and recover any payments that he may have made, or to affirm the contract and sue for damages for the fraud. If he elects to affirm the contract he has the right, if seasonably exercised, either to recover damages in an independent action for deceit, or to recoup such damages against the claim of the vendor for the unpaid portion of the purchase price. Damages for fraud cannot be applied upon the purchase price, unless the vendee affirms the contract instead of rescinding it, and elects to apply them thereon instead of recovering them as an independent claim. Such damages cannot operate as a payment upon the purchase price until the vendee by some appropriate proceeding, causes them to be applied thereon. Bringing an action to rescind an executory contract for fraudulent misrepresentations as to the quality of the land, and thereafter voluntarily dismissing such action because the right to rescind had been lost by laches, is not such an election of remedies as will debar plaintiff from subsequently bringing an action to enforce specific performance of such contract. Where the vendor has given the statutory notice to terminate the contract for non-payment of overdue instalments and the time limited by statute for making such payment has expired, the vendee cannot reinstate the contract by thereafter electing to apply his claim for damages in discharge of such instalments. International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

See §§ 10095–10097, 10100.

10094. Contractual remedy exclusive—(4) See True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

10095. Rescission—In general—A delay in tendering a return of the contract and demanding the money paid thereon held not to terminate a right to rescind for fraud, the other party having declared the contract forfeited on other grounds. Ballard v. Lyons, 114 Minn. 264, 131 N. W. 320.

The right to rescind for fraud may be lost by an affirmance after notice of the fraud. Mayer v. Knudsen, 126 Minn. 85, 147 N. W. 819 (a finding that the vendee did not affirm a purchase of land, subject to rescission because the wrong land was mistakenly pointed out to him as that covered by the deed, held supported by the evidence, though after knowledge of the mistake, and after demanding a rescission and restitution, the vendee gave a real estate broker an option or exclusive agency to sell for a limited period).

(5) Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502.

See § 10092.

10097. Action to rescind for fraud—The right to rescission does not depend upon actual fraud, or the motive which actuated the defendant in making the misrepresentation. It is unnecessary to show actual damages. Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710.

(16) See Ballard v. Lyons, 114 Minn. 264, 131 N. W. 320.

(17) Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710 (plaintiff held not guilty of laches). See Mayer v. Knudsen, 126 Minn. 85, 147 N. W. 819.

(19) Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710 (complaint sustained—variance as to time and place held immaterial).

(20) Meyers v. Eames, 111 Minn. 362, 126 N. W. 1102; Pennington v. Roberge, 122 Minn. 295, 142 N. W. 710.

See §§ 10092, 10095.

10097a. Action for rescission for mutual mistake—The vendor having shown to the vendee certain land as the tract offered for sale, and the sale having been consummated in the belief by both parties that the land conveyed was the land so examined, the vendee may rescind his purchase on discovering that the land conveyed was not the land examined, but a different tract. There is no statute of limitations that applies in such cases, but the right to rescind may be barred by laches. The vendee is not guilty of laches until he discovers the mistake, or is chargeable with knowledge of facts from which, in the exercise of proper diligence, he ought to have discovered it. Lindquist v. Gibbs, 122 Minn. 205, 142 N. W. 156.

10098. Action for recovery of payments—A land contract providing for payments in instalments may provide that upon default all payments

previously made shall be forfeited. Such provision is valid. True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948.

A defrauded vendee in an executory contract for the sale of land may, after discovering the fraud, entirely ignore the existence of the contract, and sue the vendor for instalments paid as for money had and received. Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387; Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 234, 148 N. W. 67.

(21) Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071; Williams v. Gilbert, 120 Minn. 299, 139 N. W. 502. See Woodward, Quasi Contracts, § 262.

(22) True v. Northern Pacific Ry. Co., 126 Minn. 72, 147 N. W. 948. See Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67.

(30) Ballard v. Lyons, 114 Minn. 264, 131 N. W. 320 (complaint sustained); Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67 (complaint held not to state a cause of action for money had and received).

10098a. Action to recover broker's commission paid by vendor—Where the purchasers of real estate made a contract direct with the owners to buy at a stipulated price, then knowing that out of such price the owners were to pay commission to a broker employed by the purchasers' agent to assist in negotiating the deal, such purchasers may not, in the absence of fraud or collusion, recover of such owners any part of this commission. The broker, under the facts found, was entitled to the reasonable commission the purchasers' agent agreed he should have, since the purchasers, knowing of this employment and that he was to have commission out of the purchase price to be paid the owners, nevertheless, without attempting to learn the amount of such commission, made the contract direct with the owners to purchase at a price which they knew included the broker's pay or commission. Since the broker rightfully received the whole of the commission, the purchasers cannot recover from those who subsequently were permitted to share it. The purchasers, having made a valid contract with the owners to buy the property for a stipulated price, then knowing that such price included the broker's commission, are not in a position to ask a reformation of the contract, so as to reduce the purchase price to the net price given in the first instance by the owners to the broker. Stumpf v. Norton, 124 Minn. 93, 144 N. W. 469.

10100. Action for damages for fraud—A vendee in an executory contract for the sale of land cannot maintain an action for damages for false representations, when it appears that he has failed to make the stipulated payments and by reason thereof the vendor has lawfully terminated the contract. The forfeiture of instalments paid before the cancelation is the result of the terms of the contract, and the loss to the vendee therefrom

is no part of the proximate damages resulting from the false representations. Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67.

(34) Olson v. Northern Pacific Ry. Co., 126 Minn. 229, 148 N. W. 67; International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895. See Digest, §§ 3841, 10101.

10101. Action for breach of contract—Damages—Bond for deed including right of way. Vendee possessed of right of way by prescription. Vendee entitled only to nominal damages for breach of bond. Liquidated damages held a penalty. Dryer v. Kistler, 118 Minn. 112, 136 N. W. 750.

The vendee need not show a present ability to make future payment under the contract. Matteson v. United States & Canada Land Co., 112 Minn. 190, 127 N. W. 629, 997.

Evidence held to justify a finding that defendant unconditionally repudiated the contract and refused to perform it. Damages awarded held not excessive. Western Land Securities Co. v. Daniels-Jones Co., 113 Minn. 317, 129 N. W. 587.

A judgment in a former action on a note given by the vendor to secure performance of his agreement to convey held not a bar to an action by the vendee for breach of the contract. Evidence held not to show that the action was prematurely brought. A sum stipulated in the contract to be paid to the vendee held to be liquidated damages and not a penalty. Chapman v. Propp, 125 Minn. 447, 147 N. W. 442.

Evidence held not to show a breach on the part of a vendor who terminated the contract by notice when the vendee refused to pay over the proceeds of a resale of the land. Alexander v. Ward, 126 Minn. 340, 148 N. W. 123.

10102. Failure to furnish abstract—(45) See Schlemmer v. Nelson, 123 Minn. 66, 142 N. W. 1041.

VENUE

PLACE OF TRIAL

10104. Not jurisdictional—(49) Hjelm v. St. Cloud, 129 Minn. 240, 152 N. W. 408.

10105. Distinction between local and transitory actions—The general rule is that actions must be brought and tried in the county where the parties reside; but if the subject-matter of the action is situated in a county other than the one in which the parties reside, and the primary purpose of the action and the principal relief sought relate to such subject-matter, then the action must be brought and tried in the county where such subject-matter is situated. It is not sufficient to bring a case within the exception to the rule that the complaint asks for relief as to the subject-matter which is merely incidental to the primary purpose of the action. State v. District Court, 120 Minn. 99, 139 N. W. 135.

An action in which the primary relief sought was an accounting, with the cancelation of a real estate mortgage as incidental relief, held transitory. State v. District Court, 120 Minn. 99, 139 N. W. 135.

An action for conversion is transitory. Hubbard Milling Co. v. Grover, 130 Minn. 103, 153 N. W. 266.

(50) See 24 Harv. L. Rev. 577; 26 Id. 291; Note, 26 L. R. A. (N. S.) 928; 22 Am. St. Rep. 22.

(54) See Banks v. Penn. Railroad Co., 111 Minn. 48, 126 N. W. 410.

10106. General rule—Where defendant resides—(55) State v. District Court, 120 Minn. 99, 139 N. W. 135; Hubbard Milling Co. v. Grover, 130 Minn. 103, 153 N. W. 266. See State v. Common Council, Waseca, 116 Minn. 40, 133 N. W. 67 (mandamus).

10107. Replevin—Where property is wrongfully taken replevin may be brought in the county where the plaintiff resides, if he so elects. Hubbard Milling Co. v. Grover, 130 Minn. 103, 153 N. W. 266.

10108. Actions relating to realty—An action by a homesteader in possession of his claim to recover damages for loss of his crops thereon, alleged to have been caused by the negligence of the defendant in maintaining, operating, and supervising his dam in a river, whereby the water of the river was cast upon the land in destructive quantities, does not necessarily involve the title to real estate. Thompson v. St. Louis River Dam & Improvement Co., 113 Minn. 425, 129 N. W. 780.

An action to set aside a deed, executed by plaintiff to defendant, on the ground of fraud, in which defendant pleads a counterclaim alleging title to the land in himself, is local. State v. District Court, 120 Minn. 526, 139 N. W. 613.

An action to cancel a deed and have the plaintiff declared the owner of the land is local. Hjelm v. St. Cloud, 129 Minn. 240, 152 N. W. 408.

(58) See State v. District Court, 120 Minn. 99, 139 N. W. 135; Hjelm v. St. Cloud, 129 Minn. 240, 152 N. W. 408.

(67, 68) See Hjelm v. St. Cloud, 129 Minn. 240, 152 N. W. 408.

10110. Actions against domestic corporations—Railroad companies and other public service corporations are deemed to reside in any county wherein their roads or lines extend and may be sued therein. The subject of venue as regards corporations is a matter lying in legislative discretion. State v. Municipal Court, 128 Minn. 225, 150 N. W. 924.

10111. Actions against foreign corporations—(72) See State v. Municipal Court, 128 Minn. 225, 150 N. W. 925.

10111a. Actions against municipal corporations—Actions against municipal corporations are inherently local. State v. District Court, 120 Minn. 458, 139 N. W. 947.

Section 275 of the home rule charter of the city of St. Cloud, providing that "all suits and proceedings by or against said city not brought before a city justice shall be brought in the district court of Stearns county, and that no other court whatever shall have original jurisdiction thereof," refers to transitory actions and to actions and proceedings pertaining to or growing out of governmental affairs of the city, and does not apply to actions for the recovery of real estate, which are governed by the general law found in section 7715, G. S. 1913. Hjelm v. St. Cloud, 129 Minn. 240, 152 N. W. 408.

10113. Actions against public officers—(74) See State v. District Court, 120 Minn. 458, 139 N. W. 947.

CHANGE OF VENUE—IN GENERAL

10113a. What constitutes—An agreement of the parties to waive a jury trial and take up the case before the judge in another county, where he resided, held not to constitute a change of venue. Lovell v. St. Clair, 126 Minn. 108, 147 N. W. 822.

10120. Time of application—(86) See Thompson v. St. Louis River Dam & Improvement Co., 113 Minn. 425, 129 N. W. 780.

CHANGE OF VENUE—BY PARTIES AS OF RIGHT

10121. Statute—Application—R. L. 1905, § 4096 (G. S. 1913, § 7722), providing that, if there are several defendants residing in different counties, the trial shall be had in the county upon which the majority of them unite in demanding, does not authorize a change of venue in an action to which a municipal corporation is a party defendant from the county in which such municipality is located, though a majority of the individ-

ual defendants unite in demanding a change to the county of their residence. State v. District Court, 120 Minn. 458, 139 N. W. 947.

Before it can be held that the action was brought in replevin solely to avoid a change of venue, it must appear conclusively that damages for conversion of the property is the only remedy available therein. It does not so appear in the present case. Where a demand is made for a change of venue of an action in replevin upon the ground that the action is in fact an action in trover which has been put in the form of an action in replevin solely to avoid a change in venue, the clerk is governed by the form of the action and cannot transfer it to another county without an order of the court; but the court may look beyond the form of the pleadings and, if it finds the claim true, should grant the change. The ruling of the court upon this question has the same force and effect as its findings upon other questions of fact. Hubbard Milling Co. v. Grover, 130 Minn. 103, 153 N. W. 266.

10122. A matter of right—Record must show right—Waiver—Refusal of clerk—Practice—A defendant held not to have waived a right to have the venue changed by appearing and objecting to a motion to strike out his amended answer. State v. District Court, 120 Minn. 99, 139 N. W. 135.

The place of trial is not changed ipso facto if the affidavit does not make out a prima facie case, under the statute, as for, example, if it shows on its face that a majority of the defendants did not demand the change. Scott v. Miller Liquor Co., 122 Minn. 377, 142 N. W. 817.

The refusal of the clerk to transmit the files is not the refusal of the court. Application to the court must be made upon such refusal before seeking a writ of mandamus from the supreme court. State v. District Court, 125 Minn. 522, 146 N. W. 480.

While a change is a matter of right upon a proper showing, the defendant must make a record showing that he is entitled to a change. If he does not do so the court in which the action is brought may treat the attempted change as a nullity. What may be the proper forum for determining a dispute as to whether a demand for a change is made in time is an open question. Peterson v. Carlson, 127 Minn. 324, 149 N. W. 536.

(91) State v. District Court, 120 Minn. 99, 139 N. W. 135.

10123. Time of demand—Stipulations—A demand for a change of venue under G. S. 1913, § 7722, must be made within twenty days after the summons is served. If made after that time, it is too late, even though the time for answering has been extended and has not yet expired. A stipulation extending the time for answering does not extend the time for making application for change of venue. In order to effect a change of venue, the defendant must make a record showing him

entitled to a change. The essentials are that defendant be a non-resident of the county in which the action is brought and that the demand be made seasonably and in due form. The fact of non-residence is made to appear by affidavit, and the truth of the affidavit in this particular can be challenged only in the court to which the venue is changed. In determining whether the demand was seasonably made, the court in which the action was commenced will look at its whole record, and if the record shows on its face that the demand was not made in time, the court will treat the demand as a nullity. Peterson v. Carlson, 127 Minn. 324, 149 N. W. 536.

10124. Affidavit—An affidavit by a corporation held not vitiated by the use of the word "home" instead of "residence." State v. District Court, 120 Minn. 99, 139 N. W. 135.

(95) Peterson v. Carlson, 127 Minn. 324, 149 N. W. 536.

10125. Where there are several defendants—The statute does not apply to an action to which a municipality is a party defendant. State v. District Court, 120 Minn. 458, 139 N. W. 947.

Under R. L. 1905, § 4096 (G. S. 1913, § 7722), where an action is brought against two defendants in the county where one of them resides, and it does not appear that the resident defendant was merely a nominal party, was in default, or was joined to prevent a change of venue, the non-resident defendant cannot, by making a demand and affidavit in which the resident defendant does not join, have the place of trial changed to the county of his residence. To effect such a change a majority of the defendants in the action must demand it. The provision of R. L. 1905, § 4096 (G. S. 1913, § 7722), that if there are several defendants, residing in different counties, the trial shall be had in the county upon which a majority of them shall unite in demanding, or, if the numbers be equal, in that whose county seat is nearest, has no application where less than a majority of the defendants demand a change of venue. Scott v. Miller Liquor Co., 122 Minn. 377, 142 N. W. 817.

10128. When parties are made defendants to prevent change—(6) Roesler v. Union Hay Co., 131 Minn. —, 154 N. W. 789 (finding that one was not made a party to prevent a change sustained).

WAGERS

10132. Void—Recovery—Stakeholders—The statute does not authorize a recovery of money lost at gambling from the keeper of the gambling place, or from the lessee of the building, unless such keeper or lessee was playing or betting, and so won the money, or unless he had some arrangement by which he shared in the money won. Nagle v. Randall, 115 Minn. 235, 132 N. W. 266.

(15) Note, 37 Am. St. Rep. 697; 119 Id. 172.

(17) Nagle v. Randall, 115 Minn. 235, 132 N. W. 266.

10133. Options and margins—Contracts for future delivery—Speculating in stocks on margin. Respective rights of broker and customer. Effect of bankruptcy of broker. Richardson v. Shaw, 209 U. S. 365.

WAIVER

10134. Definition and nature—A waiver of a notice of claim cannot be predicated upon a mere denial of liability when the claim is presented. Gamble-Robinson Commission Co. v. Northern Pacific Ry. Co., 119 Minn. 40, 137 N. W. 19.

Waiver is sometimes a technical doctrine introduced and applied by the courts to defeat forfeitures. Orr v. Sutton, 127 Minn. 37, 58, 148 N. W. 1066.

10134a. When favored—Forfeitures—Waivers, where they operate to dispense with merely formal requirements in judicial procedure and to defeat forfeitures, are, and should be, favored, but where the sole effect of a waiver is, not to defeat forfeiture, or dispense with formality, but to deprive a party of some substantial property rights without any substantial consideration, that is, in fact to work a forfeiture, a waiver should not be favored and should not be extended by the application of merely technical rules. In such cases it should be necessary, to make a waiver effective, that the party claiming it should have been led to act upon the facts going to make up the waiver to his detriment. Orr v. Sutton, 127 Minn. 37, 58, 148 N. W. 1066.

10135. What may be waived—(27) Karalis v. Agnew, 111 Minn. 522, 127 N. W. 440.

10136a. How proved—Inconsistent conduct—While it is true that, to justify the conclusion that a right given either by contract or the law has been waived, an intention to waive the right must be made to appear either expressly or by fair implication, yet the law does not require that any particular facts be shown in order that a waiver may be found.

Any conduct on the part of the person entitled to insist upon the right which is inconsistent with an intention to claim it may amount to a waiver as a matter of law; the intent to waive being a matter of legal inference from the disclosed inconsistent conduct. Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co., 129 Minn. 292, 152 N. W. 650.

WAREHOUSEMEN

10136b. Definition—A warehouseman is one who receives goods of others for storage in his warehouse for hire. State v. Minneapolis & St. L. R. Co., 115 Minn. 116, 122, 131 N. W. 1075.

10137. Regulation—License—The business of warehousemen is affected with a public interest and may be regulated under the police power. State v. Sperry & Hutchinson Co., 110 Minn. 378, 394, 126 N. W. 120.

10141. Liability for negligence—A warehouseman is liable for negligence. When the loss is established, the burden of proof is upon him of proving that the loss did not occur through his negligence. This burden is not merely a burden of going forward with the evidence, nor a shifting burden, but a burden of establishing by a preponderance of the evidence freedom from negligence. Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

In an action on a note given by a warehouseman to a bailor, held proper to allow a setoff for damages for injury to goods stored, though the warehouseman had become bankrupt. Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

(47) See G. L. Bradley Co. v. Little, 131 Minn. ——, 154 N. W. 948; Note, 136 Am. St. Rep. 212.

(50) See Rustad v. Great Northern Ry. Co., 122 Minn. 453, 142 N. W. 727.

10143. Delivery of grain for storage a bailment—(56) Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

10145. Warehouse receipts—In general—Possession of a warehouse receipt is constructive possession of the property covered. Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

Where property is not capable of actual delivery on account of its character or situation, the delivery of a warehouse receipt is sufficient to transfer the property and right of possession. Dale v. Pattison, 234 U. S. 399.

(63) Gordon v. Freeman, 112 Minn. 482, 128 N. W. 834, 1118.

(65, 66) Ammon v. Gamble-Robinson Commission Co., 111 Minn. 452, 127 N. W. 448.

10147. Lien for charges—Sale—The lien is superior to a prior chattel mortgage. Monthly Instalment Loan Co. v. Skellet Co., 124 Minn. 144, 144 N. W. 750.

Unclaimed property cannot be sold until one year after its receipt. G. S. 1913, § 6077; Klein v. W. & D. Railroad, Warehouse & Storage Co., 124 Minn. 530, 144 N. W. 1134.

10147a. Effect of chattel mortgage—After a bailment of property, the bailor gave a note to the bailee in renewal of an old note and secured it by a mortgage on the property bailed. The mortgage contained a clause to the effect that so long as the mortgagor performed the conditions of the mortgage he should remain in possession, and that in consideration thereof he agreed to keep the property in as good condition as it then was at his own expense. Held, that such a provision in no way affected the liability of the mortgagee as bailee. Huntoon v. Brendemuehl, 124 Minn. 54, 144 N. W. 426.

WASTE

10150. Definition and nature—Injury by the negligence of a stranger is not waste for which a life tenant is liable to the remainderman. Rogers v. Atlantic, G. & P. Co., 213 N. Y. 246, 107 N. E. 661. See 15 Col. L. Rev. 253; 28 Harv. L. Rev. 637.

10151. Action for waste—Damages—Statute—In the statutory action the proper basis for damages is the depreciation in the value of the premises. Evans v. Kohn, 113 Minn. 45, 128 N. W. 1006.

A life tenant may recover for injury by negligence of a stranger, not only to the life estate, but to the remainder, not on the theory of waste, but of trusteeship. Rogers v. Atlantic, G. & P. Co., 213 N. Y. 246, 107 N. E. 661. See 15 Col. L. Rev. 253; 28 Harv. L. Rev. 637.

WATERS

IN GENERAL

10156. Deepening watercourse by ditch—Prescriptive right—(96) Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094; Schuette v. Sutter, 128 Minn. 150, 150 N. W. 622.

10157a. Agreements for private drains—Estoppel—Where landowners agree to construct and maintain a ditch for the purpose of draining their lands they are estopped as against each other from obstructing the ditch. Munsch v. Stelter, 109 Minn. 403, 124 N. W. 142; Schuette v. Sutter, 128 Minn. 150, 150 N. W. 622.

In an action to compel the defendant to abate and remove an obstruction to the flow of water through a drain upon his land, and for damages, held, that upon the evidence the plaintiff had a right by prescription and by way of estoppel to the use of a ditch on the defendant's land; that the finding that the defendant did not obstruct the ditch was not justified by the evidence; that upon the obstruction of the ditch the plaintiff was entitled to relief by injunction; that plaintiff was not entitled to specific performance of the defendant's agreement to construct a system of tile drainage upon his land in place of a system of open drainage; that the action was not one for specific performance, nor was it tried as such, nor was relief appropriate to such action given, and the judgment was erroneous. Schuette v. Sutter, 128 Minn. 150, 150 N. W. 622.

10159. Fouling waters—Injunction—An injunction to restrain the defendants from removing a fence erected across a public highway by the plaintiff to prevent access to and the pollution of the waters of Vadnais Lake, from which the city of St. Paul obtains part of its water supply, held properly denied, the plaintiff having no right to place the fence where it did. Board of Water Commissioners v. Belland, 113 Minn. 292, 129 N. W. 389.

Evidence held to justify a finding that a spring of plaintiff was polluted by the waste product of the defendant's creosoting plant through the breaking of its sewer. Sandstone Spring Water Co. v. Kettle River Co., 122 Minn. 510, 142 N. W. 885.

(1) See Note, 84 Am. St. Rep. 908.

10159a. Diversion of streams—Restoration—Mandatory injunction—Where an owner of logs negligently allowed them to pile up and remain in a river so that they caused the water to back up and form a new channel, a lower riparian owner who was thereby deprived of his rights on the old channel was held entitled to a mandatory injunc-

tion for the restoration of the river to its old channel. The fact that defendant did not own the land on the banks of the river upon which it might be necessary to go in order to construct a dam to divert the river to its former channel was held not a ground for reversing the judgment awarding the injunction. Aubol v. Grand Forks Lumber Co., 131 Minn. —, 154 N. W. 968.

10159b. Obstruction of private ditches—Injunction—Where a party has a right to the maintenance of a private ditch, either by agreement, prescription or estoppel, he is entitled to an injunction against its unlawful obstruction. Schuette v. Sutter, 128 Minn. 150, 150 N. W. 622.

SURFACE WATERS

10163. Obstruction and overflow—In general—(9) See Digest, § 10167.

10165. Diversion—Doctrine of Sheehan v. Flynn—The old common-law rule that surface water is a common enemy, which each owner may get rid of as best he can, is in force in this state, except that it is modified by the rule that he must so use his own as not unnecessarily or unreasonably to injure his neighbor. To the end that land may be made productive, a landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another; but in doing so he must use all reasonable means to avoid unnecessary injury to the land of others—that is, he cannot, in draining his own land, cause unreasonable or unnecessary injury to the land below. What is reasonable in such cases depends upon the facts of the particular case. If it is practicable to deliver the water drained into a natural drain or watercourse, it is the duty of the landowner to do so. But it is not indispensable that the artificial drainage be along the natural course of drainage. Circumstances may warrant the landowner in cutting through a watershed, or in draining a marsh or pond that has no natural outlet or course of drainage. Whether the course pursued follows the natural course of drainage is an important factor in determining the question of reasonable use, but it is not controlling. Any failure to observe the duty of reasonable care in such matters is negligence and renders the landowner liable. Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462; Peterson v. Lundquist, 106 Minn. 339, 119 N. W. 50; Howard v. Illinois Central R. Co., 114 Minn. 189, 130 N. W. 946; Rieck v. Schamanski, 117 Minn. 25, 134 N. W. 228; Hopkins v. Taylor, 128 Minn. 511, 151 N. W. 194; Skinner v. Great Northern Ry. Co., 129 Minn. 113, 151 N. W. 968.

Under the doctrine of Sheehan v. Flynn, defendants were entitled to maintain ditches upon their lands for the purpose of accelerating the flow of surface waters, and under the evidence they are not responsible

for the damages resulting to plaintiff caused by the overflow of a meadow, which was the natural receptacle for such waters. Praught v. Bukosky, 116 Minn. 206, 133 N. W. 564.

The numbers of the notes to this section of the Digest were disarranged in printing. Note 19 should be 13, 13 should be 14, 14 should be 15, 15 should be 16, 16 should be 17, 17 should be 18, and 18 should be 19.

10166. Temporary diversion—Restoration to natural channel—Estoppel—(19) Canton Iron Co. v. Biwabik Bessemer Co., 63 Minn. 367, 65 N. W. 643. See Kray v. Muggli, 84 Minn. 90, 86 N. W. 882; Schulenberg v. Zimmerman, 86 Minn. 70, 90 N. W. 156.

10167. Obstruction of flow in natural channels—Damages—One who obstructs the natural flow of water through a natural watercourse is liable to an upper landowner, whose lands are damaged and flooded thereby, irrespective of negligence. One may improve his own lands and thereby interfere with the natural flow of surface waters; but in doing so he must proceed reasonably, using his own so as not to interfere unreasonably with the rights of others, and is liable for negligence. A railroad company, acquiring its right of way either by purchase or condemnation, may make appropriate use of it for the purposes for which it is required; but if it obstructs a natural watercourse, or unreasonably and negligently obstructs the flow of surface waters, it is liable for the damage which it causes. Skinner v. Great Northern Ry. Co., 129 Minn. 113, 151 N. W. 968.

10171. Marshes—Drainage—Deepening natural outlet—The drainage of a marsh without any natural outlet by a system of tile drains into another marsh, whereby the adjacent lands of plaintiff were overflowed somewhat more than usual, held justifiable. Hopkins v. Taylor, 128 Minn. 511, 151 N. W. 194.

(26) See Praught v. Bukosky, 116 Minn. 206, 133 N. W. 564; Rieck v. Schamanski, 117 Minn. 25, 134 N. W. 228.

10172. Diversion by municipalities—Fouling streams—(35) Batcher v. Staples, 120 Minn. 86, 139 N. W. 140.

See 6 Mich. L. Rev. 448 (surface waters in cities).

10173. Diversion by railroad companies—(39) Johnson v. Great Northern Ry. Co., 110 Minn. 412, 125 N. W. 1018 (cut through sand ridge—duty of company to provide a new permanent outlet—proximate cause of injury—instructions sustained); Lieberknecht v. Great Northern Ry. Co., 114 Minn. 55, 129 N. W. 1047 (cut through sand ridge and burrow pits along right of way—no error in instructions—verdict for plaintiff sustained); Howard v. Illinois Central R. Co., 114 Minn. 189, 130 N. W. 946 (natural watercourse obstructed by roadbed—large quan-

tities of surface waters collected by means of ditches without outlets—discharge of waters in destructive quantities on plaintiff's land); Howard v. Illinois Central R. Co., 116 Minn. 256, 133 N. W. 557 (id.); Watre v. Great Northern Ry. Co., 127 Minn. 118, 149 N. W. 18 (diversion of surface waters by cutting through a sand ridge—inadequate burrow pit ditches—plaintiff suffered some loss from waters for which defendant was not responsible—damages—approximation); Koltes v. Great Northern Ry. Co., 129 Minn. 281, 152 N. W. 641 (id.); Skinner v. Great Northern Ry. Co., 129 Minn. 113, 151 N. W. 968 (culvert—obstruction of natural watercourse—overflowing lands of upper proprietor—measure of damages).

10174a. Measure of damages—Where the particular tract of land damaged is part of a larger tract constituting a single farm used as such, damages may be assessed upon the basis of the decreased rental value of the whole tract as a farm. Where the injury to land is a continuing one, but subject to remedy and not in its nature permanent, a recovery may be had for damages accruing within six years of suit brought, though the cause of the injury arose prior to such six-year period; and in such case one who purchases land after the cause of the injury arose may recover damages accruing while he was owner, not antedating the six-year period. Skinner v. Great Northern Ry. Co., 129 Minn. 113, 151 N. W. 968.

DAMS AND WATER POWERS

10183. Right to maintain—In general—(52) See Simons v. Munch, 127 N. W. 266, 149 N. W. 304.

10184. Prescriptive right to maintain—(53) Baldwin v. Fisher, 110 Minn. 186, 192, 124 N. W. 1094; Simons v. Munch, 115 Minn. 360, 132 N. W. 321; Munch v. McGrath, 124 Minn. 475, 145 N. W. 163.

10185. Grants and contracts relating to dams and water powers—(54) Johnson v. Wild Rice Boom Co., 118 Minn. 24, 136 N. W. 262 (contract to refrain from diverting water from a stream so as to interfere with the operation of a mill—measure of damages for breach); Munch v. McGrath, 124 Minn. 475, 145 N. W. 163 (lease of dam requiring lessee to keep it in repair and pay a fixed annual rental—lease contemplated use of dam for logging operations and for no other purpose—lessors, having been compelled to pay adjacent landowners for flooding of their land, held not entitled to recover from the lessees).

10187. Dams to maintain waters in lakes at a uniform height—(58) Stenberg v. Blue Earth County, 112 Minn. 117, 127 N. W. 496 (action to enjoin proceedings under Laws 1907, c. 104—held that plaintiff, a riparian owner, was not damaged by the proceedings—state may restore waters to their natural level); State v. District Court, 119 Minn.

132, 137 N. W. 298 (in proceedings under the provisions of section 2552, et seq. R. L. 1905, for raising and maintaining the waters of Foot lake in Kandiyohi county, certain alleged irregularities held not fatal to the validity of the proceedings—the rights of riparian owners in land below the ordinary high-water mark are subject to the superior rights of the public; and, where a lake or other body of public water is raised to a point not beyond the ordinary high-water mark, under the authority of the above statute, the riparian owner is not entitled to compensation—the report of the assessors in such proceedings, to the effect that no lands would be damaged by raising the lake, held sustained by the law and the evidence).

10188. To what height water may be raised—(59) See Erdman v. Watab Rapids Power Co., 112 Minn. 175, 127 N. W. 487, 128 N. W. 454.

10189. Definition of natural state of water in stream—(60) See Stenberg v. Blue Earth County, 112 Minn. 117, 127 N. W. 496 (what constitutes the natural or usual level of a lake—vegetation as a watermark).

10191. Bursting of dam—Liability—The erection and maintenance of a dam across a natural watercourse for the purpose of utilizing a water power is not a nuisance, nor is the owner thereof an insurer of its safety, but he is bound to exercise in the premises a degree of care proportionate to the injuries likely to result to others if it proves insufficient. The dam must be sufficient to resist, not merely ordinary freshets, but such extraordinary floods as may reasonably be anticipated. City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817; Barnard v. Fergus Falls, 115 Minn. 506, 132 N. W. 998. See 24 Harv. L. Rev. 412.

Action by a lower riparian owner for damages from the bursting of a dam of an upper owner. Rule of res ipsa loquitur held applicable to facts alleged, but not to aid complaint. Complaint held insufficient on demurrer. City Water Power Co. v. Fergus Falls, 113 Minn. 33, 128 N. W. 817.

Action for damage to a stock of goods in a basement flooded by the bursting of a dam of defendant. Verdict for defendant. New trial properly denied. No error in the admission of evidence. Rule of res ipsa loquitur applicable. Barnard v. Fergus Falls, 115 Minn. 506, 132 N. W. 998.

10193. Removal—Prescriptive right to maintain—Estoppel—(64) See Baldwin v. Fisher, 110 Minn. 186, 124 N. W. 1094; 11 Col. L. Rev. 770.

10194. Abandonment—(65) See Note, 32 L. R. A. (N. S.) 47.

10196. Action for unlawful flowage—(67) Wadman v. Trout Lake Lumber Co., 130 Minn. 80, 153 N. W. 269.

(69) Thompson v. St. Louis River Dam & Improvement Co., 113

Minn. 425, 129 N. W. 780 (evidence as to the time and labor expended in clearing land of the debris thrown upon it by the water, in preparation for next year's crops).

(70) Thompson v. St. Louis River Dam & Improvement Co., 113 Minn. 425, 129 N. W. 780; Wadman v. Trout Lake Lumber Co., 130 Minn. 80, 153 N. W. 269.

(72) Liimatainen v. St. Louis River Dam & Improvement Co., 119 Minn. 238, 137 N. W. 1099 (res judicata).

(73) Gruben v. Trout Lake Lumber Co., 130 Minn. 531, 153 N. W. 271 (damage to grass—verdict for $550 reduced by trial court to $375 and sustained on appeal); Wadman v. Trout Lake Lumber Co., 130 Minn. 80, 153 N. W. 269 (damage done not large—verdict for $300 reduced to $225 by trial court and sustained on appeal).

10198. Impairment of water power—Damages—Upon a breach of a contract to refrain from diverting the water from a stream so as to interfere with the operation of a mill, used for manufacturing flour, the motive power of which is the water of the stream, the contractee may recover as damages profits which he would have made except for the breach. Johnson v. Wild Rice Boom Co., 118 Minn. 24, 136 N. W. 262; Id., 123 Minn. 523, 143 N. W. 111.

WEIGHTS AND MEASURES

10201. Standard weights and measures—Offences—Laws 1911, c. 156, establishing a department of weights and measures, has been sustained against various constitutional objections. State v. Armour & Co., 118 Minn. 128, 136 N. W. 565; State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962.

A specific intent to defraud is not an essential element of an offence under the statute. The represented weight of an article may include the weight of the wrappings without offending the statute. Sales in packages are not necessarily forbidden. What constitutes a prima facie case for the state in a prosecution under the statute defined. State v. Armour & Co., 118 Minn. 128, 136 N. W. 565.

This statute is a police regulation, and changes the prior law so that intent to defraud or commit wrong is not an element of the offence of selling or exposing for sale less than the quantity represented, and the exclusion of evidence tending to show absence of such intent was not error. State v. People's Ice Co., 124 Minn. 307, 144 N. W. 962.

The statute does not forbid the use of untested and unsealed scales by the owner for his own exclusive purposes. Northwestern Elevator Co. v. Great Northern Ry. Co., 121 Minn. 321, 141 N. W. 298 (weights

given by unsealed scales held admissible on an issue between a shipper and a carrier as to the quantity of grain shipped).

10201a. Municipal regulation—The authority to define and provide a uniform standard of weights and measures rests with the legislature, under the police power of the state. And though that authority is exclusively legislative, the enactment of such regulations and restrictions in the use and application of the standard so prescribed, as local conditions may justify, may be delegated to municipal corporations. An ordinance providing for the weighing of coal on municipal scales held valid. State v. Eck, 121 Minn. 202, 141 N. W. 106.

10202. State weighmaster of grain—Record—Certificates—The records in the office of the state weighmaster made pursuant to rules established by the Railroad and Warehouse Commission are competent evidence of the facts recorded therein as required by such rules. Such rules require state weighers, at the time of weighing loaded cars, to make and enter in the record notations as to any bad order condition of such cars, and such notations so entered become a proper part of such record. Copies of such records are not admissible in evidence unless duly authenticated, but such authentication may be waived, and was waived in this case. St. Anthony & Dakota Elevator Co. v. Great Northern Ry. Co., 127 Minn. 299, 149 N. W. 471.

WHARVES

10202a. Injury to wharf by vessel—(85) See 10 Col. L. Rev. 372.

10202b. Municipal wharves—Liability for negligence—Municipalities maintaining public wharves, landings, and docks for hire are required to use reasonable care to keep them in safe condition for use. Hoppe v. Winona, 113 Minn. 252, 260, 129 N. W. 577.

WILLS

IN GENERAL

10203. What constitutes a will—A trust deed, made by the deceased some years prior to his death, provided that the trustee should take possession of personal property, transferred to him as trustee, consisting of secured notes, should pay the accruing interest to the grantor, should reinvest the principal in real estate securities, and upon his death should pay the principal to his children. Held, that such trust deed was not testamentary in character. Smith v. Wold, 125 Minn. 190, 145 N. W. 1067. See Note, 1 L. R. A. (N. S.) 315.

A direction to a trustee to deliver the subject of a gift to the donee only in case of the death of the donor is not decisive of testamentary character. Nor is a statement of a donor that he wants to leave the property to the donee. Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

What constitutes a will. Note, 89 Am. St. Rep. 486.

Informal testamentary phraseology. Note, 41 L. R. A. (N. S.) 39.

(89) Ekblaw v. Nelson, 124 Minn. 335, 144 N. W. 1094: Dickson v. Miller, 124 Minn. 346, 145 N. W. 112; Smith v. Wold, 125 Minn. 190, 145 N. W. 1067.

10206a. Consent of spouse—A written consent by the husband to the devise by the wife of her real property does not require a consideration to support it. Such consent by the husband is valid and effectual, though given in furtherance of a void written agreement between husband and wife, by which each, in terms, released all interest in the other's real property; the wife having performed her part of the agreement. Erickson v. Robertson, 116 Minn. 90, 133 N. W. 164. See Digest, §§ 4282, 10301; Note, 37 L. R. A. (N. S.) 1133.

10207. Contracts to make a devise or bequest—(96) Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025; Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812. See Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455; Odenbreit v. Utheim, 131 Minn. —, 154 N. W. 741; § 8789a; Note, 44 L. R. A. (N. S.) 733; 25 Harv. L. Rev. 571; 28 Id. 241; 3 Mich. L. Rev. 84.

TESTAMENTARY CAPACITY

10208. Test—One who is unable to understand, without being prompted, the nature and importance of making a will, is not qualified to do so. Schleiderer v. Gergen, 129 Minn. 248, 152 N. W. 541.

(4) Note, 63 Am. St. Rep. 80.

(97–4) Buck v. Buck, 126 Minn. 275, 148 N. W. 117; Schleiderer v. Gergen, 129 Minn. 248, 152 N. W. 541; Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131; Lewis v. Murray, 131 Minn. —, 155 N. W. 392. See Note, 27 L. R. A. (N. S.) 2; L. R. A. 1915A 443.

(98) See Crowley v. Farley, 129 Minn. 460, 152 N. W. 872.

10209. Burden and order of proof—(5) Kennedy v. Kelly, 123 Minn. 259, 143 N. W. 726.

10210. Evidence—Admissibility—Presumptions—Where the issue is the mental capacity of a testator at the time of making a will, evidence of incapacity within a reasonable time before and after is relevant and admissible. A judgment in proceedings for the appointment of a guardian of an incompetent person is admissible in evidence, but not con-

clusive, in any litigation, to prove the mental condition of the person at the time the judgment is rendered, or at any past time during which the judgment finds the person incompetent. When such a judgment is rendered in proceedings instituted after the will is made, and does not find the testator incompetent at such prior time, it is competent evidence, and whether it should be admitted depends upon its probative value as tending to prove the fact at issue. It stands on the same basis as would other evidence of the mental condition of the testator at a subsequent time. Whether it has probative value, or is too remote, is largely for the trial court to determine. In this case, the decision of the trial court that the exclusion of such judgment was prejudicial error is sustained. That the application was not to have the testatrix declared insane, but only to have a guardian appointed because of the impairment of her mental faculties by reason of old age, and her consequent inability to manage her affairs, did not render the adjudication inadmissible. The petition for such an adjudication is not admissible on the ground that it was made by one of the devisees, and therefor an admission against interest, when there are others financially interested in sustaining the will. McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412.

That a person is frugal, saving and appreciative of the value of property, tends to negative the existence of an unsound mind. Buck v. Buck, 126 Minn. 275, 148 N. W. 117.

A person who has been adjudged insane and committed to an insane hospital, though at liberty on parole, but not discharged, is presumed to be mentally incompetent to make a will. The presumption is not conclusive, and may be rebutted by showing that the derangement of mind was not general, but limited, and had no necessary reference to the subject-matter of the will. Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

Declarations of beneficiary or executor to show lack of testamentary capacity or undue influence. Note, 39 L. R. A. (N. S.) 731.

(9) See In re Cunnion, 201 U. S. 123.

10211. Opinion evidence—Whether a physician consulted by the testator professionally may testify as to the complaints made to him by the testator as to the latter's condition, is an open question. Buck v. Buck, 126 Minn. 275, 148 N. W. 117.

(14) See Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854.

(17) See Buck v. Buck, 126 Minn. 275, 148 N. W. 117.

10212. Evidence—Sufficiency—(18) Kletschka v. Kletschka, 113 Minn. 228, 129 N. W. 372; Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854; Kennedy v. Kelly, 119 Minn. 531, 137 N. W. 456; Id., 123 Minn. 259, 143 N. W. 726; Buck v. Buck, 126 Minn. 275, 148 N. W. 117; Schleiderer v. Gergen, 129 Minn. 248, 152 N. W. 541; Crowley v. Farley, 129 Minn. 460,

152 N. W. 872 (finding of a want of testamentary capacity sustained); Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131 (finding of capacity sustained).

EXECUTION

10214a. What constitutes a signature—See Note L. R. A. 1915D, 902.

10218. Attestation—It is probably the rule that a request to sign as witnesses, made by one intrusted with the preparation of the will, in the presence and hearing of the testator and the witnesses, is to be taken as the request of the testator if he acquiesces. Madson v. Christenson, 128 Minn. 17, 150 N. W. 213.

(25) Note, 38 L. R. A. (N. S.) 161; 114 Am. St. Rep. 209.

10219. Competency of witnesses—See Note, 77 Am. St. Rep. 459.

10221. Findings of due execution or the reverse—(36) Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854; Madson v. Christenson, 128 Minn. 17, 150 N. W. 213.

ALTERATIONS AND ERASURES

10224. Attestation—(40) See Note, 51 L. R. A. (N. S.) 169.

REVOCATION AND REVIVAL

10226. Statutory modes exclusive—(43) See Note, 28 Am. St. Rep 344.

10227. Effect of partial cancelation—(47) Note, 38 L. R. A. (N. S.) 797; 48 Am. St. Rep. 197.

10234. By transfer of property devised—Ademption—A conveyance by the testator, after the execution of his will and before his death, of specific property therein devised to a certain person, the conveyance being to such devisee, is an ademption or satisfaction of the specific legacy, and not a revocation of the will. As to all other matters, such as the payment of debts, and devises and bequests to other persons, the will remains in force and effect. Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010. See Note, 95 Am. St. Rep. 342.

10237a. Revival—Where a subsequent will is refused probate on the ground of want of testamentary capacity a prior subsisting and valid will is revived and may be probated. See Crowley v. Farley, 129 Minn. 460, 152 N. W. 872.

UNDUE INFLUENCE

10238. What constitutes—(60) Buck v. Buck, 122 Minn. 463, 142 N. W. 729; Lewis v. Murray, 131 Minn. ——, 155 N. W. 392. See Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

(62) Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

10238a. Effect—Partial invalidity—The fact that a particular gift in a will is procured by undue influence does not necessarily invalidate the whole will. Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

10239. Evidence—Admissibility—The failure of the testator to provide for a contesting child does not raise a presumption of undue influence, but may be considered as an item of evidence in connection with all other evidence in the case. Kletschka v. Kletschka, 113 Minn. 228, 129 N. W. 372.

Undue influence necessary to set aside a will, must appear from affirmative evidence, and, apart from declarations of the testator, be of a character to destroy the free agency of the testator in the disposition of his property. Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

(63, 65) Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

(68) See Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980; Note, 107 Am. St. Rep. 459.

(69) See Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131.

10240. Burden of proof—There is no definite, uniform rule as to the amount or character of evidence which will make out a prima facie case of undue influence and shift the burden of going on with the evidence. Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

(71, 72) Buck v. Buck, 122 Minn. 463, 142 N. W. 729. See 24 Harv. L. Rev. 329.

10241. Degree of proof required—(74) See Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

10242. Law and fact—(75) Buck v. Buck, 122 Minn. 463, 142 N. W. 729. See Grattan v. Rogers, 110 Minn. 493, 126 N. W. 134 (issue submitted to a jury and subsequently withdrawn and determined by the court); Lewis v. Murray, 131 Minn. ——, 155 N. W. 392 (id.).

10243. Findings of undue influence or the reverse—(76) Grattan v. Rogers, 110 Minn. 493, 126 N. W. 134; Collins v. Dowlan, 118 Minn. 214, 136 N. W. 854; Moe v. Paulson, 128 Minn. 277, 150 N. W. 914; Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131; Lewis v. Murray, 131 Minn. ——, 155 N. W. 392. See Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

(77) Kennedy v. Kelly, 119 Minn. 531, 137 N. W. 456; Buck v. Buck, 122 Minn. 463, 142 N. W. 729.

(78) Kletschka v. Kletschka, 113 Minn. 228, 129 N. W. 372; Chamberlain v. Gordon, 129 Minn. 523, 151 N. W. 529.

PROBATE

10244. Who may offer will for probate—An executor named in a will may offer it for probate. He is the "champion of the will." Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

10246. Proof—Witnesses—Where a will is contested, neither party is limited to the testimony of the subscribing witnesses, and either party may present other evidence to overcome the adverse testimony of such witnesses. The questions in controversy are to be determined from all the evidence bearing thereon, and not from the testimony of the subscribing witnesses only. The statute requires that all subscribing witnesses, "who are within the state and competent and able to testify, shall be produced and examined." Where the proponent called a subscribing witness and examined him as to the manner in which the will was executed, the failure to examine him as to the sanity of the testator will not defeat the will, if such sanity be proven by other evidence. By calling him as a witness, his testimony was made available, and, if contestants desired his testimony upon matters omitted by proponent, it was incumbent upon them to examine him in respect thereto. It was error to permit a legatee under the will to testify to statements made by the testator at the time he executed the will, but the validity of the will was conclusively established outside such testimony, and the error was without prejudice. Madson v. Christenson, 128 Minn. 17, 150 N. W. 213.

(81) See Note, 50 L. R. A. (N. S.) 861 (lost will); 47 L. R. A. (N. S.) 722 (depositions of attesting witnesses out of state).

(83) See Note, 51 L. R. A. (N. S.) 927.

10247. Foreign wills probated elsewhere—(88) See Note, 113 Am. St. Rep. 211.

10250. Burden of proof—(98, 99) Kennedy v. Kelly, 123 Minn. 259, 143 N. W. 726. See § 10240.

10251. Who may contest—A beneficiary under a prior will of a testator has the right to contest the probate of a subsequent will which, if allowed, would take away or lessen the interest of such beneficiary, providing there is sufficient proof of the due execution and validity of the prior will. The burden of the proof in this respect is upon the contestant, but it is not necessary to probate the prior will or offer it for probate, or in all cases to make the formal proof necessary for the admission of a will to probate. Where the prior will, apparently executed and attested according to law, is received in evidence without objection, and the signature and mental capacity of the testator is proved this is sufficient proof, in the absence of evidence to the contrary,

to warrant a finding that the prior will was legally executed and attested, and that a beneficiary thereunder has the right to contest the subsequent will. It is not necessary for the court in a will contest to make a specific finding of the facts upon which the right of the objector to contest the will depends. Crowley v. Farley, 129 Minn. 460, 152 N. W. 872.

10251a. Agreements not to contest—Family settlements—An agreement on the part of a brother of a deceased person with another brother and sister to refrain from contesting the will of decedent in consideration of the promise of the latter, beneficiaries named in the will, to pay to him a certain sum of money, is not, on the facts stated in the opinion, a "family settlement," within the meaning of the law upon that subject. There was no basis, legal or otherwise, for the proposed contest, nor did the facts furnish reasonable cause for the belief that grounds therefore existed, and plaintiff's threat of contest was not made in good faith. Held, that the agreement to refrain from contesting the will was not a legal or valid consideration for the promissory notes given by defendants in consideration of the agreement. Montgomery v. Grenier, 117 Minn. 416, 136 N. W. 9. See Thayer v. Estate of Pray, 111 Minn. 449, 127 N. W. 392; Note, 13 L. R. A. (N. S.) 484.

10252. Scope and effect—A probate of a will in another state does not affect the title to land in this state. A probate in one state does not affect a bona fide purchaser of land in another state from an heir and before the probate of the will in the state where the land is located. Barnes v. Gunter, 111 Minn. 383, 395, 127 N. W. 398.

10253. Vacation—(5) See § 7784.

10256. Of destroyed will—(10) See Note, 50 L. R. A. (N. S.) 861; 110 Am. St. Rep. 445.

CONSTRUCTION

10257. In general—A court cannot give effect to an unexpressed intention of the testator, or add a term to the will or modify its language in order to make what seems to the court a more reasonable or proper disposition of the property. Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110.

Where an absolute estate is granted in unambiguous language, subsequent ambiguous language limiting the grant to an estate for life will be disregarded. Elberg v. Elberg, 155 N. W. 751.

One of the highest duties resting upon a court is to carry out the intentions of a testator as expressed in valid provisions not repugnant to well settled principles of public policy. Shelton v. King, 229 U. S. 90.

Striking out or disregarding words inserted by mistake. See 26 Harv. L. Rev. 212.

(11) Lohlker v. Lohlker, 112 Minn. 273, 127 N. W. 1122; Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

(13) Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

10260. Resort to surrounding circumstances—(22) See Lohlker v. Lohlker, 112 Minn. 273, 277, 127 N. W. 1122.

10261. Extrinsic evidence—(29) Extrinsic evidence to identify legatee or devisee. Note, 47 L. R. A. (N. S.) 514.

See Note, 50 Am. St. Rep. 279.

10263. Popular sense of words—(31) Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498.

10269. Intention to disinherit children—Statute—Parol evidence—Under section 7260, G. S. 1913, which provides that, if a parent omit to provide for a child in his will, such child shall take the same share of the estate which he would have taken if such parent had died intestate, "unless it appears that such omission was intentional," parol testimony is admissible to show that such omission was intentional. The burden is upon those claiming that such omission was intentional to prove such fact. Whitby v. Motz, 125 Minn. 40, 145 N. W. 623.

A parent may by will entirely disinherit a child. The rights given by G. S. 1913, § 7260, to a pretermitted child must be enforced in the probate court, and if not so enforced are barred by a final decree of distribution. Odenbreit v. Utheim, 131 Minn. ——, 154 N. W. 741.

10273. Various words and phrases construed—A devise of a homestead to a wife with a right of children to occupy it with her "until they should have homes of their own." Lohlker v. Lohlker, 112 Minn. 273, 127 N. W. 1122.

The word "leave" is of common use in wills to indicate a testamentary intent. Innes v. Potter, 130 Minn. 320, 153 N. W. 604.

10274. Particular wills construed—(67) Casey v. Brabec, 111 Minn. 43, 126 N. W. 401; Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398; Lohlker v. Lohlker, 112 Minn. 273, 127 N. W. 1122; Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498; Bemis v. N. W. Trust Co., 117 Minn. 409, 135 N. W. 1124; Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110; Larson v. Curran, 121 Minn. 104, 140 N. W. 337; Greenman v. McVey, 126 Minn. 21, 147 N. W. 812; Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

DEVISES AND LEGACIES

10275. Definitions—(68) Baldwin v. Zien, 117 Minn. 178, 184, 134 N. W. 498.

10275a. Validity—Equitable titles—Residuary clauses—A devise of an estate for life with remainder to the children of the life tenant, with a condition that if the life tenant sells his estate the remainder shall vest

in the children immediately, has been sustained. **Barnes v. Gunter**, 111 Minn. 383, 127 N. W. 398.

Equitable titles are subject to devise and if not specifically bequeathed form part of the residuary estate. They are covered by a residuary clause in the words, "all the rest and residue of my estate, real, personal and mixed, which I now possess or which may hereafter be acquired by me." Mayer v. American S. & T. Co., 222 U. S. 295.

10276. **Demonstrative legacies**—Bequests of stocks, bonds, and the like. Note, 11 L. R. A. (N. S.) 49.

10277. **To fluctuating class of persons**—The testator herein gave three funds to the appellant herein, in trust to pay the annual income therefrom to each of his three sons during his life, and at his death to pay two-thirds of the fund held for his benefit to the trustees of a home for aged men and women, which the testator attempted by his will to found and endow; but the provisions as to the proposed home are invalid. Held, that the provisions for the benefit of the sons were not so connected with and dependent upon those for the home that they must also fail. Bemis v. N. W. Trust Co., 117 Minn. 409, 135 N. W. 1124.

See Note, 73 Am. St. Rep. 413.

10278. **Conditional**—(71) Barnes v. Gunter, 111 Minn. 383, 127 N. W. 398. See Note, L. R. A. 1915C, 1012 (attainment of a certain age as a condition).

10280. **Uncertainty**—General bequest for charity or religion. Note, 37 L. R. A. (N. S.) 993.

(01) Casey v. Brabec, 111 Minn. 43, 126 N. W. 401.

See § 9885.

10281. **Description of the property**—Wills sometimes refer to a deed for a description of the property. Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110.

10285. **In trust**—(82) See Bemis v. N. W. Trust Co., 117 Minn. 409, 135 N. W. 1124.

10286. **Charge on devise**—A residuary devisee held to take the homestead free from liability for any of the debts of the testator. Larson v. Curran, 121 Minn. 104, 140 N. W. 337.

(85) Larson v. Curran, 121 Minn. 104, 140 N. W. 337.

10287. **Particular estates held to pass**—(91) Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

10289. **Partial invalidity**—If a will contains distinct and independent provisions, some of which are valid and others invalid, effect must be given to the valid ones, and there is an intestacy only as to that part of his estate affected by the invalid ones; but when the several provi-

sions of the will are so dependent upon and connected with each other that they cannot be separated, without defeating the general intent of the testator, they are all void, and there is a total intestacy. Bemis v. N. W. Trust Co., 117 Minn. 409, 135 N. W. 1124.

10290. Presumed a bounty—(97) Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498.

10291. Death of devisee or legatee—Lapse—A testator devised a life estate in all his property, real and personal, to his wife. The will provided that after her death the property should be converted into money and specific sums should go to three daughters named, and the balance to a fourth daughter named. The fourth daughter outlived her father and was married after his death. She died before her mother, leaving no issue. Her husband survived her. Held, that the provision in the will for a sale and division of property amounted to an equitable conversion as of the date of the testator's death; that the fourth daughter took a vested estate in remainder upon the death of the testator; and that upon her death her estate passed to her husband. Johrden v. Pond, 126 Minn. 247, 148 N. W. 112.

10292. Lapsed devises and legacies—(1, 2) Note, 44 L. R. A. (N. S.) 789; 29 Harv. L. Rev. 109.

10297. When vest—Conversion of realty into personalty—Though there is no express direction in a will to sell the real estate of the testator and convert it into personalty, where it appears that the testator must have contemplated that it would be necessary to sell the real estate in order to carry out the provisions of the will, the direction is implied and there is an equitable conversion of the realty into personalty. Where the sale is directed, expressly or by implication, at a specified time in the future, the conversion takes place as of the date of the testator's death. Between that time and the actual sale the legatees have no interest in the land that can be levied upon or sold on execution. Greenman v. McVey, 126 Minn. 21, 147 N. W. 812.

(10) Johrden v. Pond, 126 Minn. 247, 148 N. W. 112 (vested remainder in personalty—equitable conversion of realty into personalty as of the date of the death of the testator).

See Note, 10 Am. St. Rep. 471.

10298. Recovery—An agreement to refrain from legal proceedings to recover a legacy held to have a sufficient consideration. Thayer v. Pray, 111 Minn. 449, 127 N. W. 392.

ELECTION TO TAKE UNDER WILL

10301. By spouse—Statute—The right given by section 3649, R. L. 1905 (G. S. 1913, § 7239), to the surviving husband or wife to renounce

the testamentary disposition of property made by the deceased spouse, is personal to the survivor, and does not pass to his or her personal representative or heirs. Such a renunciation not having been made by the surviving wife during her lifetime, though at all times subsequent to the death of her husband insane, cannot be made on her death by the administrator of her estate, though it might perhaps, during her life, and within the time prescribed by statute, have been made by her guardian, or by the probate court for her. Estate of Nordquist v. Sahlbom, 114 Minn. 329, 131 N. W. 323. See Note, 11 L. R. A. (N. S.) 379.

The election of a spouse to take under a will must be construed with reference to the intention of the testator as expressed in the will. Baldwin v. Zien, 117 Minn. 178, 134 N. W. 498.

Where a testator bequeathed to his wife the balance of his personal property after the payment of his debts and funeral expenses, and after directing the sale of all his lands and making provision for the payment of debts and certain legacies from the proceeds thereof, ordered that the balance should be invested, and that his wife should be paid a certain sum annually for her support during her lifetime, with certain legacies to his children after her death, the widow's written acceptance of the provisions of the will, duly filed in the probate court, precluded her from claiming the proceeds of the sale of the testator's homestead as being exempt from liability to the payment of a contingent claim duly allowed against the testator's estate. Connelly v. McMahon, 122 Minn. 113, 142 N. W. 16.

The surviving spouse of a non-resident testator may, though also a non-resident, renounce the will and claim as statutory heir. Such a renunciation, when properly made, will estop the survivor from thereafter claiming under the will in this state or elsewhere. The renunciation contemplated by G. S. 1913, § 7239, must be made in the probate court of this state in which the foreign will is proved, or, if already proved elsewhere, in which it is allowed and filed; and the existence or non-existence in other states of statutes relating to election can be material only upon a question of common-law estoppel. Boeing v. Owsley, 122 Minn. 190, 142 N. W. 129.

Under the provisions of G. S. 1913, §§ 7237, 7238, 7239, 7243, the surviving spouse who has consented to her husband's will, and codicils added thereto, cannot arbitrarily withdraw her consent and elect to take under the statute instead of under the will. Where the husband procures his wife to consent in writing to his will and to codicils added thereto there is cast upon him the affirmative duty of making a fair disclosure of his property so that she may have knowledge of the effect of the will upon her rights and intelligently determine whether she will consent; and if such disclosure is not made, the surviving wife, not being guilty of laches, and not being precluded from doing so by contract

or estoppel, may, after his death, rescind her consent and elect to take under the statute. State v. Probate Court, 129 Minn. 442, 152 N. W. 845.

What constitutes election. Note, 49 L. R. A. (N. S.) 1072.

(19) Jones v. Jones, 75 Minn. 53, 77 N. W. 551; Nordquist v. Sahlbom, 114 Minn. 329, 131 N. W. 323.

(21) Nordquist v. Sahlbom, 114 Minn. 329, 131 N. W. 323.

WITNESSES

IN GENERAL

10302. Definition—(24) See, for definition of an attesting witness, Williams v. Reid, 130 Minn. 256, 153 N. W. 324.

10302a. Before legislative and administrative bodies—Punishment for contempt—Provision is made by statute for calling witnesses before legislative, municipal and administrative bodies. Such bodies cannot punish witnesses before them as for contempt. The power to punish for contempt must be clearly granted and not left to inference. Witnesses before legislative, municipal or administrative bodies cannot be required to produce private papers not pertinent to a legitimate subject of investigation before such a body. State v. Fitzgerald, 131 Minn. —, 154 N. W. 750.

COMPETENCY

10304. Objections to witnesses—(32) Selover, Bates & Co. v. Freeman, 111 Minn. 318, 127 N. W. 9 (informal objection to competency of expert); Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871 (an objection to the calling of one of several defendants for cross-examination under the statute, "for the reason that he is not in any manner interested in this case," does not challenge the competency of the witness under R. L. 1905, § 4660, on the ground that he is the husband of one of the other defendants and cannot be called without her consent); Christenson v. Madson, 128 Minn. 17, 150 N. W. 213 (objection to a witness on the ground that he was incompetent to testify as to conversations of a person since deceased held sufficient though informal). See Digest, § 10316g.

10307. Defendant in a criminal prosecution—Cross-examination—If a defendant voluntarily takes the stand in his own behalf his testimony is admissible against him on a second trial, though self-incriminating. State v. Newman, 127 Minn. 445, 149 N. W. 945.

(38) See State v. Jones, 126 Minn. 45, 147 N. W. 822.

(39) State v. Hendriksen, 116 Minn. 366, 133 N. W. 850; State v. Lucken, 129 Minn. 402, 152 N. W. 769 (record must contain comments of county attorney in order to raise objection on appeal).

(42) State v. Sailor, 130 Minn. 84, 153 N. W. 271.

(43) State v. Sailor, 130 Minn. 84, 153 N. W. 271 (form of charge on the interest of the defendant and its effect upon his testimony disapproved but held not prejudicial—testimony of defendant should not be disparaged).

(45) State v. Seeling, 126 Minn. 386, 148 N. W. 458 (cross-examination tending to negative a defence held not prejudicial though it went beyond the scope of the direct examination—how far the cross-examination shall go rests largely in the discretion of the trial court); Powers v. United States, 223 U. S. 303. See Note, 38 Am. St. Rep. 895.

(46) State v. Seeling, 126 Minn. 386, 148 N. W. 458; State v. Virgens, 128 Minn. 422, 151 N. W. 190 (defendant on trial for murder, by the cross-examination of the state's witnesses, insinuated that a witness and defendant's wife desired conviction; and when defendant took the stand he accused them of criminal intimacy—in this situation it was proper cross-examination of defendant to elicit that he claimed that, at the time of the commission of the crime, his wife was with him at home, and no impropriety in asking him in view of his accusation if he would consent to the wife testifying).

(47) State v. Findling, 123 Minn. 413, 144 N. W. 142. See State v. Johnson, 114 Minn. 493, 131 N. W. 629; Digest, § 7103.

(01) State v. Fleetwood, 111 Minn. 70, 126 N. W. 485, 827.

10310. Persons of unsound mind or drunk—(56) Note, 46 L. R. A. (N. S.) 1028.

10311. Children—(57) State v. Findling, 123 Minn. 413, 144 N. W. 142. See Note, 124 Am. St. Rep. 295.

10312. Husband and wife—In an action against husband and wife upon an account for which it appears the wife alone is liable, an account kept in the husband's name in a daybook may be received in evidence. In such action, the wife having in her answer admitted liability, except as to amount, she is not prejudiced by the cross-examination of her husband as an adverse party concerning the financial transactions between the husband and wife. Wilkins v. Sublette, 111 Minn. 339, 126 N. W. 1089.

Objection to incompetency under the statute must be specific. Haataja v. Saarenpaa, 118 Minn. 255, 136 N. W. 871.

Admissions against interest are admissible against the one making them, though the spouse of such person is a party to the action. Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25.

A spouse is incompetent only in case of objection. The adverse party may call a spouse, and if no objection is made, the testimony of the spouse may be received and considered as in the case of an ordinary witness. The county attorney called the wife of defendant as a witness for the state. Defendant claimed his statutory privilege and excluded her testimony. Held, the action of the county attorney in calling the wife was not misconduct, though defendant, before he was indicted, had notified the county attorney that he would object to the evidence of his wife either before the grand jury or elsewhere or otherwise. State v. Roby, 128 Minn. 187, 150 N. W. 793.

Where the defendant in a criminal case takes the stand and gives testimony which makes the testimony of his wife important, the state may request him to permit his wife to testify. Comment by the prosecuting attorney in his closing address as to the failure of the state, under such circumstances, to obtain the testimony of the wife has been held not prejudicial. State v. Virgens, 128 Minn. 422, 151 N. W. 190.

(63) Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25.

(64) State v. Roby, 128 Minn. 187, 150 N. W. 793.

(68) State v. Lasher, 131 Minn. ——, 154 N. W. 735.

10313. Attorney and client—(78) Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715. See, as to privilege of attorney to refuse to disclose identity of client, 29 Harv. L. Rev. 109.

(81) See Grant v. United States, 227 U. S. 74.

(88) See In re Cunnion, 201 U. S. 123.

See Note, 66 Am. St. Rep. 213; 5 Mich. L. Rev. 459 (waiver of privilege).

10314. Physicians—A waiver by the patient, procured by fraud or misrepresentation, should be disregarded. Kloppenburg v. Minneapolis etc. Ry. Co., 123 Minn. 173, 143 N. W. 322.

If a patient fails to object to a question put to his physician, which necessarily calls for testimony which is privileged under the statute, after a fair opportunity is given him to make an objection, he waives the privilege. Burke v. Chicago & N. W. Ry. Co., 131 Minn. ——, 154 N. W. 960.

The statute merely prescribes a rule of evidence and does not bar an action for money had and received to recover money paid by a patient to his physician in consideration of the latter's guaranty to cure him of a certain disease, when such consideration fails. In such an action, the physician cannot invoke the statute where he has been allowed to testify fully in regard to the transactions involved. Bernard v. Doctor Nelson Co., 123 Minn. 468, 143 N. W. 1133.

The testimony of a physician as to the instructions given his patient, and as to whether the patient obeyed such instructions, is within the

privilege conferred by section 8375, G. S. 1913, and was properly excluded. The patient does not waive his privilege by bringing an action to recover for the injuries for which the physician treated him, unless the action be against the physician for malpractice. Neither does he waive such privilege by presenting evidence in support of his claim, where such evidence is confined to matters outside his transactions with the physician. Marfia v. Great Northern Ry. Co., 124 Minn. 466, 145 N. W. 385.

The testimony of physicians making an examination of the plaintiff to ascertain his physical ability to work on a railroad, their information not being obtained for the purpose of treating or acting for him, is not privileged, and it was error to exclude it. Cherpeski v. Great Northern Ry. Co., 128 Minn. 360, 150 N. W. 1091.

(90) See Buck v. Buck, 126 Minn. 275, 148 N. W. 117 (testimony as to complaints of patient as to his infirmities to physician—issue as to testamentary capacity of patient).

(91) See Arizona & New Mexico Ry. Co. v. Clark, 235 U. S. 669; 28 Harv. L. Rev. 532.

(92) See Note, 48 L. R. A. (N. S.) 394, 418; 7 Col. L. Rev. 287.

(95) Cherpeski v. Great Northern Ry. Co., 128 Minn. 360, 150 N. W. 1091.

(98) See 25 Harv. L. Rev. 673.

10315a. Jurors on former trial—Jurors on a former trial may testify on a subsequent trial as to physical facts coming to their knowledge during a view made by them on the former trial. It is not material that the former verdict was set aside because of the misconduct of the jury in conducting unauthorized experiments during the view. It was not error to permit jurors on the former trial to give their opinions or conclusions derived from and based upon the knowledge acquired on the view. State v. Ward, 127 Minn. 510, 150 N. W. 209.

10316. Parties and interested persons—Conversations with deceased or insane persons—An executor, propounding a will by which he is nominated, is not, as such, incompetent under the statute, to testify as to conversations with the testator concerning the will. Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

A child of the grantee in a deed sought to be set aside is not incompetent under the statute to testify as to conversations between the deceased grantor and the grantee. McEleney v. Donovan, 119 Minn. 294, 138 N. W. 306.

The heirs of a deceased person are not incompetent to give in evidence declarations or conversations of the deceased, where neither they nor the estate can be made liable for the result of the action. Pabst v. Ferch, 126 Minn. 58, 147 N. W. 714.

The mere fact that the record may be admissible against the witness to prove the existence of the judgment does not disqualify him. The test is whether the record can be used against him to prove the facts on which the judgment rests. The mere liability over of an agent to his principal, or of a servant to his master, does not disqualify. Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

A beneficiary under a will is incompetent to testify as to statements of the testator, made at the time he executed the will, but he is competent to testify as to the acts of the testator at the time and the circumstances of the execution. Error in the admission of evidence contrary to the statute is harmless if the fact to which the evidence is directed is otherwise conclusively proved. Christenson v. Madson, 128 Minn. 17, 150 N. W. 213.

Where a party, who is entitled to object to evidence of a conversation with a deceased person, by a person interested in the event of the action, calls such witness and cross-examines him in reference to such conversation, he thereby waives the right to object to a full statement of the entire conversation. The rule applies even though the questions put to the witness were intended to call only for statements made by him to the deceased. Such statements are necessarily a part of the conversation, and by calling them out the other party is entitled to the whole conversation. Moe v. Paulson, 128 Minn. 277, 150 N. W. 914.

(4) Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116 (conversations as to consideration for a note—wife of maker of note as witness); Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

(5) Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

(6) Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292 (the agent of defendant, who negotiated the insurance, to whom the insured made and delivered a note for the amount of the first premium, and to whom the defendant sent the policy after its issue, held not interested in the event of the action so as to prevent his testifying to conversations with the insured, now deceased).

(7) Christenson v. Madson, 128 Minn. 17, 150 N. W. 213.

(9) Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

(01) Peterson v. Merchants Elevator Co., 111 Minn. 105, 126 N. W. 534.

(10) Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481. See Fallon v. Fallon, 110 Minn. 213, 124 N. W. 994.

(11) Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850 (witness held competent to testify that in preparing an application for insurance the physician did not ask the deceased the questions which defendant claimed were falsely answered).

(12) Christenson v. Madson, 128 Minn. 17, 150 N. W. 213 (that a will was signed by the testator after an attesting witness came into the room

and in his presence). See, as to possession of documents, Note, 45 L. R. A. (N. S.) 583.

(20) Moe v. Paulson, 128 Minn. 277, 150 N. W. 914.

(25) Christenson v. Madson, 128 Minn. 17, 150 N. W. 213 (objection held sufficient). See Grannis v. Hitchcock, 118 Minn. 462, 137 N. W. 186 (necessity of exception or specification of error on motion for a new trial to secure review on appeal).

(27) Finn v. Modern Brotherhood, 118 Minn. 307, 136 N. W. 850; Ikenberry v. New York Life Ins. Co., 127 Minn. 215, 149 N. W. 292.

EXAMINATION

10317. In general—Leading questions on direct examination—The attention of a witness may be called to testimony given by an adverse witness and then asked if such testimony is true. Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102.

10318. Scope of cross-examination on the merits—A witness may be required to answer yes or no to a question. Brown v. Andrews, 116 Minn. 150, 133 N. W. 568.

(32) Larson v. Barlow, 112 Minn. 246, 127 N. W. 924.

(36) Brown v. Andrews, 116 Minn. 150, 133 N. W. 568.

(41) Ward v. Meeds, 114 Minn. 18, 130 N. W. 2; Clark v. Thorpe Bros., 117 Minn. 202, 135 N. W. 387; Drew v. Carroll, 120 Minn. 478, 139 N. W. 953; State v. Seeling, 126 Minn. 386, 148 N. W. 458.

10319. Redirect examination—Where a witness on cross-examination admits that he is not friendly to one of the parties, it is not proper on redirect examination to show by him why he was unfriendly. Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305.

(44) Brown v. Douglas Lumber Co., 113 Minn. 67, 129 N. W. 161.

10327. Adverse party—Cross-examination under statute—It is proper practice, when calling a witness as an adverse party, to so announce, and, if the court sees fit to then rule that the witness will be so considered, it is not necessary, perhaps, for the preservation of one's rights, to repeat the objection whenever a leading question is asked. But it is necessary to show that some prejudice resulted from the ruling. Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507.

The statute is inapplicable to proceedings which are not adversary, such as proceedings for the appointment of a guardian for an insane or incompetent person. Prokosch v. Brust, 128 Minn. 324, 151 N. W. 130.

(55) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507.

(62) Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954 (error, if any, in refusing to allow a former agent to be examined under the statute held harmless).

(64) Allen v. Eneroth, 118 Minn. 476, 137 N. W. 16.

(67) Smith & Nixon Piano Co. v. Lydick, 110 Minn. 82, 124 N. W. 637; Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507; Johnson v. Bankers Mutual Casualty Co., 129 Minn. 18, 151 N. W. 413; Fitzgerald v. Armour & Co., 129 Minn. 81, 151 N. W. 539.

(68) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507; Allen v. Eneroth, 118 Minn. 476, 137 N. W. 16; Johnson v. Bankers Mutual Casualty Co., 129 Minn. 18, 151 N. W. 413.

(71) Torgeson v. Crookston Lumber Co., 123 Minn. 476, 144 N. W. 154 (where a party called for cross-examination under the statute is an unwilling witness considerable latitude should be allowed in examining him). See Langford v. Issenhuth, 134 N. W. 889 (S. D.).

(72) Leystrom v. Ada, 110 Minn. 340, 125 N. W. 507; Uhlman v. Farm, Stock & Home Co., 126 Minn. 239, 148 N. W. 102 (the attention of the impeaching witness may be called to the testimony of the adverse party and asked if such testimony is true).

USE OF MEMORANDUM TO REFRESH MEMORY

10328. General rule—A memorandum may be used to quicken the memory of a witness, so that at last he testifies from his own recollection as refreshed and quickened, or it may be used where the witness has no independent recollection of the facts, even after seeing it, but recollects having seen it before, and remembers that at the time he saw it he knew its contents to be correct. Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819.

(77) Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561 (stenographer may use his notes); State v. Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 417 (id.); Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N. W. 955 (entries made by witnesses in a book kept by the plaintiff insurance company, and known as its liability policy register, held to constitute sufficient and proper memoranda for use by the witnesses in refreshing their recollection); Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

10329. Necessity for use—Discretion of court—When and under what circumstances a witness may be permitted to use a memorandum to refresh his memory is a matter resting largely in the discretion of the trial court. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

10330. When made—(82) Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. ——, 154 N. W. 954.

10331. By whom made—(83) Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819; Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188 (newspaper).

(84) Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819.

10333. Form—It need not be an original entry. Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819.

10335. Verification—(90) B. Presley Co. v. Illinois Central R. Co., 120 Minn. 295, 139 N. W. 609 (memorandum not verified—testimony of witness related only to a matter not in controversy—error harmless).

10336. Inspection by adverse party—The counsel for the adverse party always has the right to inspect memoranda submitted to the jury. See Salo v. Duluth & Iron Range R. Co., 121 Minn. 78, 140 N. W. 188.

10336a. Introduction in evidence by adverse party—Where the witness of one party testifies from a properly verified memorandum as to facts of which he has no present recollection, the adverse party may offer such memorandum in evidence. Ammon v. Illinois Central R. Co., 120 Minn. 438, 139 N. W. 819.

10336b. Impeachment of memoranda—The memoranda may be impeached by cross-examining the witness and by contradicting his testimony by other evidence. Specific errors in memoranda may be shown by extrinsic evidence. Northwestern Elevator Co. v. Great Northern Ry. Co., 121 Minn. 321, 141 N. W. 298.

PRIVILEGE AGAINST SELF-INCRIMINATION

10337. General rule—(93) State v. Drew, 110 Minn. 247, 124 N. W. 1091. See, as to sufficiency of statutes granting immunity, Glickstein v. United States, 222 U. S. 139.

10339. Scope and meaning of privilege—Testimony before grand jury—The fact that in an investigation by a grand jury of a charge against another party the defendant has been required to give evidence which would tend to show that he himself had committed another crime, cannot give him perpetual immunity from prosecution for the offense committed by himself where such offense may be proven by independent evidence. Chapter 192, Laws 1905 (G. S. 1913, § 3199), gives no immunity to the defendants in this case. Mankato v. Olger, 126 Minn. 521, 148 N. W. 471.

(95) State v. Drew, 110 Minn. 247, 124 N. W. 1091. See Digest, § 4061.

10339a. Voluntary testimony on former trial—Where the defendant in a criminal prosecution takes the stand in his own behalf his testimony, voluntarily given, is admissible against him on a second trial. State v. Newman, 127 Minn. 445, 149 N. W. 945.

10340. Papers of the citizen protected—Books and papers of corporations—A private banker being on trial for receiving money on deposit when he was insolvent, the schedules of creditors, assets and liabilities filed by him in involuntary bankruptcy proceedings are not admissible in evidence to prove insolvency, when objected to upon the ground that the effect would be to compel him to be a witness against himself. State v. Drew, 110 Minn. 247, 124 N. W. 1091.

An officer of a corporation cannot refuse to produce books and papers of the corporation in response to a subpœna duces tecum on the ground that the contents thereof would tend to incriminate him personally. Wilson v. United States, 221 U. S. 361; Dreier v. United States, 221 U. S. 394; Baltimore & Ohio Railroad Co. v. Interstate Com. Commission, 221 U. S. 612.

(96) See Weeks v. United States, 232 U. S. 383.

(97) See State v. Drew, 110 Minn. 247, 124 N. W. 1091; 25 Harv. L. Rev. 573.

CREDIBILITY

10344. A question for the jury—While the trial court has a wide discretion in the conduct of the trial, it must not invade the province of the jury by making comments, insinuations, or suggestions indicative of belief or unbelief in the integrity or credibility of witnesses. Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

The discretion of the jury in the matter of credibility does not warrant the disregard of the positive testimony of an unimpeached witness, unless its improbability furnishes a reasonable ground for so doing, which must appear from the facts and circumstances disclosed by the evidence. Campbell v. Canadian Northern Ry. Co., 124 Minn. 245, 144 N. W. 772. See Digest, § 9786.

(2) Hartman v. Minneapolis etc. Ry. Co., 100 Minn. 43, 110 N. W. 102; Lynch v. Great Northern Ry. Co., 112 Minn. 382, 388, 128 N. W. 457; Owens v. Chicago, G. W. R. Co., 113 Minn. 49, 128 N. W. 1011; McMillan v. Northern Pacific Ry. Co., 125 Minn. 7, 145 N. W. 613.

See Digest, § 9786.

10345. Falsus in uno falsus in omnibus—Where a party gives a false account of a transaction the jury may infer that the truth would be unfavorable to him. Eckart v. Kiel, 123 Minn. 114, 143 N. W. 122.

(5) Carlson v. Chicago, G. W. R. Co., 114 Minn. 382, 131 N. W. 375; State v. Henriksen, 116 Minn. 366, 133 N. W. 850; State v. Schueller, 120 Minn. 26, 138 N. W. 937; Demerce v. Minneapolis etc. Ry. Co., 122 Minn. 171, 142 N. W. 145; Eckart v. Kiel, 123 Minn. 114, 143 N. W. 122; State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

See Digest, § 9786.

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 the credibility of the witness, an objection should be sustained. Howard v. Farr, 115 Minn. 86, 131 N. W. 1071.

A witness is not on the stand to be badgered and insulted. Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858.

It has been held proper to inquire as to the political affiliations of witnesses where defendants, being socialists, concerted to violate and test an ordinance which they contended violated the right to free speech and orderly assembly. State v. Sugarman, 126 Minn. 477, 148 N. W. 466.

The fact that a question relates to testimony of the witness before the grand jury does not render it improper. State v. Trocke, 127 Minn. 485, 149 N. W. 944.

The extent to which the competency of a witness may be tested by cross-examination rests in the discretion of the trial court. Farmers Elevator Co. v. Great Northern Ry. Co., 131 Minn. —, 154 N. W. 954.

(8) State v. Lindquist, 110 Minn. 12, 124 N. W. 215 (question to a policeman as to whether he had ever solicited money from liquor dealers).

(13) Brennan v. Minnesota, D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611.

(16) State v. McCoy, 112 Minn. 424, 128 N. W. 465; State v. Findling, 123 Minn. 413, 144 N. W. 142; Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956 (action for assault and battery—cross-examination as to an independent assault previously committed on a third party held discretionary—contradiction not permissible—test of what is collateral so as to exclude contradiction); Advance Realty Co. v. Nichols, 126 Minn. 267, 148 N. W. 65; State v. Trocke, 127 Minn. 485, 149 N. W. 944; State v. Ward, 127 Minn. 510, 150 N. W. 209.

(19) State v. McCoy, 112 Minn. 424, 128 N. W. 465; State v. Johnson, 114 Minn. 493, 131 N. W. 629; Howard v. Farr, 115 Minn. 86, 131 N. W. 1071; Petruschke v. Kamerer, 131 Minn. —, 155 N. W. 205. See Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858 (a witness is not on the stand to be badgered and insulted); Duer v. Gagnon, 129 Minn. 517, 152 N. W. 880 (improper cross-examination of defendant tending to disgrace him held not a ground for a reversal).

(20) Northwestern Elevator Co. v. Great Northern Ry. Co., 121 Minn. 321, 141 N. W. 298; Campbell v. Aarstad, 124 Minn. 284, 144 N. W. 956.

(21) Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180.

(22) Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603.

10349. Proof of conviction of crime—Conviction of any crime, whether a felony or misdemeanor, is admissible. The nature of the crime may be shown. Thompson v. Bankers Mutual Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180.

(23) Brennan v. Minnesota, D. & W. Ry. Co., 130 Minn. 314, 153 N. W. 611.

See Digest, § 10348(21).

10350. Proof of bias—A letter by a witness reflecting on the character of a scaler, who had scaled most of the logs in controversy, was offered as impeachment of the testimony of the writer. The witness had not vouched for the character of the scaler, nor had he, except vaguely, corroborated his scale. Held, the rejection of the letter was not error. O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865.

(25) Hedlund v. Minneapolis St. Ry. Co., 120 Minn. 319, 139 N. W. 603.

(27) Wells v. Sullivan, 119 Minn. 389, 138 N. W. 305.

See Digest, § 10348 (22).

10351. Proof of contradictory statements—Prior statements of a witness inconsistent with his testimony are admissible for the purpose of impeachment, though they state what he understood, instead of the facts upon which such understanding was based. Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112.

Failure to lay a technically perfect foundation as regards time and place is not ground for rejecting testimony of prior contradictory statements made by a witness out of court, where it is clear that neither he nor the impeaching witness is misled thereby. Johnson v. Young, 127 Minn. 462, 149 N. W. 940.

(28) O'Connell v. Ward, 130 Minn. 443, 153 N. W. 865.

(31) See Nelson v. Gjestrum, 118 Minn. 284, 136 N. W. 858.

(34) Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561; Johnson v. Young, 127 Minn. 462, 149 N. W. 940.

(36) Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561.

(41) See Uggen v. Bazille & Partridge, 123 Minn. 97, 143 N. W. 112.

(46) Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Svensson v. Lindgren, 124 Minn. 386, 145 N. W. 116; Pogue v. Great Northern Ry. Co., 127 Minn. 79, 148 N. W. 889 (testimony on a former trial is not conclusive against the party giving it, where his testimony on the later trial is corroborated, even though his ex-

planation of the discrepancy may not impress the supreme court with favor); Capital Trust Co. v. Great Northern Ry. Co., 127 Minn. 144, 149 N. W. 14 (the testimony of a witness which concededly made defendant's negligence a question for the jury, in this a personal injury action, was not so discredited by prior written statements and reports, or by his cross-examination, that a verdict based thereon, and approved by the trial court, should not stand—the jury have a right to consider the circumstances under which such statements are made); Grignon v. Minneapolis & St. L. R. Co., 130 Minn. 36, 153 N. W. 117.

(47, 48) Heydman v. Red Wing Brick Co., 112 Minn. 158, 127 N. W. 561.

10352. Proof of contradictory conduct—In an action for personal injuries it is permissible to prove that the plaintiff has made prior claims against others for similar or identical injuries or disabilites. Magers v. Minneapolis etc. Ry. Co., 112 Minn. 435, 128 N. W. 576.

10353. Proof of bad reputation for truthfulness—(63) State v. Christianson, 131 Minn. ——, 154 N. W. 1095.

10356. Impeachment of one's own witness—The proposition that a party to an action calling a witness for examination in chief vouches for his veracity is true to a very limited extent. Millman v. Drake & Stratton Co., 119 Minn. 124, 137 N. W. 300.

(66–72) See 12 Col. L. Rev. 452.

(67) People v. De Martini, 213 N. Y. 203, 107 N. E. 501.

(68) La Pray v. Lavoris Chemical Co., 117 Minn. 152, 134 N. W. 313.

(72) See National Bank of Commerce v. Jessup, 121 Minn. 458, 141 N. W. 525.

CORROBORATION

10357. By proof of similar statements—Where a witness rests under the imputation of a recently formed motive to falsify, it may be shown, in corroboration of his testimony, that he made a statement similar to his testimony at a time when the imputed motive did not exist, or when motives of self-interest would have induced him to have made a different statement from that which he actually made. The confession of an accomplice given before he received a promise of personal exemption if he would become a state's witness may be so received. People v. Katz, 209 N. Y. 311, 103 N. E. 305; State v. La Bar, 131 Minn. ——, 155 N. W. 211.

(73) State v. La Bar, 131 Minn. ——, 155 N. W. 211. See Note, 41 L. R. A. (N. S.) 857.

ATTENDANCE AND FEES

10360. Subpœna—Production of books and papers—A trustee in bankruptcy may be required to produce papers in his possession by a sub-

pœna duces tecum. Schall v. Northland Motor Car Co., 123 Minn. 214, 143 N. W. 357.

The ad testificandum clause is not essential to the validity of a subpœna duces tecum, and the production of papers by one having them under his control may be enforced independently of his testimony. Wilson v. United States, 221 U. S. 361.

The books of a corporation are not the books of its officers and an officer may be required to produce them by a subpœna without an ad testificandum clause. Wheeler v. United States, 226 U. S. 478.

See Note, 128 Am. St. Rep. 755.

WOMEN—See Domicil, 2814; Elections, 2922; Husband and Wife, 4251–4299; Municipal Corporations, 6539a; Names, 6918a; Public Officers, 7993; Schools and School Districts, 8689.

WOODS AND FORESTS

10365. Trees part of realty—(89) See Note, 46 L. R. A. (N. S.) 3 (trees on boundary lines).

WORDS AND PHRASES

Abandoned. Sheldon-Mather Timber Co. v. Itasca Lumber Co., 117 Minn. 355, 135 N. W. 1132.

Ability to pay. State v. Harris, 116 Minn. 401, 133 N. W. 980.

Accident. Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819; Ludwig v. Preferred Accident Ins. Co., 113 Minn. 510, 130 N. W. 5.

Accidental. Gardner v. United Surety Co., 110 Minn. 291, 125 N. W. 264.

Act of God. Vincent v. Lake Erie Transportation Co., 109 Minn. 456, 124 N. W. 221; White v. Minneapolis & Rainy River Ry. Co., 111 Minn. 167, 126 N. W. 533; Coleman v. Mississippi & Rum River Boom Co., 114 Minn. 443, 127 N. W. 192, 131 N. W. 641.

Adopted child. Anderson v. Royal League, 130 Minn. 416, 153 N. W. 853.

Aggrieved party. Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

Alienation. Lindell v. Peters, 129 Minn. 288, 152 N. W. 648.

Any. Hardwick Farmers Elevator Co. v. Chicago etc. Ry. Co., 110 Minn. 25, 124 N. W. 819.

Appraisers. American Central Ins. Co. v. District Court, 125 Minn. 374, 147 N. W. 242.

Arbitrators. American Central Ins. Co. v. District Court, 125 Minn. 374, 147 N. W. 242.

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WORK AND LABOR

10366. Express contract excludes implied contract—(90) See Dunnell, Minn. Pl. 2 ed. § 915.

10368. Services rendered upon request—Ordinarily, where a person performs labor for another with the knowledge of the latter and without his objection, the law implies a promise to pay therefor; but this rule is not of universal application, and where it appears that one, without negligence on his part, has been induced by another's conduct to enter into apparent contractual relations with or to receive the benefit of the services of such other person, when he has the right to believe that he is dealing with a third person, and it further appears that to hold him liable to any one except the person with whom he believed he was dealing will result in loss to him, he will not be held so liable. To hold otherwise would be to establish a contract which at least one of the parties never intended to make, and likewise to force a contract upon a party which he did not voluntarily enter into, to his damage and against his protest, and this without the existence of all the elements of a purely implied contract. Fitzpatrick Building Co. v. Healy, 120 Minn. 237, 139 N. W. 495.

A contract implied in fact requires a meeting of the minds, an agreement, just as much as an express contract. The difference between the two is largely in the character of the evidence by which they are established. It is sometimes said that a contract implied in fact is established by circumstantial evidence. The statement is often made that when the work is done by one on the property of another, with the knowledge of such other, a presumption of an agreement to pay is implied. This is well enough if it is understood that this presumption is one of fact, evidentiary in nature, not necessarily controlling the determination of the issue being tried, and to be weighed with other circumstances of evidentiary force upon such issue. It is true that a situation may be such that the presumption is controlling and justifies the direction of a verdict. The question whether there is such a contract is usually to be determined by the jury as an inference of fact. Lombard v. Rahilly, 127 Minn. 449, 149 N. W. 950.

(92) See Peterson v. Phelps, 123 Minn. 319, 143 N. W. 793 (implied contract to pay for services of physician); Bigelow v. Hill, 129 Minn. 399, 152 N. W. 763 (id.); Sullivan Lumber Co. v. Thorn, 130 Minn. 296, 153 N. W. 616 (instructions as to when the law will raise an implied promise to pay for services sustained).

See Dunnell, Minn. Pl. 2 ed. § 914.

10369. Services under unfinished contract—Where a contract for labor or services for a certain time is rescinded by agreement recovery may be had for labor previously performed under the contract. See Phelan v. Edwards, 112 Minn. 345, 128 N. W. 23.

A party who fails fully to perform an entire contract, without legal excuse or justification, cannot recover anything under an implied contract, at least if he sues on the express contract. Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347. See Dunnell, Minn. Pl. 2 ed. § 915(38).

(93) See Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347; Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901 (whether services were rendered under an entire contract held a question for the jury); Dunnell, Minn. Pl. 2 ed. § 915(38); Woodward, Quasi Contracts, § 174.

(96) See Woodward, Quasi Contracts, § 122.

See Dunnell, Minn. Pl. 2 ed. § 915.

10373a. Services induced by mistake—Where an oral estimate or bid upon work is given, to be followed by a written bid, and a mistake in the price is made in the latter, the one to whom the bid is offered cannot by an acceptance make a contract if he knows of the mistake and the bidder's ignorance of its occurrence. In such case the bidder, having performed the work in ignorance of the mistake, may recover the reasonable value, upon proof that the other party, cognizant of the mistake, nevertheless, in bad faith, directed the work to be done, when he knew that the bidder believed the written bid conformed in price to the oral bid previously given. Tyra v. Cheney, 129 Minn. 428, 152 N. W. 835.

10374. Particular compensation not made—(4) See Woodward, Quasi Contracts, § 262.

10375. Services between members of family—(5) Beneke v. Estate of Beneke, 119 Minn. 441, 138 N. W. 689; Maycroft v. Maycroft, 120 Minn. 529, 139 N. W. 1134; McKnight v. Martin, 124 Minn. 191, 144 N. W. 941; Lansing v. Gregory, 128 Minn. 496, 151 N. W. 277. See Note, 11 L. R. A. (N. S.) 873.

10376. Services under illegal contract—(6) See State v. Clark, 116 Minn. 500, 134 N. W. 129 (services rendered town—failure to give contractor's bond as required by R. L. 1905, § 4535—work accepted by town—recovery on implied contract sustained).

10377. Pleading—Election between quantum meruit and agreed price —Variance—It is necessary to allege a request by the defendant or circumstances equivalent to a request. Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

Where a complaint, in an action for compensation for services rendered, alleges the reasonable value thereof, and also that defendant agreed to pay a certain sum therefor, and there is no election at the trial

upon which theory, quantum meruit or express contract, plaintiff will proceed with the trial, and both issues are retained in the case, plaintiff is at liberty to prove either the agreed or reasonable value, and recover a verdict accordingly. Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Lufkin v. Harvey, 125 Minn. 458, 147 N. N. W. 444; Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901; Kruta v. Lough, 131 Minn. ——, 154 N. W. 514.

Where a complaint declares upon a quantum meruit count for the reasonable value of services, and the evidence discloses that defendant agreed to pay a specified price therefor, this is at most a variance, and when it appears that defendant was not misled thereby to his prejudice, a recovery of the agreed price is proper. Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901.

A complaint alleging that, at the special instance and request of defendants, plaintiff rendered professional services as a surgeon in treating their minor son, and alleging the value of the services, is sufficient as a complaint upon an implied contract. An allegation of a promise to pay, necessary at common law, is not necessary or proper under the code as part of the pleading of an implied contract, but the addition of this allegation makes the pleading one upon both express and implied contract. It does not defeat recovery upon an implied contract. Under such a complaint recovery may be had on contract either express or implied. Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

There has been a departure from the suggestions of some of the earlier cases; and the present holding is that, except in very rare instances where it is proper to require an election, the plaintiff may allege both contract price and reasonable value, may offer evidence as to both, and upon failure to prove contract price may recover reasonable value. Of course if there is a contract price the recovery must be of that and cannot be of the reasonable value; but the notion that the plaintiff must at his peril state the precise measure of recovery which his evidence will sustain is erroneous. Kruta v. Lough, 131 Minn. ——, 154 N. W. 514.

Where it is admitted that plaintiff is entitled to compensation for services, and the controversy is as to whether the amount has been fixed by contract and, if not so fixed, as to the reasonable value of such services, it at least would not be error to deny a motion that plaintiff be required to elect between the express contract and the quantum meruit, as it is desirable to settle the entire controversy at one trial. Theodore Wetmore & Co. v. Thurman, 121 Minn. 352, 141 N. W. 481. See Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901.

A complaint alleged both an agreed price and the reasonable value. There was evidence as to an agreed price and as to the reasonable value. In its charge the court, without objection and without a request for a

further instruction, submitted the question of an agreed price of the amount claimed by the plaintiff. The charge was the law of the case. It was the duty of the jury to apply the evidence in harmony with it; and a verdict not supported by evidence of an agreed price as claimed by the plaintiff is contrary to law and is not supported by the evidence and cannot be upheld. Kruta v. Lough, 131 Minn. ——, 154 N. W. 514.

(7) Vistaunet v. Thief River Falls, 111 Minn. 537, 126 N. W. 1134. Dunnell, Minn. Pl. 2 ed. § 910.

(8) Dunnell, Minn. Pl. 2 ed. § 911.

(9) Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444.

(11) Snyder v. Crescent Milling Co., 111 Minn. 234, 126 N. W. 822; Theodore Wetmore Co. v. Thurman, 121 Minn. 352, 141 N. W. 481; Kinzel v. Boston & Duluth Farm Land Co., 124 Minn. 416, 145 N. W. 124; Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104; Lufkin v. Harvey, 125 Minn. 458, 147 N. W. 444; Meyer v. Saterbak, 128 Minn. 304, 150 N. W. 901; Kruta v. Lough, 131 Minn. ——, 154 N. W. 514.

See Dunnell, Minn. Pl. 2 ed. §§ 910–917.

10378. Burden of proof—Where a discharged servant sues for loss of time, the burden is on the master to show that he was discharged for cause, or obtained, or could have obtained, other employment. Schommer v. Flour City Ornamental Iron Works, 129 Minn. 244, 152 N. W. 535.

10378a. Evidence—Admissibility—In an action by an agent to recover the reasonable value of services rendered in effecting an exchange of property, evidence of the value of the property received by the principal is proper. Evidence of customary charges of brokers in similar cases is proper, but, in order that a customary charge may be decisive of the amount of recovery, a custom must be established so definite, uniform, and well understood that it may be assumed the parties contracted with reference to it, and in effect made it a part of their contract. Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 N. W. 173. See § 5852.

10379. Evidence—Sufficiency—(15) Sanders v. Thiesen, 122 Minn. 533, 142 N. W. 1134; Tyra v. Cheney, 129 Minn. 428, 152 N. W. 835.

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