CHAPTER 546

TRIALS

546.01 ISSUES AND TRIALS.

HISTORY. R.S. 1851 c. 71 ss. 1, 4; P.S. 1858 c. 61 ss. 1, 4; G.S. 1866 c. 66 ss. 193, 196; G.S. 1878 c. 66 ss. 211, 214; G.S. 1894 ss. 5355, 5358; R.S. 1905 s. 4162; G.S. 1913 s. 7790; G.S. 1923 s. 9286; M.S. 1927 s. 9286.

Trial defined and distinguished. Watson v Ward, 27 M 29, 6 NW 407; Dodge v Bell, 37 M 382, 34 NW 739; Thorson v Sanby, 68 M 166, 70 NW 1083; Day v Mountin, 89 M 297, 94 NW 887; Ratcliffe v Ratcliffe, 135 M 308, 160 NW 778.

The reasonable value of the services of a real estate broker, who produced a purchaser to whom the owner of the property made a sale thereof, though not in issue under the pleadings, was litigated by consent. Confer Bros. v Currier, 164 M 207, 204 NW 929.

That no leave of court to sue on an official bond has been obtained, cannot be raised where the answer is only a general denial. Minneapolis v Hare, 168 M 424, 210 NW 161.

The construction of an ambiguous writing by the decision below is conclusive, because among other things that interpretation is supported by the personally verified pleading of the objectors. Effenham v Pesch, 182 M 586, 235 NW 278.

An admission of the town of Balkan in its pleadings does not preclude intervenors from that town from proving the facts are contrary. State ex rel v City of Chisholm, 199 M 403, 273 NW 235.

Where the defense of breach of implied warranty is neither pleaded nor litigated by consent, it comes too late when suggested for the first time by defendant's motion for amended findings on a new trial. Allen v Central Motors, 204 M 295, 283 NW 490.

As to whether another party, not a party to the suit, is the real party in interest, raises an issue of fact to be determined as such. Peterson v Johnson, 204 M 300, 283 NW 561.

546.02 ISSUES, HOW JOINED.

HISTORY. R.S. 1851 c. 71 ss. 2, 3; 1852 Amend. p. 10; P.S. 1858 c. 61 ss. 2, 3; G.S. 1866 c. 66 ss. 194, 195; G.S. 1878 c. 66 ss. 212, 213; G.S. 1894 ss. 5356, 5357; R.L. 1905 s. 4163; G.S. 1913 s. 7791; G.S. 1923 s. 9287; M.S. 1927 s. 9287.

A demurrer cannot be directed to a portion only of a single cause of action or defense, for the reason that a demurrer raises a question of law upon which the court is to render judgment. Knoblauch v Foglesong, 38 M 459, 38 NW 366.

There are here material allegations of facts arising upon the pleadings, maintained by one party and contraverted by the other, which constitute issuable facts upon which the defendant is entitled to trial by judicial examination; and the trial court erred in sustaining plaintiff's demurrer to defendant's answer. Fegelson v Dickerman, 70 M 471, 73 NW 144.

An order of the trial court, which in effect allows a receiver's account, and refuses to surcharge the same under that, such receiver, accused of fraud and bad faith, involves the conclusions of fact that the receiver's conduct was in good faith, without more specific findings. Mpls. Trust v Menage, 86 M 1, 90 NW 3.

An allegation in the answer, denied in the reply, cannot be relied upon by plaintiff as establishing the fact in question. Burghart v Sausele, 169 M 132, 210 NW 869.

Where the parties have by mistake tried issues not made by the pleadings, they are bound by the result the same as if the issues were within the pleadings. Hammerberg v State Bank, 170 M 15, 212 NW 16.

The order, upon an order to show cause submitted upon affidavits, adequately determined the right of respondent to an attorney's lien, and is an appealable order. Caulfield v Jewett, 183 M 503, 237 NW 190.

Absent legislation or any controlling consideration to the contrary, the proceedings in quo warranto proceedings to test the corporate existence of a newly organized village are governed by common law rules. State ex rel v Village of North Pole, 213 M 297, 6 NW(2d) 458.

546.03 ISSUES, HOW TRIED; RIGHT TO JURY TRIAL.

HISTORY: R.S. 1851 c. 71 ss. 5 to 7; P.S. 1858 c. 61 ss. 5 to 7; G.S. 1866 c. 66 ss. 197 to 199; G.S. 1878 c. 66 ss. 215 to 217; G.S. 1894 ss. 5359 to 5361; R.L. 1905 s. 4164; G.S. 1913 s. 7792; G.S. 1923 s. 9288; M.S. 1927 s. 9288.

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RIGHT OF JURY TRIAL

1. Constitutional provision

The constitution did not enlarge old rights or create new ones but simply conserved rights already existing and placed them beyond legislative impairment. Whallon v Bancroft, 4 M 109 (70); St. P. & S. C. v Gardner, 19 M 132 (99); Ames v Lake Superior, 21 M 241 (292); Board v Mille Lacs, 22 M 178; Bruggerman v True, 25 M 123; In re Hawes, 38 M 403, 38 NW 104; State ex rel v Minn. Thresher, 40 M 213, 41 NW 1020; Schmidt v Schmidt, 47 M 451, 50 NW 598; Lommen v Mpls. Gas Light, 65 M 196, 68 NW 53; State ex rel v Kingsley, 85 M 215, 88 NW 742.

The right to a jury trial depends on the nature of the right to be adjudicated and not on the form of the action or proceeding. Board v Mille Lacs, 22 M 178.

The constitutional right to a trial by jury is limited to cases at law. State ex rel v Minn. Thresher, 40 M 213, 41 NW 1020.

Laws 1895, Chapter 328, providing for struck juries, is constitutional. Lommen v Mpls. Gaslight, 65 M 196, 68 NW 53.

Minnesota Constitution, Article 1, Section 4, providing for trial by jury does not apply to a proceeding under Revised Laws 1905, Chapter 65 (Minnesota Stat-

utes 1941, Chapter 508) to register a land title. Peters v City of Duluth, 119 M 96, 137 NW 390.

Minnesota Constitution, Article 1, Section 4, continued the right of trial by jury as it existed at the time the constitution was adopted, but did not enlarge the right. In actions at law either party may demand a jury trial. In equitable actions neither party can demand a jury trial as of right as to any issue. Where legal and equitable issues are united, the legal issues are triable by a jury and the equitable issues by the court. To secure a jury trial of issues properly triable by jury, demand must be made that the specific issues proper for trial by jury be so tried. Morton v Sodergren, 130 M 252, 153 NW 537.

On an appeal from the probate court to the district court from the allowance of a will, the parties have no constitutional right to a trial by jury of the issues of testamentary capacity or undue influence. Whether such issues be submitted to a jury is within the discretion of the trial court; and after the issues are framed and after their submission to the jury, and before a return on the findings, the court may withdraw them and itself make findings. Lewis v Murray, 131 M 439, 155 NW 392.

A party to an election contest, though the basis of the contest is the violation of the corrupt practices act, and though it may result in an annulment of the election, is not entitled to a jury trial. Hawley v Wallace, 137 M 187, 163 NW 127.

In the conciliation court there is no trial by jury. There is the right of removal in the losing party to a court where a jury trial may be had. Such arrangement satisfies the constitutional guaranty. Flour City v Young, 150 M 452, 185 NW 934.

Constitutional protection of equitable rights as they existed prior to the adoption by the code. 11 MLR 449, 15 MLR 478, 15 MLR 810.

2. Statutory provision

The effect of this provision is to preserve in substance the common law distinction between actions at law and suits in equity. Berkey v Judd, 14 M 394 (300).

This provision was in effect at the time of the adoption of the constitution. State ex rel v Minn. Thresher, 40 M 213, 41 NW 1020.

See note (1) cases. Lewis v Murray, 131 M 439, 155 NW 392; Hawley v Wallace, 137 M 187, 163 NW 127.

3. Complaint controls

The decisive test whether an action is triable by the court or by a jury is to be determined on an examination of the complaint. Shipley v Balduc, 93 M 414, 101 NW 952.

4. Cases and questions for the jury

A jury may be demanded in an action in the nature of a replevin although it involves the issue as to a secret trust. Blackman v Wheaton, 13 M 326 (299); Tancre v Reynolds, 35 M 476, 29 NW 171;

In an action in conversion although it involved an examination of a complicated account. St. P. & S. C. v Gardner, 19 M 132 (99); Greenleaf v Egan, 30 M 316, 15 NW 254;

An action for trespass on land. Chadbourne v Zilsdorf, 34 M 43, 24 NW 308;

An action for money had and received. Lace v Fixen, 39 M 46, 38 NW 762;

An action by an assignee in insolvency to recover money paid by the insolvent to a creditor as an unlawful preference. Tripp v N. W. Nat'l, 45 M 383, 48 NW 4;

An action in a policy of insurance for the recovery of a loss. Crich v Williamsburg, 45 M 441, 48 NW 198;

An action for the recovery of rent. Peterson v Ruhnke, 46 M 115, 48 NW 768;

An action for the recovery of money only. Martin v Northern Pacific, 68 M 521, 525, 71 NW 701; State ex rel v Kingsley, 85 M 215, 88 NW 742;

An action by a contractor for labor and material although a long account was involved. Nordeen v Buck, 79 M 352, 82 NW 624;

Or an action on a stated account between partners. Shipley v Balduc, 93 M 414, 101 NW 952.

In the following cases parties on demand were held to be entitled to a jury trial: Willett v Ill. Central, 122 M 513, 142 NW 883; Mason v Cedar Lake, 123 M 401, 143 NW 1125; Schultz v M. & St. L., 123 M 405, 143 NW 1131; Bernard v Dr. Nelson, 123 M 468, 143 NW 1133; Peterson v Locomotive Engrs. 123 M 505, 144 NW 160; Mitton v Cargill Elevator, 124 M 65, 144 NW 434; Schultz v City of St. Paul, 124 M 257, 144 NW 955; Swadner v Schefcik, 124 M 269, 144 NW 958; Kulberg v Nat'l Council, 124 M 437, 145 NW 120; Marfia v Gt. Northern, 124 M 466, 145 NW 385; Street v Chic. Milwaukee, 124 M 517, 145 NW 746; McMillan v N. P. 125 M 7, 145 NW 613; Whitby v Matz, 125 M 40, 145 NW 623; Bemis v Pac. Coast, 125 M 54, 145 NW 622; Howell v Gt. Northern, 125 M 137, 145 NW 804; State ex rel v Erickson, 125 M 238, 146 NW 364; Beck v Chic. Milw. 125 M 256, 146 NW 1092; Sinclair v Inv. Syndicate, 125 M 311, 146 NW 1109; McCall v Cameron, 126 M 144, 148 NW 108; Amann v M. & St. L. 126 M 279, 148 NW 101; Farmer v Studebaker, 126 M 346, 148 NW 285; Hayes v Hayes, 126 M 389, 148 NW 125; Blocher v Mayer Bros. 127 M 241, 149 NW 285; Vollmer v Big Stone, 127 M 340, 149 NW 545; Carnegie v Gt. Northern, 128 M 14, 150 NW 164; Klasens v Village of Kasota, 128 M 47, 150 NW 221; Kimball v City of St. P. 128 M 95, 150 NW 379; Klink v Val Blatz, 128 M 144, 150 NW 398; Bauer v Gt. Northern, 128 M 146, 150 NW 394; Graseth v N. W. Knitting, 128 M 245, 150 NW 804; Cherpeski v Gt. Northern, 128 M 360, 150 NW 1091; Carlson v Elwell, 128 M 440, 151 NW 188; Klemik v Hendricksen, 128 M 490, 151 NW 203; Cody v Twin City Taxi Cab, 129 M 70, 151 NW 537; Gambell v Mpls. St. P. 129 M 262, 152 NW 408; Knapp v Gt. Northern, 130 M 405, 153 NW 848; Kinshella v Small, 137 M 406, 163 NW 744; Flour City v Young, 150 M 454, 185 NW 934.

An action on a lease for the recovery of rent is triable by jury, and the fact that the defendant pleaded a surrender and release, alleged by plaintiff to have been signed in the mistaken belief that it was a receipt for rent, did not entitle defendant to a trial of the case by the court without a jury. King v Int'l Lbr. 156 M 494, 195 NW 450.

Where there has been a settlement between attorney and client, the attorney retaining his fees out of the recovery with the client's consent, the client cannot be forced into court by summary proceedings to have the settlement confirmed. In such case, if the client should sue the attorney for part or all of the money retained, the client would have the right to a trial by jury, which the attorney's lien statute does not impair. Westerlund v Peterson, 157 M 379, 197 NW 110.

In actions for malicious prosecution it is the province of the court to determine whether the established facts constituted probable cause for the prosecution; but it is the province of the jury to determine the facts, where or in the instant case they are in dispute. Polzin v Lischefska, 164 M 260, 204 NW 885.

In an action to enjoin the defendant from making any payment on a benefit certificate, it was within the discretion of the court to determine what issues, if any, should be submitted to the jury. Knappen v Locomotive Engrs. 166 M 328, 207 NW 641.

The evidence was sufficient to take to the jury the question whether the employee was injured by the falling tile and also whether there was a causal connection between the injury and the act of negligence. Rasmussen v Benz, 168 M 319, 210 NW 75, 212 NW 20.

Triers of fact must accept as true "the positive, uncontradicted and unimpeached testimony of credible witnesses, which is neither inherently improbable nor rendered so by the facts or circumstances disclosed". Turner v Gackle, 168 M 514, 209 NW 626.

When the evidence is conflicting on an issue tried, a question of fact arises which, under proper instructions, is for the jury. Peterson v Parvaineu, 174 M 297, 219 NW 180.

A litigant is not in a position to assign error upon the submission to the jury of an issue tendered by his pleading and proof. Geist v Schultz, 180 M 78, 230 NW 259.

The opinion of the owner of personal property as to its value is admissible. Its weight is for the jury. Hoffman v Piper, 181 M 603, 233 NW 313.

The evidence was such as to justify submitting to the jury the question whether the defendant represented that the mortgagor lived upon the mortgaged land. Gunnerson v Met. Nat'l, 182 M 480, 235 NW 909.

Where the evidence of the plaintiff is sufficient to sustain a verdict in his favor, it is error for the court to direct a verdict at the close of plaintiff's evidence. Osborn v Will, 183 M 205, 236 NW 197.

The question as to whether this action was barred by the statute of limitations was in this case a question for the jury. Schmit v Esser, 183 M 354, 236 NW 622.

It was prejudicial error to direct a verdict for plaintiff before defendants had rested. Grossman v Lockedell, 184 M 446, 238 NW 893.

Where without objection a cause of properly triable to the court has been tried to a conclusion to a jury and the evidence is such that the issues may be determined by a jury, neither party can predicate error upon the refusal of the court to withdraw the case from the jury. Renn v Wendt, 185 M 461, 241 NW 581.

On a motion for a directed verdict, the evidence is to be viewed in the most favorable light for the adverse party. Boyer, Kohler v Clara City, 189 M 22, 248 NW 294; Holland's Estate, 189 M 172, 248 NW 750.

Fact issues properly determinable by a jury may not be taken away from that body and decided by the court when seasonable objection is made. Rawleigh v Shogren, 192 M 483, 257 NW 102.

To give rise to res ipsa loquitor it must appear that the instrumentality inflicting the injury was under the control of the defendant. Where there is dispute as to this factor, it is proper for the court to submit this issue to the jury under instructions such that if they find defendant to be in control of the instrumentality then they may apply res ipsa loquitor, otherwise not. Hector Constr. v Butler, 194 M 310, 260 NW 496.

The jury is exclusive judge of the facts, including inferences such as where medical experts give contradictory evidence. Jorstad v Benefit Ass'n, 196 M 568, 265 NW 814; Weinstein v Schwartz, 204 M 189, 283 NW 127.

The question of speed is based on opinion testimony. The jurors observe and hear the witnesses. They must decide. Polchow v Chic. St. P. 199 M 5, 270 NW 673.

The lower court erred in directing a verdict for the evidentiary facts where in dispute. Jude v Jude, 199 M 217, 271 NW 475.

Where fair-minded men might draw differing conclusions from the evidence, it is for the jury. Benson v Northland, 200 M 445, 274 NW 532; Theisen v Minn. Power, 200 M 515, 274 NW 617.

Where intrinsic evidence is resorted to in order to find the meaning of an ambiguous contract, and such intrinsic evidence is conclusive and undisputed and renders the meaning of the contract clear, its construction again becomes a question of law for the court. Leslie v Mpls. Teachers Ass'n, 218 M 374, 16 NW(2d) 313; Ewing v Von Nieda, 76 F(2d) 177.

Though facts are undisputed, negligence and contributory negligence are jury questions if different minds, in applying legal criteria of due care to conduct of parties, might reasonably disagree as to inference to be drawn from the facts. Nees v Mpls. St. Ry. 218 M 532, 16 NW(2d) 758.

Under Section 169.03, the extent of slowing down required is generally a fact question for the jury, in connection with the circumstances of each case. The supreme court in determining whether there was error in the trial court withdrawing from the jury the issue of defendant's negligence, must weigh the defendant's evidence in its most favorable light. Travis v Collett, 218 M 594, 17 NW(2d) 68.

A motion for a directed verdict should not be granted unless there is a complete absence of evidence reasonably sustaining plaintiff's claim, or unless evidence in support of the claim is wholly incredible and unworthy of belief or so conclusively overcome by other uncontradicted evidence as to leave nothing upon which verdict may stand. The test is not whether the court might in the exercise of its discretion grant a new trial, but whether it would be its manifest duty to do so. Kundiger v Prudential, 219 M 25, 17 NW(2d) 49.

In administrator's action in federal court for death resulting from crossing collision, it is only where the evidence upon any issue is all one one side, or so

overwhelmingly on one side as to leave no room for doubt about what the fact is, that the court should direct a verdict. Roth v Swanson, 145 F(2d) 262.

Where evidence is conflicting, or where different conclusions may reasonably be drawn from evidence, question of fact is presented. Karlson v United States, 82 F(2d) 330.

In an action on a fire policy covering potatoes, the trial court properly denied insurers' motion for a directed verdict, and for judgment notwithstanding the verdict, notwithstanding evidence was also introduced as to loss of potatoes not covered by the policy Miller's Mut. v Warroad Potato Growers, 94 F(2d) 741.

5. Equitable actions

In equitable actions pure and simple, that is, in actions based upon an equitable cause of action, or to obtain equitable relief solely, there is no right to demand a jury trial of any of the issues. Jordan v White, 20 M 91 (77); Garner v Reiss, 25 M 475; Judd v Dike, 30 M 380, 15 NW 672; Fair v Stickney Farm, 35 M 380, 29 NW 49; Roussain v Patten, 46 M 308, 48 NW 1122; Bond v Wellcome, 61 M 43, 63 NW 3; Shipley v Balduc, 93 M 414, 101 NW 952; Morgan v City of Albert Lea, 129 M 59; 151 NW 532; Morton Brick v Sodergren, 130 M 252, 153 NW 527; St. Nicholos v Kropp, 135 M 115, 160 NW 500.

In action to recover on a contract whereby the plaintiff was to receive as compensation for his services in exploring for minerals a stated weekly compensation and a percentage of the net profits, is one in equity in which the plaintiff is not entitled to a jury trial. Swanson v Alworth, 168 M 84, 209 NW 907.

Equity has jurisdiction to enjoin and abate nuisances; and defendants in equitable actions of this character are not entitled to a jury trial. State ex rel v Guilford, 174 M 457, 219 NW 770.

6. Mixed actions

In actions not of a strictly legal nature where the plaintiff seeks both legal and equitable relief there is no right to a jury trial Finch v Green, 16 M 355 (315); Koeper v Town, 109 M 519, 124 NW 218.

In mixed actions based on both a legal and an equitable cause of action a party has a constitutional right to have the legal cause submitted to a jury but he is not entitled to a jury trial of both causes, and a demand for such trial is properly denied unless it is strictly limited to a legal cause. Greenleaf v Egan, 30 M 316, 15 NW 254; Judd v Dike, 30 M 380, 15 NW 672; Herber v Christopherson, 30 M 395, 15 NW 676; Chadbourne v Zilsdorf, 34 M 43, 24 NW 308; Butman v James, 34 M 547, 27 NW 66; Lace v Fixen, 39 M 46, 38 NW 762; Peterson v Ruhnke, 46 M 115, 48 NW 768; Levine v Lancashire, 66 M 138, 68 NW 855; Crosby v Scott, 93 M 475, 101 NW 610; Koeper v Town of Louisville, 109 M 519, 124 NW 218.

The action for a rescission is entirely distinct from an action at law to recover damages for fraudulent representations or a breach of warranty, and, after a trial on the merits, alternative relief by way of damages cannot be recovered in the former action upon the refusal by the court to grant the equitable relief sought. Marshall v Gilman, 47 M 131, 49 NW 688.

All the rights of the mortgagee were transferred to plaintiff by his payment of the mortgage, and to that extent he obtained a lien on the land superior to the homestead rights of the mortgagors. Spalti v Blumer, 63 M 269, 65 NW 454.

The record concedes that the insured made an untrue statement in his application which might have been fraudulently made and material. It was error to leave this question to the jury. Johnson v Nat'l Life, 123 M 453, 144 NW 218.

A subcontractor agreed to furnish all "millwork" for a church building. The evidence presented in the trial court, the question whether the contract included cathedral glass, should have been disposed of by the trial court as a question of mixed law and fact. Foltmer v First Methodist, 127 M 129, 148 NW 1077.

Whether it would be unreasonable for the servant to rely upon the assurance of safety 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, 127 M 132, 148 NW 1078.

Plaintiff owned 100 shares in the capital stock of the defendant corporation. The shares were never delivered to him, the defendant claiming that its officers had been authorized to deliver the shares to a bank in pledge for plaintiff's loan. This plaintiff denied. The issue of original authority, as well as satisfaction, were for the jury. Daly v Falk Co. 131 M 231, 154 NW 1081.

In this action for malicious prosecution of five civil actions against plaintiffs, the probable cause does not conclusively appear for bringing each action, and that in two or more disputed facts the jury's aid may be necessary, although want of probable cause for bringing an action is for the court. Petruschke v Kamerer, 131 M 320, 155 NW 205.

Plaintiff demanded a money judgment and also that it be a special lien upon certain real estate. He was not entitled to a jury trial. If he had such a right it had been waived. Patswald v Olivia State Bank, 184 M 529, 239 NW 771.

Where there was a general verdict on two material issues, it was error to submit one of such issues which should have been decided for plaintiff as a matter of law. First Nat'l v Flynn, 190 M 102, 250 NW 806.

The trial of an action to set aside and invalidate a trust deposit in a savings bank is not a jury case, even if the relief asked is the recovery of money. Coughlin v Farmers & Mechanics, 199 M 102, 272 NW 166.

In this mixed action no objection was made to the dismissal of the jury, and it is too late to raise the question after verdict. Nordby v Central Life, 201 M 375, 276 NW 278.

In an action by an employer against its employee for an accounting and against his surety for a money judgment, the court may discharge the jury midway in the trial, as in an accounting action there is no right to a jury trial. Raymond Elev. v Amer. Surety, 207 M 117, 290 NW 231.

Effect of verdict of jury on special issues of fact. 15 MLR 479.

7. Not entitled to go to the jury

The following are cases where parties are not entitled to a jury trial:

Election contests. Whallon v Bancroft, 4 M 109 (70); Ford v Wright, 13 M 518 (480); Newton v Newell, 26 M 529, 6 NW 346;

Mandamus proceedings. State ex rel v Sherwood, 15 M 221 (172); State ex rel v City of Lake City, 25 M 404; State ex rel v Burr, 28 M 40, 8 NW 899;

An action to abate a dam for damages. Finch v Green, 16 M 355 (315);

An action to reform a policy of insurance. Guernsey v Amer. Ins. 17 M 104 (83);

Condemnation proceedings. Weir v St. Paul, Stillwater, 18 M 155 (139); Ames v Lake Superior, 21 M 241; City of Mpls. v Wilkin, 30 M 140, 14 NW 581; City of St. P. v Nickl, 42 M 262, 44 NW 59;

An action to have land discharged from the lien of a mortgage. Jordan v White, 20 M 91 (77);

An action to compel specific performance. Piper v Packer, 20 M 274 (245);

Taxation proceedings. Board v Morrison, 22 M 178; City of Duluth v Dul. St. Ry. 60 M 178, 62 NW 267; Wade v Drexel, 60 M 164, 62 NW 261;

Proceedings for contempt. State ex rel v Becht, 23 M 411;

Proceedings in laying out highways. 25 M 123;

An action for an accounting. Garner v Reis, 25 M 475; Greenleaf v Egan, 30 M 316, 15 NW 254; Fair v Stickney Farm, 35 M 380, 29 NW 49; Lace v Fixen, 39 M 46, 38 NW 762; Bond v Wellcome, 61 M 43, 63 NW 3; Shipley v Balduc, 93 M 414, 101 NW 952; Peck v Schultz, 161 M 519, 200 NW 930.

The rule for determining the sufficiency of evidence to support the findings of a jury upon controverted questions of fact applied to verdicts in civil actions of a purely legal nature, applies also to all verdicts upon specific questions of fact tried by a jury under the direction of the court, whether in actions of equitable cognizance only or in cases transferred to and tried in a district court, on appeal from a probate court. Marvin v Dutcher, 26 M 391, 4 NW 685.

Parties are not entitled to a jury trial in cases in:

Proceedings to enforce a mechanic's lien. Sumner v Jones, 27 M 312, 7 NW 265;

An action to foreclose a mortgage. Sumner v Jones, 27 M 312, 7 NW 265; Herber v Christopherson, 30 M 395, 15 NW 676;

An action of an accounting of a trustee, a partition and the appointment of a receiver. Judd v Dike, 30 M 380, 15 NW 672;

An action to restrain a trespass whereby the flow of a river was obstructed. Puit v Bauer, 31 M 4, 16 NW 425;

An action for divorce on the ground of cruelty. Schmidt v Schmidt, 31 M 106, 16 NW 513;

An action for an accounting in a case where a deed absolute in form was in fact a mortgage. Sloan v Becker, 31 M 414, 18 NW 143;

An action for the cancelation of instruments. Russell v Reed, 32 M 45, 19 NW 86; Banning v Hall, 70 M 89, 72 NW 817;

An action to restrain the foreclosure of a mortgage. Russell v Reed, 32 M 45, 19 NW 86;

An action for an injunction to restrain a trespass on land and to determine that the defendant has no interest or easement therein. Chadbourne v Zilsdorf, 34 M 43, 24 NW 308;

An action to have a deed absolute in form declared a mortgage. Niggeler v Maurine, 34 M 118, 24 NW 369;

An action to remove a cloud on title. Butman v James, 34 M 547, 27 NW 66; Yanish v Pioneer Fuel, 64 M 175, 66 NW 198; McAlpine v Resch, 82 M 523, 85 NW 545;

Proceedings under Laws 1881, Chapter 148, the insolvency law. Wendell v Lebon, 30 M 234, 15 NW 109; In re Howes, 38 M 403, 38 NW 104;

An action by the assignee of an insolvent debtor under Laws 1881, Chapter 148, to recover money paid by the debtor to a creditor in payment of an antecedent debt, for the purpose of giving an unlawful preference over other creditors, in an action for the recovery of money only, and either party is entitled to a trial by jury. Trip v Northwestern, 45 M 383, 48 NW 4.

Parties are not entitled to a jury trial in the following cases:

An action for the correction of a stated account. Cobb v Cole, 44 M 278, 46 NW 364;

Proceedings on information in the nature of quo warranto. State ex rel v Minn. Thresher, 40 M 213, 41 NW 1020;

An action to reform a written lease. Peterson v Ruhnke, 46 M 115, 48 NW 768;

An action to determine adverse claims. Roussain v Patten, 46 M 308, 48 NW 1122;

On appeal to the district court in proceedings to test the validity of a will. Schmidt v Schmidt, 47 M 451, 50 NW 598; Enyart's Estate, 180 M 260, 230 NW 781;

Proceedings for the commitment of infants to the reform school. State ex rel v Brown, 50 M 353, 52 NW 935;

Proceedings for the recommitment of a pardoned convict, except on the question whether he is the same person who was convicted. State ex rel v Wolfer, 53 M 135, 54 NW 1065;

In garnishment proceedings. Weibeler v Ford, 61 M 398, 63 NW 1075;

An action in the nature of a creditor's bill. Weibeler v Ford, 61 M 398, 63 NW 1075;

An action to set aside an award and recover on an insurance policy. Levine v Lancashire Ins. 66 M 138, 68 NW 855;

An action in the nature of a bill of peace or to prevent multiplicity of suits. State ex rel v Kingsley, 85 M 215, 88 NW 742;

An action to set aside deed and mortgage as fraudulent and to subject land to payment of judgment for alimony. Cochran v Cochran, 96 M 523, 105 NW 183;

An action to register a title. Peters v City of Duluth, 119 M 96, 137 NW 390;

Proceedings to foreclose a mechanic's lien though defendant interposes counter-claim. Johnson Service v Kruse, 121 M 28, 140 NW 118.

The record concedes that the insured made an untrue statement in his application which might have been found fraudulently made and material. It was error of the trial court to leave the question to the jury. Johnson v National Life, 123 M 453, 144 NW 218.

A general verdict based upon grounds erroneously submitted to the jury, should not be permitted to stand. Roy v Dannehr, 124 M 234, 144 NW 758.

Whether the undisputed facts are sufficient to constitute probable cause for a criminal prosecution is a question exclusively for the courts, and upon appeal will be weighed in the supreme court as if the case had been heard there. Cox v Lauritsen, 126 M 128, 147 NW 1093.

This action is one to charge the defendant as trustee, and to require him to account as such. It is an equitable action, and plaintiff was not entitled to a jury trial. Morton v Sodergren, 130 M 253, 153 NW 527.

In this mandamus proceeding there were no issues for the jury. State ex rel v Anding, 132 M 36, 155 NW 1048.

Whether a transaction is usurious is generally a question of fact; but where the facts are undisputed and only one conclusion can reasonably be drawn, usury becomes a question of law. Rantala v Haish, 132 M 323, 156 NW 666.

Where a party is ordered to interplead and his right to a fund paid into court by a defendant depends upon the power of the court to relieve him from the legal consequences of an accepted bid, he is not entitled to a jury trial. St. Nicholas v Kropp, 135 M 115, 160 NW 500.

In an election contest a jury may not be demanded. Hawley v Wallace, 137 M 183, 163 NW 127.

When the evidence concerning an issue is uncontradicted, there is nothing for the jury unless such evidence in itself is improbable or inconclusive or put in doubt by other circumstances in evidence. Kasal v Picha, 156 M 446, 195 NW 280.

When charged with a violation of a municipal ordinance the defendant is not entitled to a jury trial. State v Nelson, 157 M 506, 196 NW 279.

The issue between a judgment creditor and a garnishee, as to whether the latter is under any liability to the judgment debtor which can be subject to garnishment, arises under a statutory proceeding which is equitable in nature. In consequence, there is no constitutional right to trial by jury. Bassi v Bassi, 165 M 100, 205 NW 947.

Where there is no evidence of contributory negligence, submitting that question to the jury is error. Vukos v Dul. St. Ry. 173 M 237, 217 NW 125; Bakkensen v Mpls. St. Ry. 184 M 274, 238 NW 489.

It is the right and duty of the trial court to direct a verdict when the state of the evidence is such as not to warrant a verdict for a party and if a verdict were rendered the other party would be entitled to a new trial. Manos v St. P. City Ry. 173 M 402, 217 NW 377; Phelion v Duluth-Superior, 202 M 224, 277 NW 552; Bartley v Fritz, 205 M 192, 285 NW 484.

Where no motion is made to submit all or part of the issues in a court case to a jury, as provided by the court rules, the court is not properly called upon at the trial to exercise its discretion. Hatcher v Union Trust, 174 M 241, 219 NW 76.

It is the duty of the trial court to direct a verdict at the close of the evidence if it would be its duty to set aside a contrary verdict returned by the jury. A question of law only is presented by the motion to set aside a verdict. Bryant v Dimmick, 174 M 339, 219 NW 185; Mechler v McMahan, 180 M 252, 230 NW 776; Dorgeloh v Mack, 183 M 265, 236 NW 325; Hall v Gillis, 188 M 20, 246 NW 466; Yates v Gamble, 198 M 7, 268 NW 670.

The liability of the surety on a statutory public contractor's bond was correctly determined by the trial court by whom the case was tried without a jury. Rodichel v Federal Surety, 178 M 183, 226 NW 473.

It is error to submit to the jury an issue as to which there is no conflict of evidence. Central States v Boettcher, 180 M 6, 230 NW 120; Cannon Falls v Peterson, 184 M 294, 238 NW 487.

The question of proximate cause, while generally a jury question, is not for the jury if, viewing the facts in the most favorable light for the plaintiff, there is no sufficient evidence to sustain a finding of proximate cause. Hamilton v Vare, 184 M 580, 239 NW 659.

Defendants Baker were entitled to the instruction that plaintiff had not proved negligence on the part of defendant Mrs. Baker. Zobel v Boutelle, 184 M 172, 238 NW 49.

The trial court was justified under the rule in Krenz v Lee, 104 M 455, 116 NW 832, in directing the verdict for defendant. The trial court may direct a judgment, when, had the case gone to the jury and a verdict returned, the court would be compelled to set it aside. White v Rothschild, 216 M 87, 11 NW(2d) 773.

Where evidence for plaintiff was incredible, and there was no evidence or palpably untrue evidence on which a verdict could stand, the trial court properly directed a verdict for defendants. Spensley v Oliver Iron Mining Co. 216 M 451, 13 NW(2d) 425; Reiter v Porter, 216 M 479, 13 NW(2d) 372.

A verdict should be directed when it is plain that all reasonable men can draw but one conclusion. Sviggum v Phillips, 217 M 586, 15 NW(2d) 109.

Where plaintitff is not entitled as a matter of law to recover, the trial court should direct a verdict for defendant. Porter v Grennan, 219 M 24, 16 NW(2d) 906.

Legal effect of contract is a matter to be determined by the court. Nat'l Surety v Ellison, 88 F(2d) 399.

8. Generally

Having made the point that the question was one of law to be disposed of as such by the court, counsel is not estopped to reassert the claim on appeal simply because, met by an adverse ruling below, they proceeded to ask an instruction predicated on the theory of that ruling. Vogt v Ganley, 185 M 442, 242 NW 338.

It is only in the clearest of cases, when the facts are undisputed, and it is plain that all reasonable men can draw but one conclusion from them that the question of contributory negligence becomes one of law. Eckman v Lum, 187 M 437, 245 NW 638; Campion v City of Rochester, 202 M 136, 277 NW 422.

Defendant dentist is not entitled to a directed verdict even though the evidence falls short of the standard which the instructions given at defendant's request set up, for the evidence justified a recovery under the correct principles of law. Ellering v Gross, 189 M 68, 248 NW 330.

While a jury may not be permitted to guess as between two equally persuasive theories consistent with circumstantial evidence, such evidence in a civil case need not exclude every reasonable conclusion other than that arrived at by the jury. Sherman v Minn. Mutual, 191 M 607, 255 NW 113.

The defendant's claim to judgment on the ground that the insured because afflicted with a serious disease, to his knowledge, before the application for reinstatement was accepted, and guilty of fraud which voids the insurance, is not sustained for the reason that such defense was neither pleaded nor litigated; and if it had been asserted it would have raised a jury issue. Robbins v N. Y. Life, 195 M 205, 262 NW 210, 872.

The evidence, taken as a whole, was too uncertain and speculative on which to base a judgment. Bauer v Miller Motor, 197 M 352, 267 NW 206.

Appellant's motion that the court withdraw the issues in this case from the jury and make findings and order for judgment on behalf of the appellant on all issues in the cause cannot be construed as a motion for direction by verdict. Ydslie Estate, 195 M 501, 263 NW 447.

While it is common practice in this state for a court to direct a verdict for defendant where plaintiff rests where a cause of action is not proved, such practice is not authorized by the statute and is objectionable. Dismissal should be ordered. Willard v Kohen, 202 M 626, 279 NW 553.

Defendant having, by motion for a directed verdict, insisted that there was no fact issue as to giving of train signals, the point was not waived because, the motion for directed verdict denied, defendant asked appropriate instructions in submitting the case to the jury. Engberg v Gt. Northern, 207 M 194, 290 NW 579.

On defendant's motion for a directed verdict, plaintiff's testimony must be accepted as true. Jacobson v Chic. St. Paul, 66 F(2d) 688.

Question of negligence becomes one of law for court only where all reasonable men must draw same conclusions from facts. Sears v Peterson, 76 F(2d) 244.

In considering whether there is any substantial evidence to sustain jury's verdict, all facts which appellees' evidence reasonably tended to prove must be assumed to have been established and all inferences fairly deductible therefrom must be drawn in their favor. Egan v Gunderson, 102 F(2d) 373.

Neither court nor jury may credit testimony positively contradicted by physical facts. Walsh v United States, 24 F. Supp. 877.

Trial by jury as a matter of right under the code. 11 MLR 450.

Jury trial in will cases. 22 MLR 513.

Dismissal and directed verdict. 23 MLR 363.

ISSUES TO THE JURY IN EQUITABLE ACTIONS

1. Compared with equity practice

The distinction in forms of actions has been abolished. The distinction in the mode of trial preserved. The court may now, as the chancellor could formerly, either on application of a party, or on its own motion, direct any issues of fact to be tried by a jury. Formerly a decree was entered directing one of the parties to bring an action at law to try issues set out in the decree. Now there is a jury available in the court. The chancellor could at any stage direct a jury trial. It must now be done before trial. At present an order is substituted for a decree. Berkey v Judd, 14 M 398 (300).

Upon the facts, plaintiff was not entitled to a jury trial, and had he had such right it was waived by proceeding to trial without objection. Patzwold v Olivia Bank, 184 M 529, 239 NW 771.

2. Submission of the "whole issue"

The statute provides for the submission of the whole issue. Berkey v Judd, 14 M 394 (300); Hunt v Ahnemann, 94 M 67, 102 NW 376.

The "wholesome" does not mean that the case may be submitted to a jury generally for them to return a general verdict as in a legal action. Cummings v Taylor, 21 M 366.

Though the question may generally be one of fact, to be submitted to the jury, from the evidence in this case, the court properly disposed of it as a question of law. Thompson v Peterson, 122 M 232, 142 NW 307.

When the issues are suitable for submission to a jury, the discretion of the court is absolute. Messerall v Dreyer, 152 M 473, 189 NW 446.

3. How far discretionary

The court is not authorized to submit issues intrinsically unfit to be tried by a jury. Berkey v Judd, 14 M 394 (300).

When the issues are suitable for submission the discretion of the court is absolute. It may submit all or some of the issues or refuse to do so without regard to the wishes of the parties. Jordan v White, 20 M 91 (77); Sumner v Jones, 27 M 312, 7 NW 265; Russell v Reed, 32 M 45, 19 NW 86; Cobb v Cole, 44 M 278, 46 NW 364; Roussian v Patten, 46 M 308, 48 NW 1122; Schmidt v Schmidt, 47 M 451, 50 NW 598; Hulett v Carey, 66 M 327, 69 NW 31; Banning v Hall, 70 M 89, 72 NW 817

Illustrative of the jurisdiction of the court in summary proceedings. Landro v Gt. Northern, 122 M 87, 141 NW 1103; Farmer v Studebaker, 126 M 346, 148

NW 285; Morgan v City of Albert Lea, 129 M 59, 151 NW 532; Nesland v Eddy, 131 M 62, 154 NW 661; Lewis v Murray, 131 M 439, 155 NW 392; Brazill v Co. of Sibley, 139 M 458, 166 NW 1077; Messerall v Dreyer, 152 M 471, 189 NW 446.

After dismissal of the complaint, the counter-claim and reply involved matters in equity only, and no jury was required. Hormel v Bank, 171 M 65, 212 NW 738.

Since, in a case triable to the court, the court, on its own motion, may submit an issue to a jury, no reversible error results from such a submission without there having been a motion for settling a jury issue as prescribed by rules of the district court. Marttinen's Estate, 171 M 475, 214 NW 469.

The complaint sets forth an action in equity to compel the issuance to plaintiff of certificates of capital stock, and defendant was not entitled to a jury trial. Falk v Dirigold, 174 M 219, 219 NW 82.

In an equity case tried to the court, the granting or refusal of a request for submission of issues to a jury, lies within the sound discretion of the court. State Bank of Riley, 176 M 550, 224 NW 237.

The action being to enjoin a trespass and for equitable relief on the alleged ground that plaintiffs had no remedy at law, the submission of issues to a jury was discretionary. Doyle v Babcock, 182 M 556, 235 NW 18.

The determination of an application to the trial court to submit special issues in an equity case to a jury rests in the sound discretion of the trial court. Westberg v Wilson, 185 M 307, 241 NW 315.

4. Issues suitable for submission

There are some issues which ought not to be tried by a jury The authority of the court is the same as when law and equity were administered by different courts. The direction should be by formal order, stating the issues to be tried, and made before the trial is entered on. The following cases illustrate the class of cases suitable for submission to the jury: Berkey v Judd, 14 M 394 (300); Pint v Bauer, 31 M 4, 16 NW 425; Fair v Stickney Farm, 35 M 380, 29 NW 49; Schmidt v Schmidt, 47 M 451, 50 NW 598; Shipley v Balduc, 93 M 414, 101 NW 952; Green v Hayes, 120 M 201, 139 NW 139; Hayes v Hayes, 126 M 389, 148 NW 125; Pierce v Maetzold, 126 M 445, 148 NW 302; Cole v Johnson, 127 M 291, 149 NW 466; Lewis v Murray, 131 M 441, 155 NW 392; Messerall v Dreyer, 152 M 471, 189 NW 446.

5. Order of court

When law and equity were administered by separate courts, the submission of a fact question to the jury was by decree, now by order. The issue should be submitted by formal order, stating the issues to be tried. Berkey v Judd, 14 M 394 (300); Guernsey v Amer. Ins. 17 M 104 (83); Nesland v Eddy, 131 M 62, 154 NW 661; Messerall v Dreyer, 152 M 473, 189 NW 447.

6. Framing the issues

The court on its own motion may submit issues of its own framing. Russell v Reed, 32 M 45, 19 NW 86.

The court on its own motion impaneled a jury for the trial of special issues only. No issues were framed. After taking evidence claimants of the money seized by garnishment asked the court to submit three specific questions to the jury. This the court declined to do, and discharged the jury. On appeal it is held that the conduct of the claimants was such that they had waived the right to a jury trial if any such right existed. Smith v Barclay, 54 M 47, 55 NW 827

7. Court must find on reserved issues

See section 546.20 notes under (1) and (12).

If the verdict of the jury does not cover all the issues it is the duty of the court to make findings on the reserved issues and order judgment on the verdict and findings. Piper v Packer, 20 M 474 (245); Sumner v Jones, 27 M 312, 7 NW 265; Schmidt v Schmidt, 31 M 106, 16 NW 543.

When the court erroneously orders judgment on the verdict without making findings on the reserved issues the remedy is not a motion for a new trial but a motion for the trial of the reserved issues. Cobb v Cole, 44 M 278, 46 NW 364, 51 M 48, 52 NW 985, 55 M 235, 56 NW 828.

8. Dismissal of action; directing verdict

If an affirmative answer to a question submitted to the jury is essential to plaintiff's recovery, and if there is no evidence to warrant the jury in finding an affirmative answer, the court may dismiss; but in the instant case the dismissal was erroneous. Sloan v Becker, 31 M 414, 18 NW 143.

In an action to remove a cloud on a title, the court properly submitted issues to a jury and found in favor of plaintiff. McAlpine v Resch, 82 M 523, 85 NW 545.

The court may, in an equitable action, notwithstanding the order submitting issues to the jury, withdraw the same at the conclusion of the trial or direct a verdict thereon, as the evidence in the opinion of the court may require. Morgan v City of Albert Lea, 129 M 59, 151 NW 532.

In this mandamus proceeding there were no issues for the jury, and no error in refusing appellant's demand for a jury. State ex rel v Anding, 132 M 36, 155 NW 1048.

9 Mode of trial

This action was brought to reform an insurance policy, and recover on it as reformed. There was nothing for the jury until the court had first decided that appellant was entitled to have the policy reformed. Guernsey v Amer. Ins. 17 M 104 (83).

Whenever an issue of fact is directed to be tried by a jury in an equitable action, or in any other proceeding, it is tried as an issue of fact in any action tried; and there is no reason why the verdict should not receive the same effect as other verdicts. Marvin v Dutcher, 26 M 410, 4 NW 685; Sloan v Becker, 31 M 414, 18 NW 142.

In the instant case the findings were a "decision" within the meaning of the statute, and a motion to vacate same, and for a new trial, may be made before the accounting ordered by the court is had. Ashton v Thompson, 28 M 330, 9 NW 876.

The questions submitted to the jury were not sufficient to determine all the essential facts. Upon the return of the jury, the court made no order reserving the case but long afterwards made findings of fact upon matters not included in the findings of the jury, and directed judgment. Held to be no error. Schmitt v Schmitt, 31 M 106, 16 NW 543.

10. How far findings of jury conclusive on court

The verdict of the jury on the issues submitted to them is binding on the court until vacated and set aside and cannot be disregarded in the determination of the action. Wilson v McCormick, 10 M 216 (174); Marvin v Dutcher, 26 M 391, 4 NW 685; Niggeler v Maurin, 34 M 118, 24 NW 369; Stanek v Libera, 73 M 171, 75 NW 1124; Reider v Walz, 93 M 399, 101 NW 601.

After a court has submitted issues to a jury it may withdraw them before verdict, discharge the jury, and determine the issues itself. Smith v Barclay, 54 M 47, 55 NW 827

A verdict of a jury upon specific questions of fact submitted to them in an equity action is as binding on the court as a general verdict in a legal action, and it is subject to the same rules as to setting it aside for insufficiency of evidence. Ydstie's Estate, 195 M 501, 263 NW 447.

11. Generally

Equity cases of similar import. State v Brooks-Scanlon, 122 M 405, 142 NW 717; Whitby v Matz ,125 M 40, 145 NW 623; Mather v London Guar. 125 M 186, 145 NW 963; Fairchild v Fleming, 125 M 431, 147 NW 434; Bork v Keller, 126

M 203, 148 NW 113; Kueberg v Supreme Ruling, 126 M 494, 148 NW 299; Watre v Gt. Northern, 127 M 122, 149 NW 18; Capital Trust v Gt. Northern, 127 M 144, 149 NW 14; Crandall v Chic. & G. W. 127 M 498, 150 NW 165; State ex rel v Dist. Court, 128 M 43, 150 NW 211; Bombolis v M. & St. L. 128 M 112, 150 NW 385; Williams v Pullman, 129 M 97, 151 NW 895; Park Rapids v Aetna Ins. 129 M 328, 152 NW 732; Silverstein v Knights, 129 M 340, 152 NW 724; Hannula v Dul. & Iron Range, 130 M 3, 153 NW 250; Luther v Joyce, 132 M 452, 157 NW 708; Olson v Moulster, 137 M 96, 162 NW 1068.

546.04 CONSOLIDATION; SEPARATE TRIALS; ACTIONS TRIABLE TOGETHER.

HISTORY. R.S. 1851 c. 71 ss. 11, 18; P.S. 1858 c. 61 ss. 11, 18; G.S. 1866 c. 66 ss. 203, 209; G.S. 1878 c. 66 ss. 221, 227; G.S. 1894 ss. 5271, 5365; R.L. 1905 s. 4141; G.S. 1913 s. 7767; G.S. 1923 s. 9264; M.S. 1927 s. 9264.

The section providing that a second action shall not be brought where one is already pending to foreclose liens on property affected by several lien claims, but further providing that, if such action be brought, it must be consolidated with the first action, is a regulation of practice, and does not make such second action a void proceeding. Miller v Cordit, 52 M 455, 55 NW 47.

There was a demurrer to one of two actions started to enforce stockholders' liability. The actions were consolidated The order consolidated the two complaints so that the allegations in the one aided the other, and the case stood as if the complaint demurred to had been amended. Pioneer Fuel v St. Peter St. 64 M 386, 67 NW 217.

Husband and wife each brought an action against the same defendant for injuries resulting from the same accident. By consent the cases were consolidated. The wife had a verdict and collected with costs. The verdict was against the husband. Statutory costs are recoverable against him. Schuler v Mpls. St. Ry. 76 M 48, 78 NW 881.

Under this section granting separate trial is within the discretion of the trial court. Fortier v McRae, 190 M 575, 252 NW 833.

Defendant is not, after consolidation of the several suits into one, in a position to urge the objection that when two of the suits were begun plaintiff had no capacity to sue or that a cause of action was split in one of the consolidated suits. Atkinson v Neisner, 193 M 175, 258 NW 151, 259 NW 185.

Defendant consenting but asserting there should be separate verdicts, two actions, one for assault and the other for slander, were consolidated. The trial developed facts showing the slander action had a substantial basis, and the allegations as to assault were groundless. The court directed the jury to bring in but one verdict assessing general damages and also special. The judgment for plaintiff is affirmed. Gendler v Kresge, 195 M 578, 263 NW 925.

In separate suits arising out of an automobile collision by which passengers and driver of one of the cars sought damages of the owner of the other, the court, over the objection of all of the plaintiffs, rightfully, under its inherent power consolidated the cases. Ramswick v Messerer, 200 M 299, 274 NW 179.

Causes of action blended. 22 MLR 498, 511.

546.05 NOTICE OF TRIAL; NOTICE OF ISSUE.

HISTORY. R.S. 1851 c. 71 s. 8; P.S 1858 c. 61 s. 8; G.S. 1866 c. 66 s. 200; 1877 c. 28 s. 1; G.S. 1878 c. 66 s. 218; G.S. 1894 s. 5362; R.L. 1905 s 4165; 1909 c. 221 s. 1; G.S. 1913 s. 7793; 1917 c. 6 s 1; G.S. 1923 s. 9289; M.S. 1927 s. 9289.

See district court rules.

1. Notice of trial

2. Note of issue

1. Notice of trial

A notice of trial is not avoided by a subsequent amendment of the pleadings. Stevens v Curry, 10 M 316 (249); Griggs v Edelbrock, 59 M 485, 61 NW 555.

The statute was formerly applicable to special terms. Colt v Vedder, 19 M 539 (469).

In computing the time the day of service is excluded and the first day of the term included. State ex rel v Weld, 39 M 426, 40 NW 561.

A party is entitled to a notice of trial as a matter of right. If a new trial is ordered and an appeal taken from the order, the cause must be again noticed if the order is affirmed. A right to have a cause stricken from the calendar is not waived by participating in a trial after a refusal of the court to strike from the calendar or to continue the cause. Mead v Billings, 43 M 239, 45 NW 228; Flannagan v Borg, 64 M 394, 67 NW 216.

The erroneous refusal of the court to strike from the calendar a case based on an improper notice is ground for a new trial. Flannagan v Borg, 64 M 394, 67 NW 216.

Admission of service of a notice is not a waiver of objection to a want of jurisdiction over the subject matter. Hagenmeyer v Board, 71 M 42, 73 NW 628.

A defendant is under no obligation to notice a cause for trial. St. P. & Mpls. v Eckel, 82 M 278, 84 NW 1008.

Whether an adjourned term is a "term" within the statute is an open question. Johnson v Velve, 86 M 46, 90 NW 126.

An irregularity in the motion for new trial as to notice will not be relieved against if the claimant is guilty of laches. Noonan v Spear, 129 M 528, 152 NW 270.

After a case has been tried and determined, and a new trial granted, a new notice is necessary to bring the case again for trial, and, if a party is required to go to trial without such notice, he may have a verdict against him set aside and a new trial granted. Dr. Ward v Walleat, 148 M 410, 182 NW 523.

A party litigant is not entitled to proceed to trial in the absence of proof of service of notice of trial upon parties who have appeared. Zell v Friend-Crosby, 160 M 181, 199 NW 928.

Since quo warranto is an extraordinary remedy, procedure is not governed by the requirements of service of notice of trial applicable in civil actions. State ex rel v Village of North Pole, 213 M 297, 6 NW(2d) 458.

Changes in procedure effected by the Laws of 1917. 1 MLR 542.

2. Note of issue

Irregularities in a note of issue were in this case held to be immaterial. Homberger v Brandenberg, 35 M 401, 29 NW 123.

The designation of the case as a "court case" or "jury case" is not conclusive on the court. Shipley v Balduc, 93 M 414, 101 NW 952.

No definite prejudice being claimed, the irregularity regarding filing of note of issue was in the trial court's discretion properly disregarded. Mollan's Estate, 181 M 218, 232 NW 1.

546.06 ISSUES OF LAW, HOW BROUGHT TO TRIAL

HISTORY. R.S. 1851 c. 71 ss. 8, 43; 1852 Amend. p. 11; P.S. 1858 c. 61 ss. 8, 43; 1862 c. 15 s. 1; G.S. 1866 c. 66 ss. 200, 226; 1867 c. 67 s. 4; 1868 c. 90 s. 1; 1877 c. 28 s. 1; G.S. 1878 c. 66 ss. 87, 218, 244; 1881 c. 7 s. 1; 1885 c. 267; 1889 c. 151 s. 1; G.S. 1894 ss. 5227, 5362, 5388; R.L. 1905 s. 4166; G.S. 1913 s. 7794; G.S. 1923 s. 9290; M.S. 1927 s. 9290.

Objection that the court did not fix the time for argument on a demurrer as provided in this section cannot be raised for the first time on appeal. Fallgotter v Lammers, 71 M 238, 73 NW 860.

An issue of law arising on demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time whether it be at term of court or not. Johnson v Velve, 86 M 46, 90 NW 126.

Upon the facts stated in the opinion it was an abuse of discretion in refusing to permit defendant to amend his answer. Erickson v Bjertness, 167 M 323, 209 NW 32.

When an order requires motion for a new trial to be submitted to trial judge outside his district, against the protest of one of the parties, a writ of prohibition should issue. State ex rel v Johnson, 173 M 271, 217 NW 351.

546.07 ORDER OF TRIAL; ABSENCE OF PARTIES.

HISTORY. R.S. 1851 c. 71 ss. 9, 10; P.S. 1858 c. 61 ss. 9, 10; G.S. 1866 c. 66 ss. 201, 202; G.S. 1878 c. 66 ss. 219, 220; G.S. 1894 ss. 5363, 5364; R.L. 1905 s. 4167; G.S. 1913 s. 7795; G.S. 1923 s. 9291; M.S. 1927 s. 9291.

The failure of a party demurring to appear at the hearing in the trial court does not prevent him from being heard on appeal. Hall v Williams, 13 M 260 (242).

Where the answer denies material allegations in the complaint, it is error for the court to order judgment for plaintiff without proof merely because the defendant fails to appear when the cause is called. Strong v Comer, 48 M 66, 50 NW 936; Newman v Newman, 68 M 1, 70 NW 776.

On appeal from the probate to the district court, where the appellant does not appear and prosecute his appeal, the district court is not required to hear evidence and determine the case on its merits. Blandin v Brennin, 106 M 353, 119 NW 57.

546.08 CONTINUANCE

HISTORY. R.S. 1851 c. 71 s. 11; P.S. 1858 c. 61 s. 11; G.S. 1866 c. 66 s. 204; 1868 c. 78 s. 1; G.S. 1878 c. 66 s. 222; G.S. 1894 s. 5366; R.L. 1905 s. 4168; G.S. 1913 s. 7796; G.S. 1923 s. 9292; M.S. 1927 s. 9292.

Judgment in this case reversed upon the ground of error in refusing to postpone the trial of the action on account of the absence of evidence. Wright v Levy, 22 M 466.

The trial court having granted respondent's motion to amend the complaint by striking out certain admissions and substituting entirely new issues, appellant was entitled to a continuance. Dispatch Laundry v Employers Liability, 105 M 384, 117 NW 506, 118 NW 152; Hayday v Hammermill, 184 M 8, 237 NW 600.

The stipulated testimony of an absent witness received under General Statutes 1913, Section 7796 (section 546.08), may be used for purpose of impeachment. Young v Avery, 141 M 483, 170 NW 693.

The granting of a continuance is in the sound discretion of the trial court, and its action will not be reversed on appeal except for a clear case of abuse of discretion. Peterson v Parviainen, 174 M 297, 219 NW 180.

In refusing to continue to alter date, the hearing on the order to show cause why a receiver should not be appointed, and in allowing an amendment to the complaint, the court did not abuse its discretion. Defendants were not prejudiced. Mpls. Svgs. v Yolton, 193 M 632, 289 NW 382.

Ordinarily when an action is brought to reform an instrument set up as a defense in an action at law for damages, the court should stay the latter action to abide a decision in the former. Ahlsted v Hart, 201 M 82, 275 NW 404.

The granting of a continuance or postponement of a cause is a matter lying in the discretion of the trial court, and its action will not be reversed on appeal except for a clear abuse of discretion. Lehman v Lehman, 216 M 538, 13 NW(2d) 604.

546.09 JURY, HOW IMPANELED; BALLOTS; RULES OF COURT; EXAMINATION; CHALLENGES.

HISTORY. R.S. 1851 c. 71 ss. 14, 16; P.S. 1858 c. 61 ss. 14, 16; G.S. 1866 c. 66 ss. 205, 207; G.S. 1878 c. 66 ss. 223, 225; G.S. 1894 ss. 5367, 5369; R.L. 1905 s 4169; 1909 c. 417 s. 1; G.S. 1913 s. 7797; G.S. 1923 s. 9293; M.S. 1927 s. 9293; 1943 c. 228 s. 1.

In examining prospective jurors, a party may elicit such information as is necessary to enable him to determine whether the jurors are interested in the result of the suit or biased against the bringing of such suits; but should not be permitted to excite prejudice against the adverse party through an abuse of this prejudice. N. W. Fuel v Mpls. St. Ry. 134 M 378, 159 NW 832.

The jurors before being sworn were examined relative to their interest in the insurance companies defending the actions. This under our procedure was proper. Seitz v Claybourne, 181 M 7, 231 NW 714; Martin v Schiska, 183 M 256, 236 NW 312.

The direction of a verdict for defendants foreclosed the possibility of any prejudice resulting to plaintiff by reason of method followed in calling jury trial. Keiger v St. Paul City Railway, 216 M 38, 11 NW(2d) 757.

Examination of prospective jurors on voir dire. 17 MLR 300.

546.095 ALTERNATE JURORS.

HISTORY. 1941 c. 256.

546.10 CHALLENGES.

HISTORY. R.S. 1851 c. 71 s. 17; P.S. 1858 c. 61 s. 17; 1860 c. 34 s. 1; G.S. 1866 c. 66 ss. 206, 208; 1878 c. 21 s. 1; G.S. 1878 c. 66 ss. 224, 226; G.S. 1894 s. 5368, 5370; R.L. 1905 s. 4170; 1913 c. 217 s. 1; G.S. 1913 s. 7798; G.S. 1923 s. 9294; 1927 c. 281; M.S. 1927 s. 9294; 1943 c. 228 s. 2.

1. Order of challenging; joinder and waiver
2. Peremptory challenge
3. Implied bias
4. Payment of jury fee

1. Order of challenging; joinder and waiver

The order in which challenges to individual jurors in a civil action may be taken is a matter the regulation of which is in the sound discretion of the court in which the trial takes place. St. Anthony Falls v Eastman, 20 M 277 (249).

In the selection of juries for the trial of civil action the proper practice is to require the parties to exercise their right of peremptory challenge alternately, one challenge at a time, beginning with defendant. Swanson v Mendenhall, 80 M 56, 82 NW 1093.

Either party may at any time indicate to the court that he is satisfied with the jury, and, when he does so, cannot thereafter, without leave of court, challenge peremptorily one of the jurors so accepted. If the opposing party thereafter makes a further challenge and a new juror is called, the right within his limit to challenge the new juror remains. Swanson v Mendenhall, 80 M 56, 82 NW 1093.

Under General Statutes 1913, Section 7798 (section 546.10), defendants must join in peremptory challenges. Carr v Davis, 159 M 485, 199 NW 237.

Where the fact that an outsider has attempted to influence a juror in favor of the accused is made known in open court, and the accused thereafter voluntarily proceeds with the trial to a verdict, he waives any right which he may have had to object to the competency of the jury on the ground that this occurrence may have prejudiced them against him. State v Remen, 160 M 527, 200 NW 803.

2. Peremptory challenges

Where a party, who has not exhausted his peremptory challenges, passes them and accepts the jury as then constituted, without expressly reserving his right to use them if other jurors are called, he does not thereby waive his right to peremptorily challenge a juror thereafter called in place of one challenged by his adversary. Swanson v Mendenhall, 80 M 56, 82 NW 1093; Lerum v Geving, 97 M 269, 105 NW 967.

It is assigned as error that the trial court directed the defendants to join in the peremptory challenges and limited the number to three for both. Defendants insist their respective interests are antagonistic. Assuming the ruling erroneous, in the instant case there was a waiver on the part of the defendants. (See Laws 1943, Chapter 228, Section 2.) Tuttle v Farmer's Handy Wagon, 124 M 208, 144 NW 938.

Defendants whose interests are not adverse are allowed three peremptory challenges a side, in which they are required to join. Eilola v Oliver Iron Co. 201 M 77, 275 NW 408.

3. Implied bias

Plaintiff's attorney was not guilty of prejudicial misconduct. For the purpose of enabling him to intelligently select the jury, he had a right to learn whether defendant was insured. Spoonick v Backus-Brooks, 89 M 354, 94 NW 1079; Antletz v Smith, 97 M 217, 106 NW 517.

Plaintiff, to lay a foundation for interrogation of jurors, served notice to produce a described insurance policy, and, when it was not produced, was properly allowed to examine a supposed representative of the insurance company, in the presence of the jury, as to the connection of the insurance company with the defense. Vion v Brooks-Scanlon, 99 M 97, 108 NW 891.

The relation of attorney and client between a juror and the attorney of one of the parties to the action is not ground for challenging the juror for implied bias. Sorseleil v Red Lake Falls, 111 M 275, 126 NW 903.

4. Payment of jury fee

Prior to the enactment of Laws 1913, Chapter 217, Section 1, an act of the legislature requiring, as a condition to the right of trial in a civil action by jury, the payment in advance of a reasonable jury fee, was held to be constitutional. Adams v Corriston, 7 M 456 (365).

Where a jury cause is called, jury fee paid, verdict rendered, and a new trial granted, a further jury fee must be paid, when the case is called for another trial, before the jury can be sworn. Schultz v Bower, 66 M 281, 68 NW 1080.

546.11 ORDER OF TRIAL.

HISTORY. R.S. 1851 c. 71 s. 18; P.S. 1858 c. 61 s. 18; G.S. 1866 c. 66 s. 209; G.S. 1878 c. 66 s. 227; G.S. 1894 s. 5371; R.L. 1905 s. 4171; G.S. 1913 s. 7799; G.S. 1923 s. 9295; M.S. 1927 s. 9295.

1. Opening and closing

The respondent appealed to the district court from an award. The court correctly decided that the respondent should assume the position of plaintiff in the cause, and proceed to introduce evidence in support of the issue made. Minn. Valley v Doran, 17 M 188 (162); St. P. & S. C. v Murphy, 19 M 500 (433).

If a court, under a mistake as to which party has the burden of proof, so directs the order of trial as to deprive the party having the affirmative of the issue of the privilege of opening and closing, the appellate court will not reverse unless there appears probable ground for believing that the party was injured. Paine v Smith, 33 M 495, 24 NW 305.

In exercising the right conferred by statute upon the trial court to direct that the defendant may open the case and make the closing argument to the jury, the court must exercise a sound discretion, which was done in this case. Aultman v Falkum, 47 M 414, 50 NW 471.

Although a defendant was strictly entitled to close the argument to the jury on the trial below, a new trial will not be ordered because the closing was given to the plaintiff, unless the court can see that the defendant may have been prejudiced thereby. Gran v Spangenberg, 53 M 42, 54 NW 933.

The court directed plaintiff's counsel to make the closing argument, upon the reasoning that the burden of proving death by suicide had shifted, and that it was incumbent upon plaintiff to prove the contrary. The appellate court held that the order of argument was correct, although a wrong reason was given. Sartell v Royal Neighbors, 85 M 369, 88 NW 985.

Action for rent; and defendant set up as a defense that the building was untenantable, and he vacated for that reason. The trial court did not err in permitting the defendant's attorney to close to the jury. Viehman v Boelter, 105 M 60, 116 NW 1023.

It is not reversible error to deny defendant the right to the closing argument to the jury, no prejudice appearing. Lockway v Modern Woodman, 121 M 170, 141 NW 1.

There was no reversible error in permitting the defendant to open and close the case, nor abuse of discretion in allowing amendments to the answer. Parlin v Evenson, 158 M 348, 197 NW 489.

The order in which the closing arguments shall be made is largely discretionary with the court, and its action will not be reversed except for a clear abuse of discretion. Bullock v N. Y. Life, 182 M 192, 233 NW 858.

The court properly permitted defendants to have the closing argument to the jury; they had the affirmative of the issue to be tried. Clausen v Salhus, 187 M 534, 246 NW 21.

Where plaintiff introduces sufficient evidence upon which findings can be made in favor of defendants, but neither formally rests nor asks permission to dismiss, the court is justified in concluding that the cause was submitted for findings and decision. Calhoun Beach v Mpls. Builders, 190 M 576, 252 NW 442.

The defendant was not entitled to the closing argument to the jury, its concession not having gone to the issue that the total disability did not arise from ailments occurring prior to the issue of the policy. Schoedler v N. Y. Life, 201 M 327, 276 NW 235.

In condemnation proceedings, the owner occupies the position of the ordinary plaintiff in a damage suit; and as such he has the right to open and close the case. Mpls.-St. Paul v Fitzpatrick, 201 M 442, 277 NW 394.

Plaintiff at the beginning of the trial stated that the burden was on the defendant to establish his counter-claim, and thus waived his right to the closing argument to the jury. Dickinson v Kirkwood, 204 M 401, 283 NW 725.

Defendant is under no obligation to introduce evidence, but may rest on the plaintiff's testimony. Gans v Coca-Cola, 205 M 36, 284 NW 844.

2. Effect of admission in opening

A statement of fact made by counsel in his opening to the jury is not a binding admission dispensing with the necessity of proof, not being "distinct and final, and made for the express purpose of dispensing" with such proof. Ferson v Wilcox, 19 M 449 (388).

When counsel in his opening statement to the jury makes a deliberate concession as to 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 v Johnston, 127 M 443, 149 NW 667.

In the second trial of a case, a party is not concluded by his counsel's opinion of the legal effect of the contract, expressed during the course of the first trial. Hayday v Hammermill, 184 M 8, 237 NW 600.

3. Evidence and proof

It is discretionary with the court to allow evidence in rebuttal which should have been introduced in chief. Lynd v Pickett, 7 M 184 (128); State v Staley, 14 M 105 (75); State v Cantieny, 34 M 1, 24 NW 458; Rosquist v Gilmore, 50 M 192, 52 NW 385.

When defendant begins, the admission of evidence on his part not strictly rebutting, after plaintiff has closed his case, is no ground for new trial, unless manifest injustice was the result. Thayer v Barney, 12 M 502 (406).

Where the plaintiff, in rebuttal, offers evidence which he should have given in chief, the court may, of its own motion, limit the extent to which he shall give such evidence. Plummer v Mold, 22 M 15.

The court may, in its discretion, control the order of proof. McDonald v Peacock, 37 M 512, 35 NW 370.

Where a plaintiff fairly covers his field of proof and then announces: "That is all the witnesses we have present" and silently permits the other side to offer proof, it is held that he has rested his case. In re Consolidated Ditch No. 1, 157 M 108, 195 NW 781.

The method of examination of his medical experts by plaintiff is disapproved. Rasmusson v Benz, 168 M 319, 210 NW 75, 212 NW 20.

Error assigned because the court permitted the reception of evidence relating to the construction and condition of the lift and its safety applicances before the introduction of proof tending to show defendant's responsibility toward the injured boy. This was a mere matter of proof and within the discretion of the trial court. Brandenberg v Equity, 160 M 165, 199 NW 570.

When on stipulation the case was reopened to admit testimony of a physician, it was not error to reject testimony in rebuttal when it did not appear that his testimony would rebut that of the physician. Runge v Schroeder, 174 M 131, 218 NW 455.

There was no error in inquiring the name of the insurer; nor in permitting inquiry in respect to defendant's application for insurance to rebut the attempted defense of joint ownership of the car. Martin v Schiska, 183 M 256, 236 NW 312.

Whether it was proper to show that other accidents occurred at the door is not raised by the record. It does not appear from a suggested question that an answer would be favorable to plaintiff, and there was no proof. Tierney v Graves Motor, 185 M 114, 239 NW 905.

The inexcusably erroneous procedure of counsel for plaintiff in eliciting information, in the presence of jurors, that the two defendants absolved from liability by the verdict did not carry insurance, is no ground for a new trial because not objected to at the time or assigned as error in the motion for a new trial. Brown v Murphy, 190 M 81, 251 NW 5.

The admission of the evidence of a little girl in rebuttal was properly admitted as it was confined to the mere fact that the Degedio family were there at the time. Luck v Mpls. St. Ry. 191 M 503, 254 NW 609.

An order of the trial court directing the order in which the issues be tried is not appealable. Detwiler v Lowden, 198 M 185, 269 NW 367, 838.

Objections to questions, obviously asked for the purpose of insinuating that plaintiff was malingering, were sustained; but the trial court should also have admonished the jury to disregard the insinuation implied by the questions. Hill v Ross, 198 M 199, 269 NW 396.

Defendant brought out the fact that an insurance corporation was interested in plaintiff's side of the case. No prejudice resulted as jurors were also informed of the fact that an insurance company was interested in defendant's claim of no liability. Tri-State v Nowotny, 198 M 537, 270 NW 684.

It was not error to permit plaintiffs' counsel to interrogate prospective jurors for the purpose of discovering whether they were interested in defendants' insurer, there being no evidence of bad faith. Santee v Haggert, 202 M 361, 278 NW

The rulings excluding offers of proof on collateral matters before proof of 520; McKeown v Argetsinger, 202 M 595, 279 NW 402.

facts that would show collateral matters offered might be material where not an abuse of judicial discretion. Exsted v Otto, 202 M 644, 279 NW 559.

Where counsel for plaintiff in process of choosing a jury stated that an insurance company was interested in defendant's case, the trial judge properly refused a new trial, he having instructed the jury at the time of trial to disregard the questions and answers as improper. Exsted v Stambaugh, 203 M 392, 281 NW 526.

The admission in rebuttal of evidence otherwise relevant was in the judicial discretion of the trial court. Noetzelman v Webb, 204 M 26, 283 NW 481.

The court did not err in sustaining an objection to a question which was a mere repetition of a question previously answered. Hughes v Hughes, 204 M 592, 284 NW 781.

Granting a provisional rest at close of plaintiff's evidence to enable defendant to move for a directed verdict lies in sound discretion of the trial judge, and where plaintiff does not move to dismiss before trial judge rules on the motion, he submits his case for decision on defendant's motion and is bound thereby. Porter v Grennan, 219 M 14, 16 NW(2d) 906.

Informing the jury of insurance coverage. 23 MLR 85.

4. Judicial duties and conduct

Judge's instruction fatally erroneous as directing the jury, in effect, to disregard arguments of counsel. Svensson v Lindgren, 124 M 386, 145 NW 116.

The validity of Laws 1913, Chapter 245, which prohibits the trial court from directing a verdict, is not involved in this case. The court could not properly have directed a verdict, had there been no such statute. Weide v City of St. Paul, 126 M 491, 148 NW 304.

Instructions to the jury in an action to recover possession of non-negotiable bonds held not to be argumentative or too favorable to the party who obtained the verdict. King v Joseph, 165 M 28, 205 NW 639.

The court correctly instructed the jury that the burden of proof was upon the answering defendants. Towle v Brannan, 165 M 82, 205 NW 699.

Dying declarations may be impeached in the same manner as other testimony. The charge to that effect is without error. State v French, 168 M 341, 210 NW 45.

The court stated the applicable law correctly; and though as stated it may have placed defendant's contention before the jury more prominently than plaintiff's, will not justify a reversal. Bergman v Williams, 173 M 250, 217 NW 127.

The reading of part of the pleadings to the jury disapproved but held not reversible error where the court by its charge clearly defines and limits the issues for the jury to determine. Bullock v N. Y. Life, 182 M 193, 233 NW 858.

The court's instruction that defendant's liability rested on her right to control rather than upon the ownership of the car was as favorable to her as she could demand. Martin v Schiska, 183 M 256, 236 NW 312.

Where the terms of the contract were ambiguous, the court did not mislead the jury in the charge relating to the issues. Hayday v Hammermill, 184 M 8, 237 NW 600.

An unequivocal instruction that a determinative proposition is undisputed on the evidence, the fact being to the contrary, was prejudicial error, and not cured by the court's later explanation. Poppe v Bowler, 184 M 415, 238 NW 890.

Instruction erroneous but without prejudice. Mechler v McMahon, 184 M 476, 239 NW 605.

A reference in a charge to a witness which neither discredits nor commends the veracity of the witness, is not error. Reek v Reek, 184 M 532, 239 NW 599.

The charge on apparent authority was substantially correct, and did not take from the jury the question of actual authority of the adjuster. Breuer v Continental, 188 M 112, 246 NW 533.

Reading by the court in its charge quotations from reported decisions is disapproved, but in this case not prejudicial. Christensen v Pestorious, 189 M 548, 250 NW 363.

The trial court did not err in asking a question of the witness, nor in saying to the jury that counsel correctly asked a question, nor in stating the bearing, if any, which the answer of the witness had upon his credibility. Potter v Interstate, 190 M 437, 252 NW 236.

The instruction, in substance, that a party to a deal may not rely for a recovery upon fraudulent representations, which he knows to be false when made, in view of the evidence, and in instructions given the jury in absence of counsel, there was no error. Greear v Paust, 192 M 287, 256 NW 190.

An instruction that plaintiff, if the defendant recovers in this action, might seek remedy in some other lawsuit, was erroneous and prejudicial. Knight v Dirnberger, 192 M 387, 256 NW 657.

The trial court properly instructed the jury as to the issues, and there was no error in refusing to charge as to those merely speculative. Gilbert v Megears, 192 M 495, 257 NW 73.

The sentence in the charge objected to by appellant was not prejudicial in view of the accurate and complete proper instruction in the body of the charge. Cross v Gen'l Investment, 194 M 23, 259 NW 557; Erickson v Kleinman, 195 M 623, 263 NW 795; Nanos v N. Y. Tea, 198 M 348, 269 NW 839.

There was no issue as to probable cause, but the admission of evidence, and the judge's charge on that subject while unnecessary, was not prejudicial. Hector v Butler, 194 M 310, 260 NW 496.

Where the words of a statute are plain, the court in reading the statute need not comment on the words. Clark v Banner Grain, 195 M 44, 261 NW 596; Dehen v Berning, 198 M 522, 270 NW 602; Finney v Norwood, 198 M 554, 270 NW 592.

The court should not pass upon the question whether appellant's negligence was "wilful and malicious" so as to save the judgment from the effect of a possible future discharge in bankruptcy. Raths v Sherwood, 195 M 225, 262 NW 563.

There was no evidence of contributory negligence, and it was prejudicial error to submit that issue to the jury. Cogin v Ide, 196 M 493, 265 NW 315.

Conceding the requested instructions appropriate, the failure to give it was not reversible error, for the charge fully and, perhaps, in language more readily comprehended by the jury, covered the subject of the request. Vogel v Nash, 196 M 509, 265 NW 350.

It was error for the judge to refer to the drunkenness of the plaintiff as "merely an item of evidence" when the fact of drunkenness was in fact very material. Holdys v Swift, 198 M 258, 269 NW 468.

While it was unfortunate that counsel for the plaintiff should have repeatedly referred to the non-residence of defendant's counsel and that of their expert medical witnesses, it was not sufficiently prejudicial to warrant setting aside a verdict. Finney v Norwood, 198 M 554, 270 NW 592.

Although the trial court did not charge that where violation of a statute caused an injury, such violation is negligence per se, still the charge taken as a whole sufficiently covered the subject so that there was no prejudice. Elkins v Mpls. St. Ry. 198 M 63, 270 NW 914.

In the instant case the charge was sufficiently applicable to the facts in the case. Bird v Johnson, 199 M 252, 272 NW 168.

A charge stating a fact in the alternative leaves it to the jury to ascertain the fact. Marino v Northern Pacific, 199 M 369, 272 NW 267.

The trial judge's answer to a juror's uncalled for inquiry, shows no attempt of the court to coerce the jury into agreeing on a verdict, and a repetition at the request of the jury of the judge's summary as to issues of negligence, was not error. Ames v Cramer, 200 M 92, 273 NW 361.

Instructions should be confined to issues actually raised by the evidence. Benson v Northland, 200 M 445, 274 NW 532.

Only in the clearest of cases, where the facts are undisputed, does the question of contributory negligence become one of law. Hack v Johnson, 201 M 9, 275 NW 381.

An instruction that a passenger was "presumably negligent", was, under the evidence, and taking the charge as a whole, without prejudice. Ensor v Duluth-Superior, 201 M 152, 275 NW 618.

The court was not required to define such experssions as "malice", "ill feeling", "ill will," or "bad faith"; nor to give a requested instruction of inordinate length. Clancy v Daily News, 202 M 1, 277 NW 264.

After the court in its charge had limited the negligence claimed by plaintiff to the failure to keep a proper lookout ahead, any subsequent reference to negligence could not have been understood by the jury as submitting other negligence. Forseth v Duluth-Superior, 202 M 447, 278 NW 904.

Considered as a whole, the instructions correctly informed the jury were not inconsistent nor contradictory. Larson v Lowden, 204 M 87, 282 NW 669.

The record does not sustain the contention that the trial court coerced the jury into a verdict. Osbon's Estate, 205 M 420, 286 NW 306.

While the charges requested and refused were proper, the error if any was cured by the instructions given to the jury, and there is no prejudice. Honan v Kinney, 205 M 485, 286 NW 404.

The disparaging remarks concerning defendant's counsel were without prejudice since the verdict was right as a matter of law. Wentz v Guar. Sand Co. 205 M 616, 287 NW 113.

The record as a whole so thoroughly discredits plaintiff's claim, and indicates the evidence presented by him was so incredible and unworthy of belief, so conclusively overcome by other uncontradicted evidence and documents submitted, that the trial court properly granted a judgment for defendant notwithstanding the disagreement of the jury. Spensley v Oliver Iron Co. 216 M 460, 13 NW(2d) 425.

Contributory negligence cannot be predicated upon compliance with a supervisor's orders unless the danger is imminent and so obvious and apparent to the ordinary mind that it would be unreasonable to comply. James v Chicago, St. Paul Co. 218 M 333, 16 NW(2d) 188.

Failure to instruct, as requested, that the owner was not responsible for the presence of waxed paper on the steps, and if the fall was attributable solely to the presence of the paper was not liable, was reversible error. Montgomery v Snuggins, 103 F(2d) 458.

Right of trial judge to comment on evidence in charge to jury in civil and criminal cases. 18 MLR 441.

5. Conduct of counsel

While it is ordinarily improper for either court or counsel to read pleadings to the jury, yet, even without its introduction in evidence, an admission in a pleading may be read to the jury in argument for the adversary of the pleader. Hork v Mpls. St. Ry. 193 M 366, 258 NW 576.

The few inches added to the width of the track by counsel in his argument to the jury did not mislead the jury and is not ground for reversal. Erickson v Kuehn, 195 M 167, 262 NW 56.

There was no attempt to get admissible evidence before the jury relative to the subject of the colloquy in the judge's chambers, and the conduct of counsel had no reversible effect upon the jury. Tri-State v Nowotny, 198 M 547, 270 NW 684.

It was never intended that an attorney taking exceptions to the charge should have an opportunity to make an argument that might convince the jury that there was error; but in this case there was no prejudice. During an argument of this kind the jury should be excused. Vondrashek v Dignan, 200 M 536, 274 NW 609.

The consideration of that which the trial court had kept out of the case should not be argued to the jury, and the argument of counsel in this case was improper. Mpls.-St. Paul v Fitzpatrick, 201 M 461, 277 NW 394.

The improper remarks of plaintiff's counsel were prejudicial and went beyond the bounds of permissible retaliation for previous objectionable conduct of opposing counsel. The trial court did not comply with a request to the jury to disregard the remarks, and it was an abuse of discretion to refuse a new trial. Anderson v Hawthorn Fuel, 201 M 580, 277 NW 259.

It was misconduct of counsel to comment on the fact that there were 35 or 40 passengers on the car and only three were called by the defendant as witnesses; but, as there was no showing of prejudice, it was not error to refuse a new trial. Drown v Mpls. St. Ry. 202 M 67, 277 NW 423.

An appeal by plaintiff's counsel for a verdict which would enable plaintiff to do something for his invalid wife, widowed daughter, and grandchildren was improper and should have been restrained by the trial court had it been seasonably objected to. Ross v Duluth, Missabe, 203 M 312, 281 NW 76, 271.

Counsel has the right in the closing argument to comment upon all the evidence and to present to the jury all arguments and inferences which may be drawn therefrom. Scott v Prudential, 203 M 547, 282 NW 467.

The trial court is in a better position than is the appellate court to determine whether the misconduct of counsel resulted in substantial prejudice; and there should be no reversal except the record discloses breach of discretion. Ryan v International, 204 M 177, 283 NW 129.

The alleged misconduct of plaintiff's attorney was adequately disapproved by the court, so that no prejudice resulted to defendants. Raymond v Kaiser, 204 M 220, 283 NW 119.

Had a new trial not been ordered for other causes, the appellate court must have granted a new trial because of the testimony or evidence adduced by plaintiff's attorney in his argument, without taking the witness stand, and subjecting himself to cross-examination. Noesen v Mpls.-St. Paul, 204 M 239, 283 NW 246.

The granting of a new trial for improper remarks of counsel is primarily determined by the trial court. No fixed rules can be formulated or applied. Waters v Fiebelkorn, 216 M 489, 13 NW(2d) 461.

Misconduct of plaintiff's counsel in his final address to the jury, coupled with improper statements as to the charge, was reversible error. Hubred v Wagner, 217 M 129, 14 NW(2d) 115.

In personal injury action, where counsel for defendant in his argument emphasized his own "frankness" in conceding there must be a verdict in some amount for plaintiff, it was not improper for the attorney for plaintiff to call attention of the jury to the fact of defendants contesting the case throughout the trial; nor was it grounds for a new trial that where plaintiff's counsel commented on the lack of any attempt at settlement by defendant, defendant's counsel stated that defendant had made an offer of settlement. James v Chgo. St. P. M. & O. Ry. 218 M 333, 16 NW(2d) 188.

6. Reopening case

It is discretionary with the trial court to allow a party who has rested his case, to reopen it. Beaulieu v Parsons, 2 M 37 (26); Caldwell v Bruggermann, 8 M 286 (252); Hart v Kessler, 53 M 546, 55 NW 742; Nelson v Finseth, 55 M 417, 57 NW 141; Johnson v Stillwater, 62 M 60, 64 NW 95; Fraser v Gt. Northern, 166 M 308, 207 NW 644.

Where a proper foundation is laid for it, a referee may, in his discretion, reopen a case tried before him, and hear further proofs, at any time before his report is filed or delivered. Cooper v Stinson, 5 M 201 (160).

When the defendant's counsel was summing up, he learned that one of his witnesses desired to explain his testimony, and the court refused to reopen the case. He then asked to file an affidavit by the witness, which was also refused. This was not error. It was negligence in not bringing out the facts through cross-examination. Baze v Arper, 6 M 220 (142).

An order, made after the cause had been submitted to the court, but before a decision had been made opening the case for further evidence, was not an appealable order. Sunwold v Melby, 82 M 544, 85 NW 549.

The court did not abuse its discretion in refusing to reopen the case and hear testimony upon the issues attempted to be raised by the reply to the amended answer, for no proper issue not already fully litigated and available to plaintiff was made by such reply. Kipp v Love, 128 M 498, 151 NW 201.

Vacating original findings and opening the case for further evidence was within the discretion of the court. Morris v Blossom, 181 M 71, 231 NW 397.

Whether a defendant is permitted, at the close of plaintiff's testimony, to rest for the purpose of moving for a directed verdict, with the understanding that if the motion is denied he may reopen his case, and put in evidence, rests with the discretion of the trial court. Normandin v Freidson, 181 M 471, 233 NW 14.

It is discretionary with the trial court to allow a party to reopen his case after resting. McCartney v City of St. Paul, 181 M 556, 233 NW 465.

The court did not abuse its discretion in refusing, after the decision was filed, to reopen the case to permit the defendant to introduce more evidence as to an issue litigated. Tritchler v Bergeson, 185 M 414, 241 NW 578.

The court did not err in refusing plaintiff's motion to reopen case long after trial had and decision made. Kitzman v Pastier, 204 M 343, 283 NW 542.

546.12 VIEW OF PREMISES; PROCEDURE.

HISTORY. R.S. 1851 c. 71 s. 19; P.S. 1858 c. 61 s. 19; G.S. 1866 c. 66 s. 210; G.S. 1878 c. 66 s. 228; G.S. 1894 s. 5372; R.L. 1905 s. 4172; G.S. 1913 s. 7800; G.S. 1923 s. 9296; M.S. 1927 s. 9296.

The object of a view is not to furnish evidence on which to base a verdict but to enable the jury better to understand and apply the evidence submitted in open court. An instruction that gives the jury to understand that they may take into consideration the knowledge obtained on the view in arriving at their verdict, is erroneous and ground for a new trial. Chute v State, 19 M 271 (230); Brakken v Mpls. & St. L. 29 M 41, 11 NW 124; Schultz v Bower, 57 M 493, 59 NW 631; NW Mutual v Sun Insurance, 85 M 65, 88 NW 272.

When a view is ordered it is proper practice for the court to instruct the jury as to the object of the view and their conduct while on the view but this is not indespensable. If a party wishes such instruction given he should make a time by request. Chute v State, 19 M 271 (230).

The matter of granting a review lies in the discretion of the trial court. Chute v State, 19 M 271 (230); Brown v Kohout, 61 M 113, 63 NW 248; N. W. Mutual v Sun Insurance, 85 M 65, 88 NW 272; Lindquist & Carlson v Johanson, 182 M 529, 235 NW 267.

Misconduct of parties or jurors on the view is ground for a new trial. Hayward v Knapp, 22 M 5; Oswald v Mpls. & N. W. 29 M 5, 11 NW 112; Gurney v M. & St. Croix, 41 M 223, 43 NW 2.

The objection that only eleven jurors attended the view is waived unless raised as soon as discovered. Gurney v M. & St. Croix, 41 M 223, 43 NW 2.

It probably should not be allowed if there has been a material change in the locus in quo. N. W. Mutual v Sun Insurance, 85 M 65, 88 NW 272.

Appellant's counsel suggested to the court during the examination of the first witness that the jury ought to have a view of the jointer. The court said: "I will determine that towards the end of the trial; we won't consider it now". No further request is found in the record. Bank v Keller, 126 M 203, 148 NW 113.

The court, against the objection of the appellant that the condition of the land had changed since the award was filed, permitted a view of the land by the jury. There was no abuse of discretion. State ex rel v Bruce, 209 M 578, 297 NW 848.

546.13 SICKNESS OF JUROR; FOOD AND LODGING.

HISTORY. R.S. 1851 c. 71 ss. 21, 24; P.S. 1858 c. 61 ss. 21, 24; G.S. 1866 c. 66 ss. 211, 212; G.S. 1878 c. 66 ss. 229, 230; G.S. 1894 ss. 5373, 5374; R.L. 1905 s. 4173; G.S. 1913 s. 7801; G.S. 1923 s. 9297; M.S. 1927 s. 9297.

A judicial determination by the court that a juror is sick may be reached by personal observation of the juror in connection with the statement of counsel, and such knowledge will justify action in excusing the sick juror from further service on the panel. State v Ronk, 91 M 420, 98 NW 334.

Illness of juror. 5 MLR 483.

546.14 REQUESTED INSTRUCTIONS.

HISTORY. R.S. 1851 c. 71 s. 65; P.S. 1858 c. 61 s. 65; G.S. 1866 c. 66 s. 239; G.S. 1878, c. 66 s. 257; 1883 c. 57 s. 1; 1889 c. 77 s. 1; G.S. 1894 s. 5403; R.I. 1905 s. 4174, G.S. 1913 s. 7802; G.S. 1923 s. 9298; M.S. 1927 s. 9298.

1. Generally

2. Duty of counsel to request

3. Refusal

4. Amendment

5. Covered by general charge

1. Generally

It is improper for a judge, having given the instruction as requested, to weaken its force by language of his own in disparagement. Houston v Williams, 21 M 187; Fitzgerald v St. P. Mpls. 29 M 336, 13 NW 168.

It is incumbent on a party seeking an instruction from the court on a proposition of law to put it in such clear, precise and intelligible form as to leave no reasonable ground for misapprehension by the jury as to its correct meaning; but it is not necessary that counsel word the proposition so as to anticipate and guard against every possible opportunity for misapprehension on the part of the jury. Hocum v Weitherick, 22 M 152; Parson v Lyman, 71 M 34, 73 NW 634.

The practice of charging a jury in an orderly, systematic, and consecutive manner upon the whole law of the case in chief, is preferred to giving special instructions submitted by counsel. Davidson v St. P. & Mpls. 34 M 51, 24 NW 324; Watson v Mpls. St. Ry. 53 M 551, 55 NW 742; Schultz v Bower, 64 M 123, 66 NW 139; Attix v Minn. Sandstone, 85 M 142, 88 NW 436; Hebert v Interstate Iron, 94 M 257, 102 NW 451.

This statute was intended for a wise purpose. That is, to enable counsel to have information of the issues that are to be discussed before the jury, and to give the court aid in the preparation of its general charge, as well as to reserve before submission such exceptions as are desired. Applied to a case where counsel withdrew his objection to a certain instruction, and after the court had given it, excepted. Oddie v Mendenhall, 84 M 61, 86 NW 881.

Court may express to jury in its instructions its opinion of facts in issue, provided their ultimate determination be left to the jury. It party be apprehensive that jury may be unduly influenced, he should specially request court to instruct that they, not the court, are exclusive judges of all questions of fact. Bonness v Felsing, 97 M 227, 106 NW 909.

It is the duty of the court to explain to the jury the meaning of punitive or exemplary damages and to state the circumstances and conditions under which such damages may be awarded. Sneve v Lunder, 100 M 5, 110 NW 99.

If an isolated sentence in the charge of the court is so worded that it may be misconstrued by the jury, it is the duty of the counsel to call the court's attention thereto before the jury retires. Sembum v Duluth & Iron Range, 121 M 439, 141 NW 523.

An omission to give a complete definition of assumption of risk is no cause for reversal, because the definition given was accurate as far as it went; the evidence presented no situation to which the omitted part was applicable; and no request or exception was noted. Hagen v Chgo. R. I. 123 M 109, 143 NW 121.

Incorporating the charge relating to assumption of risk in the same part of the charge relating to negligence is not error. Kloppenburg v Mpls. St. P. 123 M 176, 143 NW 322.

Where objectionable evidence is received, but before final submission the court instructs the jury to disregard it, the presumption is, if the instruction is clearly expressed, that no prejudice resulted from the admission of the evidence. Town of Wells v Sullivan, 125 M 353, 147 NW 244.

Defendant's counsel in his argument read to the jury some instructions as he had requested the court to give. As none were read that the court did not thereafter give, there was no error. Curran v Chgo. G. W. 134 M 392, 159 NW 935.

That part of the charge which counsel is entitled to have delivered to him before he begins his argument is limited to instructions previously submitted to the court, and which he has had an opportunity to consider and mark as "given" or "modified". State v Miller, 151 M 395, 186 NW 803.

Failure of the court to mark as given, refused, or modified the 38 requests to charge, presented by plaintiff's counsel, no inquiry having been made for information as to what had been done with the requests or as to which would be given, was not in and of itself prejudicial error. Kouri v Olson-Keough, 191 M 101, 253 NW 98.

The action of the trial court in stating to the jury that any portion of the charge was given at the request of either named party is disapproved. Carlson v Sanitary Farm, 200 M 177, 273 NW 665.

Although the court instructed the jury to disregard them, the language and conduct used by counsel requires a new trial. Swanson v Swanson, 196 M 298, 265 NW 39; Krenik v Westerman, 201 M 255, 275 NW 849.

An exception should single out each instruction challenged and clearly specify alleged error. A blanket exception covering five requests to charge, four of which were correct, is too general. Strand v Boehland, 203 M 9, 279 NW 746.

The action of the trial judge in charging the jury upon the emergency rule after refusing defendant's request for such instruction, thus depriving defendant of the benefit of argument thereupon to the jury, while disapproved, did not constitute reversible error. Latourelle v Horan, 212 M 521, 42 NW(2d) 343.

Misstatement at the beginning of the judge's charge corrected and cured by subsequent declarations in the charge. Kerzie v Rodine, 216 M 44, 11 NW(2d) 771.

Statement as to wide range of oratory allowed to counsel. Power of judge to restrain. Waters v Fiebelkorn, 216 M 489, 13 NW(2d) 461.

The court's cautionary instruction to the jury relating to evidence excluded at the trial, and regarding privileged communications, was not error. Dahlke v Metropolitan, 218 M 181, 15 NW(2d) 524.

There was no error in the court's instruction as to the presumption of the law of due care on decedent's part; and the submission of a certain statute was not error. Moeller v St. Paul City Railway, 218 M 353, 16 NW(2d) 290.

The plaintiff, having submitted requests to charge on the measure of damages which, by implication, adopted the rule that special damages might be recovered if they were the proximate result of the breach, is not in a position to urge upon appeal that a different rule, with reference to special damages, should have been submitted to the jury. Lanesboro v Forthun, 218 M 377, 16 NW(2d) 326.

A party is concluded by an instruction given in accordance with the theory upon which he conducted his case. Rogers v Mpls. St. Ry. 218 M 454, 16 NW(2d) 516.

The trial judge's charge must be construed in the light of the evidence, and considered as a whole. Hamilton v Thurber, 56 F. Supp. 827.

2. Duty of counsel to request

Where the court in an action based on federal employers liability act, without objection or request on the part of the defendant, instructed the jury, the defendant cannot, on a motion for a new trial complain as to the court's charge relating to contributory negligence. Desnoyer v Ry. Transfer, 121 M 269, 141 NW 175.

No request to charge having been made, and the court's attention not having been called to his omission, the fact that the court did not charge the jury upon the good faith of defendants, each being specially interested in the welfare of the schools, was not error. Faunce v Searles, 122 M 343, 142 NW 816.

If an instruction be desired upon a point omitted in the general charge, a request embodying such point should be presented. Kralic v Petcoff, 122 M 517, 142 NW 897.

The shipment was intrastate under a shipping contract limiting the value of the shipment. The omission by the court to call the jury's attention to the limitation was not reversible error, the court's attention not having been called to the omission. Robinson v Gt. Northern, 123 M 495, 144 NW 220.

There being no request, the failure of the court to instruct the jury the distinction between knowledge and notice was not reversible error. Gillespie v Gt. Northern, 124 M 2, 144 NW 466.

An instruction fundamentally wrong, given in an action well pleaded and proven, may be assigned as error, even though at the trial the attorney states he has no objection to the charge. Lassen v Haegle, 125 M 441, 147 NW 445.

Assignments of error in the charge of the court without merit, especially in the absence of objection or exception at the trial. Ebling v International, 125 M 466, 147 NW 441.

In the judge's charge was a misstatement of fact, and was plainly an inadvertence, and as counsel did not call the court's attention to it at the time, there is no reversible error. Cady v Twin City Taxi, 129 M 71, 151 NW 537.

The court declines to extend the rule in Robertson v Burton, 88 M 151, 92 NW 538, even in criminal cases; and failure to give instructions in a particular phase of the case was not error, there being no request for instructions. Likum v Porter, 131 M 274, 154 NW 1070; Smith v Gt. Northern, 132 M 149, 153 NW 513, 155 NW 1040.

Where mere verbal inaccuracies and incompleteness of statement occur in a charge such as could easily have been corrected if the court's attention had been called to them, the appellate court will not reverse for such errors. McKenzie v Dul. St. Ry. 131 M 482, 155 NW 758.

Defendants, in the absence of a request, were not entitled to an instruction that the jury might find that the parties, by their conduct, had placed a practical construction upon the terms of the contract in respect to measurement. Kopponen v Finch, 156 M 349, 194 NW 718.

Plaintiff took no exceptions to the judge's charge and made no request for additional instructions. In his motion for a new trial he assigned as error that the judge did not submit clearly the two charges of negligence alleged in the complaint. Held, that the rule in Sassen v Haegle, 125 M 441, 147 NW 445, is applicable, and the court's charge was without error. Soderberg v Crosier, 160 M 468, 200 NW 629.

Request for instructions respecting the presumption that services by one member of the family for another are performed gratuitously, comes too late in a motion for new trial, where there was no objection to the court's charge, and no requests Cowing v Cowing, 161 M 533, 201 NW 936.

If a party fears that an instruction given at his request was so placed in the charge that it might be misapplied by the jury, he should call attention to it at the time. Old Colony v Amer. Svgs. 165 M 418, 206 NW 725.

In the absence of specific request, the court need not explain the rule, relating to vehicles approaching an intersection, more in detail. Hayden v Lundgren, 175 M 451, 221 NW 715.

Where no request is made for more specific instructions, the appellant cannot complain. Norby v Sec. State, 177 M 129, 224 NW 843; Engeln v Kolling, 180 M 264, 230 NW 778; Cogin v Ide, 196 M 493, 265 NW 315.

Failure to define "proximate cause" or to charge specially as to independent, efficient intervening cause, in a negligence case, where no request to charge is made and the omission not called to the attention of the court in time, is not reversible error. Klaman v Hitchcock, 181 M 109, 231 NW 716.

Where there are no requests to charge and at the end of the judge's charge he asks if there are any suggestions and receives no for an answer, error cannot in the instant case be assigned because of errors or omissions in the court's instructions. Carlson v Stork, 188 M 204, 246 NW 746.

In view of the fact that there was no request from counsel, omission to instruct the jury that mutual assent to a parol modification of a written instrument could be expressed by conduct as well as verbal agreement. Dwyer v Illinois, 190 M 619, 252 NW 837.

No written requests to charge having been requested, the mere reading of an applicable statute, without comment was sufficient. Clark v Banner Grain Co. 195 M 44, 261 NW 596.

Failure to instruct on the question of agency was not error, no requests having been formulated. Noetzelman v Webb, 204 M 29, 283 NW 481.

That the trial court failed to give certain instructions is not error. The defendant made no request for such charge nor did his motion for a new trial mention it. Walker v Stecher, 219 M 152, 17 NW(2d) 317.

3. Refusal

It is the duty of the court, when requested in a timely and proper manner, to give in its charge any requested instruction which is correct as a proposition of law and applicable to the issues in the case, and a refusal to do so is ordinarily a

ground for a new trial. Sanborn v School District, 12 M 17 (1); Shartle v City of Mpls. 17 M 308 (284); Taubert v City of St. P. 68 M 519, 71 NW 664; Parson v Lyman, 71 M 34, 73 NW 634; Mobile Fruit v Potter, 78 M 387, 81 NW 392; McCormick v Volkort, 81 M 434, 84 NW 325; Squires v Gamble, 84 M 1, 86 NW 616; Parker v Frybergér, 165 M 374, 206 NW 716; Ranhauser v Owatonna, 166 M 487, 208 NW 194.

The court may refuse to give a requested instruction which assumes the existence of controverted facts. Conehan v Crosby, 15 M 13 (1); Lake Superior v Greve, 17 M 322 (299); Schwartz v Germ. Life, 21 M 215; Siebert v Leonard, 21 M 442; Hocum v Weitherick, 22 M 152; Starkey v De Graff, 22 M 431; Chandler v DeGraff, 25 M 88; Jones v Town, 26 M 172, 2 NW 473; Simpson v Krumdick, 28 M 352, 10 NW 18; Feber v St. P. Mpls. 29 M 465, 13 NW 902; Burnett v Gt. Northern, 76 M 461, 79 NW 523;

Or one which is misleading, indefinite, or ambiguous. Sharett v City of Mpls. 17 M 308 (284); Hayward v Knapp, 23 M 430; Olson v Gt. Northern, 68 M 155, 71 NW 5; Parson v Lyman, 71 M 34, 73 NW 634; Palmer v U. C. T. 191 M 204, 253 NW 543;

Or one in part erroneous. Simmons v St. P. & Chicago. 18 M 184 (168);

Or one embodying no legal proposition but only a logical inference from the facts in the case. Davidson v St. P. Mpls. 34 M 51, 24 NW 324; Kellogg v Janesville 34 M 132, 24 NW 359; Winger v Yale, 82 M 145, 84 NW 659;

Or one inconsistent with the theory on which the case has been tried. Perine v Grand Lodge, 48 M 82, 50 NW 1022;

Or one laying too much emphasis on particular facts. Watson v Mpls. St. Ry. 53 M 551, 55 NW 742; Hebert v Interstate Iron, 94 M 256, 102 NW 451.

The court may refuse to give a requested instruction which is not applicable to the case as made out by the evidence however correct it may be as an abstract legal proposition. Mittwer v Stremel, 69 M 19, 71 NW 698; Voligny v Stillwater, 73 M 181, 75 NW 1132; Lorentz v Aetna, 197 M 208, 266 NW 699; Benson v Northland, 200 M 445, 274 NW 532.

The court may refuse to give a requested instruction which invites the jury to disagree. State v Rue, 72 M 296, 75 NW 235;

Or one which is argumentative. Johnson v Dun, 75 M 533, 78 NW 98; Reem v St. P. City Ry. 82 M 98, 84 NW 652; Hebert v Interstate Iron, 94 M 257, 102 NW 451.

Where an injury is caused proximately by the concurring negligence of two or more parties, each is liable for the result, and a request for instructions which ignored this rule is properly refused. King v Chgo. Milw. 77 M 104, 79 NW 611;

Or one unduly prolix. Hebert v Interstate, 94 M 257, 102 NW 451.

Requested instructions may be refused when not seasonably handed to the court. Gracz v Anderson, 104 M 476, 116 NW 1116; Pettit v Nelson, 206 M 265, 288 NW 223.

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, 124 M 155, 144 NW 462.

The law of the road applicable to the case having been stated fully and clearly in the general charge, the court did not err in refusing to give the special instructions in respect thereto requested by appellants. Gronlund v Cudahy, 127 M 515, 150 NW 176.

The court properly declined to give instructions which were either inaccurate or not applicable to the facts. Doran v Chgo. St. P. 128 M 193, 150 NW 800; Klemike v Henricksen, 128 M 491, 151 NW 203; Flaaten v Lyons, 157 M 362, 196 NW 478; Burner v Northwestern, 161 M 480, 201 NW 939; Johnson v Kutches, 205 M 383, 285 NW 881.

No error in refusing to instruct that good faith in the investigation of the slander litigation might mitigate damages. Sticha v Benzick, 156 M 53, 194 NW 752.

On request of the jury the court properly explained the law relating to con-

tributory negligence, as distinguished from comparative negligence. Roach v Roth, 156 M 107, 194 NW 322.

It is the duty of the court, with brevity, and using language within reasonable latitude, to present to the jury the law applicable to the case so that the jurors may understand it. O'Rourke v Dul. St. Ry. 157 M 187, 195 NW 896.

Alleged errors in the charge cannot be reviewed on appeal, unless excepted to at the trial, or specified as error in a motion for a new trial. Cosmopolitan v Sommervold, 158 M 356, 197 NW 743.

There was no error in refusing a request which ignored the "turntable" theory on which the case was tried. Brandenberg v Equity Coop. 160 M 162, 199 NW 570.

Where a cause is submitted to the jury under a charge framed as requested by plaintiff, the charge, whether right or wrong, is the law of the case as far as plaintiff is concerned. Lee v Wilson, 167 M 248, 208 NW 803.

No error was made in refusing an instruction singling out and indicating the effect of evidentiary matter. Ewert v Chirpich, 169 M 386, 211 NW 306.

The fact that a request is couched in language of an appellate court does not necessarily mean that it must be given to the jury as an instruction. Carter v Duluth Yellow Cab, 170 M 250, 212 NW 413.

Conceding that a fellow servant of the plaintiff was negligent, and that his negligence had a causal connection with the injury, the case presented was one of contributing or concurrent negligence of a fellow servant, and a requested instruction by the defendant ignoring this was properly refused. Novak v Gt. Northern, 124 M 142, 144 NW 751.

Defendant, not having in its requests referred to assumption of risk of an unlighted switch, was not entitled to complain of the court's failure to submit such question. Campbell v Canadian Northern, 124 M 245, 144 NW 772.

It was not error to decline to permit the jury, on its request, to have a transcript of the testimony of a witness given in a former trial. Ruder v Nat'l Council, 124 M 432, 145 NW 118.

The court erred in not instructing the jury that an act of negligence not pleaded nor litigated by consent should not serve as a ground for recovery. Gegere v Chgo. & N. W. 175 M 96, 220 NW 429.

Where both defendants requested the court to charge as to the law relating to action in emergency, it was error to refuse. Sandberg v Gt. Northern, 175 M 280, 220 NW 949.

The instruction requested ignored any right of the seller to reserve title to or lien upon the property as a part of the contract of sale and was properly refused. Schnirring v Stubbe, 177 M 445, 225 NW 389.

The request "that if appellant's original wrong only became injurious through some distinct wrongful act of another he should not be held liable" was properly refused. Edblad v Brower, 178 M 465, 227 NW 493.

Requests for instructions, not made until after the jury has retired, are too late. Hall v Johnson, 179 M 428, 229 NW 867.

If a request for an instruction was received by the court and considered on its merits, error may be assigned on its refusal even though it was not submitted "before argument". Sathrum v Lee, 180 M 163, 230 NW 580.

A request, that the jury disregard the fact that an insurance company was interested in the case, and another relating to medical expenses, were properly refused. Arvidson v Slater, 183 M 449, 237 NW 12.

A new trial will not be granted for failure to instruct in respect to the presumption of due care of one killed in an accident where no request was made for such instruction. Boyer v Josephson, 185 M 224, 240 NW 538.

The issue was whether the plaintiff and the defendant insurance company had an oral contract for renewal insurance; not whether an oral contract was made between the plaintiff and the agent personally; and it was not error to refuse to submit to the jury whether there was a contract between the plaintiff and the agent personally. Schmidt v Agric. Ins. 190 M 585, 252 NW 671.

The request that "the contract contains all agreements concerning the transaction" was properly refused. Nat'l Equip. v Volden, 190 M 596, 252 NW 444, 835.

Plaintiff was not entitled to an instruction that the street car company, not a party to the action, was free from negligence. Jannette v Patterson, 193 M 153, 258 NW 31.

The court properly refused to charge as to something not pleaded or litigated and not even suggested to the trial court. Petterson v Fosseen, 194 M 265, 260 NW 225.

The refusal of the court to give instructions presented orally at the conclusion of the charge is not ground for a new trial, the charge given being adequate. Erickson v Kuehn, 195 M 168, 262 NW 56.

The court did not err in refusing to read a paragraph of the statute to the jury; and the fact that the jury heard the discussion between court and counsel is not ground for a new trial. Paulos v Koelsch, 195 M 603, 263 NW 913; Forseth v Duluth-Superior, 202 M 447, 278 NW 904.

There was no evidence justifying a jury in finding that after the deceased placed himself in peril, defendant, by due care, could have avoided injury to him; hence an instruction covering such situation was properly refused. Boyer v Josephson, 185 M 221, 240 NW 538.

The requested instruction embodying the language of the statute relating to width of vehicles was properly refused, as the evidence established the fact that the vehicle did not exceed the authorized width. Ohad v Reese, 197 M 483, 267 NW 490.

Requested instruction upon weight to be given to mortality table was properly refused as argumentative, embodying comments upon the evidence, and unduly emphasizing defendant's theory of defense. James v Chicago, St. Paul, 218 M 333, 16 NW(2d) 188.

Under the facts in this case, court did not err in refusing to submit the question of plaintiff's contributory negligence to the jury where such claimed negligence was not a material element or substantial factor in bringing about the accident. Garland v Nelson, 219 M 1, 17 NW(2d) 28.

4. Amendment

The court may amend or qualify a request and if the instruction given is substantially requested, there is no error. Dodge v Rogers, 9 M 223 (209); Blackman v Wheaton, 13 M 326 (299); Marcoll v Beaupre, 15 M 152 (117); Tozer v Hershey, 15 M 257 (197); Merriam v Pine City, 23 M 314; Chandler v DeGraff, 25 M 88; Bartlett v Hawley, 38 M 308, 37 NW 580; Smith v St. P. & Duluth, 51 M 86, 52 NW 1068; State v John Ryan, 78 M 218, NW 962.

A party at whose request an erroneous instruction is given cannot complain of an erroneous qualification of it. Simmons v St. P. & Chgo. 18 M 184 (168).

If the substance of a requested instruction is given in the general charge, error cannot be predicated upon a refusal to repeat the same thought to the jury before calling the court's attention to the omission. Fairchild v Fleming, 125 M 431, 147 NW 434.

Prejudicial error cannot be predicated on the modification of a proper request for an instruction if the charge, taken as a whole, correctly states the law applicable to the issues to which the requested instruction was directed. Moody v Can. Northern, 156 M 212, 194 NW 639.

5. Covered by general charge

The failure of the court to give requested charges is no ground for a new trial if everything of substance in them is fully covered by the general charge. It is neither necessary for the court to adopt the language of the request primarily, nor, after it has fully instructed the jury, to repeat its instructions in the language of the request. A party is entitled to have the jury instructed fully, fairly and correctly, but he is not entitled to have them instructed in any particular language. State v McCarty, 17 M 76 (54); State v Beebe, 17 M 241 (218); O'Leary v City of Mankato, 21 M 65; Hocum v Weitherick, 22 M 152; State v Mims, 26 M 183, 2 NW 494, 683; Wright v Ames, 28 M 362, 10 NW 21; Loucks v Chgo. Milw. 31 M 526, 18 NW 651; Kolsti v Mpls. & St. L. 32 M 133, 19 NW 655; Davidson v St. P. Mpls.

34 M 51, 24 NW 324; Ladd v Newell, 34 M 107, 24 NW 356; Barbo v Bassett, 35 M 485, 29 NW 198; Papooshek v Winona & St. P. 44 M 195, 46 NW 329; Gibson v Mpls. St. Paul, 55 M 177, 56 NW 686; Holm v Village of Carver, 55 M 199, 56 NW 826; Schultz v Bower, 64 M 123, 66 NW 139; Shannon v Delwer, 68 M 138, 71 NW 14; Moratsky v Wirth, 74 M 146, 76 NW 632; Richardson v Colburn, 77 M 412, 80 NW 356, 784; Parsons v Self-feeder Co. 83 M 180, 86 NW 14; Ramgren v Staples, 89 M 228, 94 NW 1135; Hebert v Interstate Iron, 94 M 257, 102 M 451; Baldinger v Camden Fire, 121 M 160, 141 NW 104; McGrath v N. P. 121 M 258, 141 NW 164; Obert v Board, 122 M 20, 141 NW 810; Petterson v Butler Bros. 123 M 516, 144 NW 407; Benson v Lehigh Valley, 124 M 229, 144 NW 774; Pierson v Mod. Woodman, 125 M 150, 145 NW 806; State v Townley, 149 M 5, 182 NW 773; Larson v Gt. Northern, 162 M 419, 203 NW 57; Sohns v Hubbard, 163 M 187, 203 NW 782; Wilkinson v Turnbull, 166 M 29, 206 NW 950; Bullock v N. Y. Life, 182 M 196, 233 NW 858; Beckman v Wilkins, 181 M 245, 232 NW 38.

No prejudice results from the refusal to give requested instruction where its equivalent is substantially contained in the general charge. Where the evidence is not sufficiently definite so as to make a requested instruction applicable, its refusal is not error. O'Connor v Chic. Milw. 190 M 277, 251 NW 674.

"With reference to the presumption of due care that accompanies plaintiff, the burden of overcoming that presumption rests on the defendants" cannot be held prejudicial to defendants in view of the accurate and more complete instruction in the body of the charge. Gross v Gen'l Invest. 194 M 23, 259 NW 557.

Requested instructions were fully covered in the charge or were properly denied, there being no testimony on which the jury could tell what work was merely routine and mechanical. Kolars v Delnik, 183 M 188, 266 NW 705; Schorr v Minn. Utilities, 203 M 386, 281 NW 523; Quinn v Zimmer, 184 M 597, 239 NW 902.

The court charged that violation of statutory provisions, duly read to the jury, was negligence; and thereby obviated the necessity to instruct as to the distinction between common law negligence and violation of statutory duty. Dehen v Berning, 198 M 522, 270 NW 602.

The court fully and adequately instructed regarding the matter raised by defendant's request and no error in refusal. Olson v Purity Baking, 185 M 571, 242 NW 283; Dickinson v Lee, 188 M 130, 246 NW 669; Orth v Wickman, 190 M 193, 251 NW 127; O'Connor v Chgo. Milw. 190 M 277, 251 NW 674; Kouri v Olson, 191 M 101, 253 NW 98; Erickson v Husemoller, 191 M 177, 253 NW 361; Luck v Mpls. St. Ry. 191 M 503, 254 NW 609; Jensvold v Minn. Comm'l, 192 M 475, 257 NW 86; Vogel v Nash, 196 M 509, 265 NW 350; Kalors v Delnick, 197 M 183, 266 NW 705; Ohad v Reese, 197 M 483, 267 NW 490; Doody v St. P. Ry. 198 M 573, 270 NW 583; Hage v Crookston Trust, 199 M 533, 272 NW 777; Becker v Northland, 200 M 272, 274 NW 180, 275 NW 510; Nelson v Garden Valley, 201 M 198, 275 NW 612; Bylund v Carroll, 203 M 484, 281 NW 873; Johnson v Kutches, 205 M 383, 285 NW 881; Honan v Kinney, 205 M 485, 286 NW 404.

The district court did not err in refusing instruction, substance of which was sufficiently covered in entirely fair, accurate, and complete instruction given by the court. Egan v Bruner, 102 F(2d) 374.

546.15 WHAT PAPERS JURORS MAY TAKE.

HISTORY. R.S. 1851 c. 71 s. 25; P.S. 1858 c. 61 s. 25; G.S. 1866 c. 66 s. 213; G.S. 1878 c. 66 s. 231; G.S. 1894 s. 5375; R.L. 1905 s. 4175; G.S. 1913 s. 7803; G.S. 1923 s. 9299; M.S. 1927 s. 9299.

When the jury returned to the court for further instructions the court started to read from the minutes. This was error if objected to, but both parties waived the error by stipulating that the judge's minutes be taken to the jury room. Coit v Waples, 1 M 134 (110).

It was not error to permit the jury on retirement to take with them the pleadings. Brazil v Moran, 8 M 236 (205).

The bottle of "Tanto" which witnesses said was intoxicating was received as an exhibit. Under restrictions not to taste its contents, there was no error in permitting the jury to take it to the jury room. State v Olson, 95 M 104, 103 NW 727.

The court may, in its discretion, permit jury to take pleadings, but of doubtful propriety, and they should not be given to the jury unless there is a special reason. Mattison v Minn. & No. Wis. 98 M 296, 108 NW 517.

The court properly declined to permit the jury to take with them a transcript of evidence of a witness given on a former trial. Ruder v Nat'l Council, 124 M 431, 145 NW 118.

Where counsel, acting jointly, collected and delivered the exhibits to the jury, and through inadvertence allowed them to take a document not in evidence, such act does not predicate error, at least not unless there is a clear showing that the document improperly influenced the jury. Leonard v Schall, 125 M 291, 146 NW 1104.

It is probable, under our statute, that the jury is not entitled to take pleadings, not put in evidence, to the jury room. Antel v St. P. City Ry. 133 M 156, 157 NW 1073.

On return to the jury, and at their request, it is proper to instruct the reporter to read testimony on the point requested from his notes. Bonderson v Hovde, 150 M 178, 184 NW 853.

The court properly permitted the jury to take all the exhibits in evidence to the jury room. Cohen v Seashore, 159 M 345, 198 NW 1009.

546.16 VERDICT, WHEN RECEIVED; CORRECTING SAME; POLLING JURY.

HISTORY. R.S. 1851 c. 71 ss. 29, 32; P.S. 1858 c. 61 ss. 29, 32; G.S. 1866 c. 66 ss. 214, 215; 1878 c. 66 ss. 232, 233; G.S. 1894 ss. 5376, 5377; R.L. 1905 s. 4176; G.S. 1913 s. 7804; G.S. 1923 s. 9300; M.S. 1927 s. 9300.

1. Generally
2. Correcting verdict
3. Polling the jury

1. Generally

The court is deemed open for every purpose connected with the cause submitted to the jury, until the verdict is rendered or the jury discharged; and the convenience of the court and jury cannot be subjected to the will of counsel or parties. Reilly v Bader, 46 M 215, 48 NW 909.

Although a verdict may be informal, yet it is sufficient if by reference to the pleadings and record it can be made certain. Cohanes v Finholt, 101 M 180, 112 NW 12.

When the jury returns a verdict which is not justified in any view of the evidence and law in the case, the court may refuse to accept it and require the jury to retire and report a proper verdict. Strite v Lyons, 129 M 372, 152 NW 765.

When a jury in a felony case fails to return a verdict while court is in regular session and the court directs the bailiff in charge of the jury to notify the court, clerk, and county attorney of an agreement, such direction should include the defendant out on bail and his attorney, to the end that they be present when the verdict is received. The remedy for non-observance of this practice should be a motion for a new trial and not a motion to set aside the verdict, which would mean an acquittal. State v Knutson, 175 M 573, 222 NW 277.

2. Correcting verdict

Where a jury came into court with a sealed verdict, stating they had agreed, but had made a mistake in figuring, the court was correct in directing them to retire and reconsider their verdict. Mininger v Knox, 8 M 140 (110); Jaspers v Lano, 17 M 296 (273); Tarbox v Gotzian, 20 M 139 (122); Aldrich v Grand Rapids, 61 M 531, 63 NW 1115; Olson v Myrland, 195 M 626, 264 NW 129.

A verdict such as in the instant case is not sufficiently certain when it cannot be made certain by reference to the record. Moriarty v McDevitt, 46 M 136, 48 NW 684.

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 M 420, 144 NW 148.

3. Polling the jury

The right to poll a jury is not affected by an agreement that the jury may return a sealed verdict. After a verdict is recorded, neither party has the right to poll the jury. Steele v Etheridge, 15 M 501 (413).

A jury cannot be polled before they have rendered their verdict for the purpose of ascertaining how they stand. Aldrich v Grand Rapids, 61 M 531, 63 NW 1115.

The polling of the jury is for the purpose of ascertaining for a certainty that each juror agrees upon the verdict. It is not to determine whether the verdict presented was reached by the quotient process. Hoffman v City of St. Paul, 187 M 320, 245 NW 373.

546.17 FIVE-SIXTHS OF JURY MAY RENDER VERDICT.

HISTORY. 1913 c. 63 s. 1; G.S. 1913 s. 7805; G.S. 1923 s. 9301; M.S. 1927 s. 9301.

The length of time devoted to meals and sleep while the jury is deliberating cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time. Hurlburt v Leachman, 126 M 180, 148 NW 51.

In an action in a state court based upon the federal employers liability act, the five-sixths jury applies. Winters v M. & St. L. 126 M 264, 148 NW 106; Bombolis v M. & St. L. 128 M 118, 150 NW 385; McNaney v C. R. I. 132 M 391, 157 NW 650.

The fact that five-sixths verdict was agreed upon at once on retirement did not vitiate the verdict as they stayed out, and did not report until the twelve hours had fully expired. Daly v Falk, 131 M 231, 154 NW 1081.

The verdict indicated the verdict brought in after 11 hours and 59 minutes deliberation. The verdict is not determinative of the time. The actual time, without applying the doctrine of de minimus, was 12 hours as indicated by the facts. Armstrong v Gt. Northern, 131 M 236, 154 NW 1075.

The five-sixths jury law applies to bastardy proceedings. State v Longwell, 135 M 65, 160 NW 189.

546.18 VERDICT; HOW SIGNED.

HISTORY. 1913 c. 63 s. 2; G.S. 1913 s. 7806; G.S. 1923 s. 9302; M.S. 1927 s. 9302.

The five-sixths verdict was signed "Ralph C. Peterson", and following his name appeared the name of nine jurors as "jurors concurring". The foreman is construed as a concurring juror, making the complete ten. Santee v Haggart, 202 M 363, 278 NW 520.

546.19 VERDICT, GENERAL AND SPECIAL.

HISTORY. R.S. 1851 c. 71 s. 34; P.S. 1858 c. 61 s. 34; G.S. 1866 c. 66 s. 217; G.S. 1878 c. 66 s. 235; G.S. 1894 s. 5379; R.L. 1905 s. 4177; G.S. 1913 s. 7807; G.S. 1923 s. 9303; M.S. 1927 s. 9303.

The verdict was in the nature of an award of arbitrators, or a decree in chancery. It was not in the form of either a general or a special verdict, and a new trial must be had. Cummings v Taylor, 21 M 366.

Special findings should always be reconciled with a general verdict, if this reasonably may be. But where there is a necessary inconsistency, the special findings prevail and on proper application the general verdict must be set aside. Awde v Cole, 99 M 357, 109 NW 812.

The answer of an interrogation not material to the issues tried, and so stated to the jury, cannot be considered a special verdict affecting the general verdict. Rohn v First Nat'l, 185 M 246, 240 NW 529.

The verdict in favor of the plaintiff was general. Where there is submitted two rights of recovery, if the evidence failed to support the affirmative of either of the propositions stated, it not now appearing how it found upon either, then error should be assumed; otherwise there was none. Berg v Union Bank, 186 M 529, 243 NW 696.

Where the only evidence of negligence to support a verdict against the employer is evidence of the negligence of a codefendant employee, in whose favor the jury finds a verdict, the verdict against the employer is perverse and a new trial is granted. Ayer v Chic. Milw. 187 M 169, 244 NW 681.

Where T. rented a car to drive and found it in such defective condition that it was dangerous to other traffic, his negligence in continuing to use it did not insulate the negligence of the corporation which rented the car. Under the circumstances a verdict for the codefendant T. does not make perverse the verdict against the corporation. Ferraro v Taylor, 197 M 5, 265 NW 829.

Trial by referees are conducted in the same manner and upon like notice as are trials by the court. If the reference to be report facts, the report has the effect of a special verdict. A special verdict is one by which a jury finds the facts only. It so presents the findings of fact as established by the evidence that nothing remains for the court to do but draw conclusions of law. The referee served a copy of his report on applicant's counsel, giving him ten days within which to file objections. No objections were filed. The decree followed as a matter of course without further notice. Ferch v Hiller, 209 M 124, 295 NW 504.

546.20 INTERROGATORIES; SPECIAL FINDINGS.

HISTORY. R.S. 1851 c. 71 ss. 35, 36; P.S. 1858 c. 61 ss. 35, 36; G.S. 1866 c. 66 ss. 218, 219; G.S. 1878 c. 66 ss. 236, 237; G.S. 1894 ss. 5380, 5381; R.L. 1905 s. 4178; G.S. 1913 s. 7808; G.S. 1923 s. 9304; M.S. 1927 s. 9304.

SPECIAL VERDICTS

1. All issues must be covered
2. Failure to cover all issues
3. Opinion of jury

INTERROGATORIES AND SPECIAL FINDINGS

1. Generally
2. Discretionary
3. Withdrawal of interrogatories
4. Character of interrogatories
5. Answer compulsory
6. Objections to answers
7. Order reserving case
8. Judgment notwithstanding the general verdict
9. Judgment on findings as in special verdict

SPECIAL VERDICTS

1. All issues must be covered

Where a cause is submitted to the jury, and a verdict in favor of the plaintiff determines only one of several material issues, the verdict will not sustain a judgment for the plaintiff. Meighan v Strong, 6 M 177 (111).

A special verdict must find all the facts which are requisite to enable the court to say, upon the pleadings and verdict, without looking into the evidence, which party is entitled to judgment; and such facts should be found so clearly and unequivocally as not to leave them to be made out by argument or inference. Pine v Bauer, 31 M 4, 16 NW 425; Lane v Lenfelt, 40 M 375, 42 NW 84.

A finding by the trial court that the allegations of fact in the complaint are true is insufficient and defective when there are issues raised by the answer which

the evidence tends to support, to be passd upon. Bolmsen v Gilbert, 55 M 334, 56 NW 1117.

Where a judgment is entered by the clerk, not in accordance with the verdict, and without the order of court, the remedy in the first instance is by proper application to the court to correct it. State v Currie, 72 M 403, 75 NW 742.

2. Failure to cover all issues

An action for specific performance is tried to the court except as it may be submitted to a jury. In this case by consent a jury was drawn and eight interrogations submitted and answered and on those the court found for the defendant. The appellate court applied the rule that a judgment of the district court, in the absence of an affirmative showing to the contrary, is correct. Piper v Packer, 20 M 274 (245).

The effect of a failure in a special verdict to cover all the issues depends upon whether the action is being tried by the court or the jury; in other words, whether it is an action of legal or equitable nature. Piper v Packer, 20 M 274 (245); Summer v Jones, 27 M 312, 7 NW 265; Schmitt v Schmitt, 31 M 106, 16 NW 543; Woodling v Knickerbocker, 31 M 268, 17 NW 387; Williams v Schembri, 44 M 250, 46 NW 403; Cobb v Cole, 44 M 278, 46 NW 364; Crick v Williamsburg, 45 M 441, 48 NW 198; Cobb v Cole, 51 M 48, 52 NW 895.

The failure of the court to make findings on issues not covered by the special verdict is not ground for a new trial of the whole cause. The remedy is a motion to the court to make the necessary findings. Osbon v Hartfiel, 201 M 347, 276 NW 270.

3. Option of jury

The jury had a right, in their discretion, to render a general or special verdict. Riley v Mitchell, 36 M 5, 29 NW 588.

It is discretionary with the judge to permit or refuse to permit the jury to return a special verdict in an action for the recovery of money or specific real property. Morrow v St. P. City Ry. 74 M 480, 77 NW 303.

INTERROGATORIES AND SPECIAL FINDINGS

1. Generally

A special verdict on which the general verdict was founded, and the presence of another element of alleged negligence, probably not established by the evidence, yet submitted to the jury, will not justfy a reversal on the theory of the rule applied in Burmeister v Guiguerre, 130 M 28, 153 NW 134. Anderson v Mpls. & St. P. 156 M 338, 194 NW 762.

A court of equity has discretion to submit specific questions to a jury. Central Bank v Royal Indemnity, 167 M 494, 210 NW 66.

2. Discretionary

The court need not submit interrogatories unless requested. Board v Parker, 7 M 267 (207).

The submission of special interrogatories is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a manifest abuse of discretion. McLean v Burbank. 12 M 530 (438); Jaspers v Lano, 17 M 296 (273); Iltis v Chgo. Milw. 40 M 273, 41 NW 1040; Stensgaard v St. P. Real Estate, 50 M 429, 52 NW 910.

There must be a real exercise of discretion. Jaspers v Lano, 17 M 296 (273).

When a jury is instructed by the court, of its own motion, to find special answers to certain questions bearing upon vital issues in the case, which questions are submitted, the court is not at liberty without the consent of the parties, to withdraw or disregard such questions by accepting a general verdict without answers thereto. Eischen v Chic. Milw. 81 M 59, 83 NW 490.

It was not error for the court to refuse a request to submit a special question for the jury to answer. Kling v Thompson, 127 M 468, 149 NW 947.

The matter of submitting special issues to a jury in an action at law rests in the sound discretion of the trial court; and the discretion extends to the form and substance of the special issues so submitted. Jacobson v Chic. Milw. 132 M 181, 156 NW 251.

Denial of defendant's request for the submission of special interrogatories to the jury was not manifestly wrong, hence there was no abuse of judicial discretion. Moody v Can. Northern, 156 M 217, 194 NW 639.

The evidence made it a question of fact for the jury whether or not the driver of the automobile in which plaintiff's intestate was riding when killed in a collision at a road intersection was the agent of such intestate. The refusal to require a special verdict on that issue was not an abuse of judicial discretion. Harris v Raymer, 189 M 599, 250 NW 577.

Trial court may refuse to submit special interrogatories to the jury withm its discretion, and there is no reversible error, in the absence of abuse of discretion. Halos v Nachbar, 196 M 387, 265 NW 26.

3. Withdrawal of interrogatories

Where a jury is instructed by the court, of its own motion, to find special answers to special questions bearing on vital issues of the case, which questions are submitted, the court is not at liberty, without the consent of the parties, to withdraw or disregard such questions by accepting a general verdict without answers thereto. Eischen v Chic. Milw. 81 M 59, 83 NW 490; Kreatz v McDonald, 123 M 353, 143 NW 975.

Clerical errors or misprisions may be corrected by the court without being limited strictly to the term at which the trial took place or to the time within which an appeal may be taken. Schloss v Lennon, 123 M 420, 144 NW 148.

4. Character of interrogatories

Interrogatories should be clear, concise, few in number, and capable of categorical answer. Jaspers v Lano, 17 M 296 (273); Cummings v Taylor, 24 M 429; Iltis v Chic. Milw. 40 M 273, 41 NW 1040.

5. Answer compulsory

A failure of the jury to answer immaterial questions is harmless error. Finch v Green, 16 M 355 (315); Schneider v Chic. Burlington, 42 M 68, 43 NW 783.

A party has an absolute right to have his interrogatories answered if they are material and proper and to have them answered clearly and fully. If the jury came in without discharging its duty in this regard, it must be sent out again and required to return full and satisfactory answers. Tarbox v Gotzian, 20 M 139 (122); Nichols v Wadsworth, 40 M 547, 42 NW 541; Ermentraut v Providence, 67 M 451, 70 NW 572; Elliott v Village of Graceville, 76 M 430, 79 NW 503; Eischen v Chic. Milw. 81 M 59, 83 NW 490.

6. Objections to answers

Formal defects in answers are waived unless objection is made on the coming in of the verdict, or at least before the jury is discharged. Tarbox v Gotzian, 20 M 139 (122); Manny v Griswold, 21 M 506; Crandall v McIlrath, 24 M 127; Varco v Chic. Milw. 30 M 18, 13 NW 921.

7. Order reserving case

Where there is a general verdict and a special finding of fact, if the court desires to reserve the case for further consideration it must at the coming in of the verdict enter an order reserving the case. Unless this is done the party in whose favor the general verdict is may have judgment entered on it. Newell v Houlton, 22 M 19; Schmitt v Schmitt, 31 M 106, 16 NW 543.

8. Judgment notwithstanding the general verdict

Judgment will not be ordered because special findings are inconsistent with the general verdict unless they are wholly irreconcilable. Every doubt will be

resolved in favor of the general verdict. Goltz v Winona & St. P. 22 M 55; Crandall v McIlrath, 24 M 127; Twist v Win. & St. P. 39 M 164, 39 NW 402; Jordan v St. P. Mpls. 42 M 172, 43 NW 849; Nethersheim v Chic. & Milw. 58 M 10, 59 NW 632; Maceman v Equit. Life, 69 M 285, 72 NW 111; Kurstelska v Jackson, 84 M 415, 87 NW 1015; Vogt v Honstain, 85 M 160, 88 NW 443; Lindem v N. P. 85 M 391, 89 NW 64; Roe v Winston, 86 M 77, 90 NW 122; Eklund v Martin, 87 M 441, 92 NW 406; Ready v Peavy, 89 M 154, 94 NW 442; Roe v Winston, 89 M 160, 94 NW 433; Kremdick v Chgo. N. W. 90 M 260, 95 NW 1122; Demerce v Mpls. & St. P. 122 M 171, 142 NW 145.

A special verdict, that a cause of action for wrongful death had been settled and discharged against one of several whose concurrent negligence caused the death, cannot be reconciled under the charge of the court with a general verdict in favor of recovery against the others and in such case the rule must be applied that the special verdict prevails and controls the judgment. Davis v Moses, 172 M 171, 215 NW 225.

In this state the verdict on a special question submitted to a jury in an equity case is not merely compulsory. Upon the whole issue so submitted the verdict is final. Unless set aside, it must be given its full and proper effect. First Nat'l v Quevli, 182 M 238, 234 NW 318.

9. Judgment on findings as in special verdict

If special findings cover all the issues they may be treated as equivalent to a special verdict and judgment may be entered thereon even in the absence of a general verdict. Armstrong v Hinds, 9 M 356 (341); Bixby v Wilkinson, 27 M 262, 6 NW 801; McNally v Weld, 30 M 209, 14 NW 895; Reilly v Mitchell, 36 M 3, 29 NW 588; Coleman v St. P. Mpls. 38 M 260, 36 NW 638; Lane v Lenfert, 40 M 375, 42 NW 84; Reed v Lammel, 40 M 397, 42 NW 202; Crich v Williamsburg, 45 M 441, 48 NW 198; Morrow v St. P. City Ry. 74 M 480, 77 NW 303.

Where the jury returns a general verdict, together with answers to specific questions or issues submitted to them by the court, such specific questions not being sufficiently full and complete to authorize a judgment thereon, the general verdict is presumed, there being no conflict or inconsistency between them, to cover all facts essential to support a judgment on the special findings. Eklund v Martin, 87 M 441, 92 NW 406.

A special finding inconsistent with the general verdict controls; but in the instant case the special finding was not inconsistent with the money judgment and does not control it. Boushor v Kuhlmann, 161 M 64, 200 NW 748.

546.21 FELLOW SERVANT, WHEN NAMED IN VERDICT.

HISTORY. 1895 c. 324; R.L. 1905 s. 4179; G.S. 1913 s. 7809; G.S. 1923 s. 9305; M.S. 1927 s. 9305.

In an action against a railway company for the negligence of its servants operating a train, where the jury finds generally for the plaintiff, and, under Laws 1895, Chapter 324 (section 546.21), also finds that a certain employee named in the verdict was guilty of the negligence which occasioned the injury, such finding excludes, by necessary implication, the negligence of every other employee on the train, and, if the evidence fails to support the negligence of the employee named, judgment for the defendant is required under Laws 1895, Chapter 324 (section 546.21). Crane v Chic. Milw. 83 M 278, 86 NW 328.

546.22 JURY TO ASSESS RECOVERY.

HISTORY. R.S. 1851 c. 71 s. 37; P.S. 1858 c. 61 s. 37; G.S. 1866 c. 66 s. 220; G.S. 1878 c. 66 s. 238; G.S. 1894 s. 5382; R.L. 1905 s. 4180; G.S. 1913 s. 7810; G.S. 1923 s. 9306; M.S. 1927 s. 9306.

The jury found the following verdict: "We, the jury, find for the plaintiff." The question of value not being in issue, and the amount of the plaintiff's recovery being fixed by the pleadings, and following as a conclusion of law in case the jury found in his favor upon the issue of fact submitted to them, the omission of the jury to insert the amount of such recovery in their verdict was at most a harmless irregularity. James v King, 30 M 368, 15 NW 670.

546.23 VERDICT IN REPLEVIN.

HISTORY. R.S. 1851 c. 71 s. 38; P.S. 1858 c. 61 s. 38; G.S. 1866 c. 66 s. 221; G.S. 1878 c. 66 s. 239; G.S. 1894 s. 5383; R.L. 1905 s. 4181; G.S. 1913 s. 7811; G.S. 1923 s. 9307; M.S. 1927 s. 9307.

Where the plaintiff has only a special interest in the property or lien thereon, the alternative value of the property is assessed, as against the general owner, only to the extent of such interest or lien. Dodge v Chandler, 13 M 114 (105); LaCrosse v Robertson, 13 M 291 (269); Wheaton v Thompson, 20 M 196 (175); Deal v Osborne, 42 M 102, 43 NW 835; Hanson v Bean, 51 M 546, 53 NW 871; State v Shevlin, 62 M 99, 64 NW 81; Flint v Luhrs, 66 M 57, 68 NW 514; Pabst v Jensen, 68 M 293, 71 NW 384; Cumbey v Lovett, 76 M 227, 79 NW 99.

If the plaintiff recovers, the practice is to assess the value as of the time of the wrongful taking or of the commencement of the wrongful detention, as the case may be; and if the defendant recovers, to assess it as of the time when the property is replevied from him. Berthold v Fox, 13 M 501 (462); Sherman v Clark, 24 M 42 (37); Howard v Rugland, 35 M 388, 29 NW 63; McLeod v Capehart, 50 M 101, 52 NW 381.

If the property is in the possession of the party in whose favor the verdict is given its value need not be assessed and this is true regardless of whether such party is the general or special owner. Leonard v Maginnis, 34 M 506, 26 NW 733; Cumbey v Lovett, 76 M 227, 79 NW 99.

Where plaintiff seeks to obtain possession of personal property under a chattel mortgage, and the pleadings and evidence disclose that plaintiff holds two such mortgages, both covering a substantial part of the same property, and defendant admits an indebtedness of a given amount, secured by one admittedly valid mortgage, the defendant is not entitled to a general verdict in his favor on a finding that the other mortgage, not admitted as valid, was procured by fraud. First Nat'l v Schroder, 175 M 341, 221 NW 62.

In replevin action where neither party is in possession of chattel at the time of trial, verdict in the alternative for possession of property or value thereof is not violative of statutory requirements; and where losing party no longer has possession of chattel, he has, in view of facts set forth in opinion, the right to be discharged from liability upon payment into court of amount found by the jury to be value thereof, plus interest and costs. Breitman v Buffalo, 196 M 369, 265 NW 36.

546.24 RECEIVING VERDICT.

HISTORY. R.S. 1851 c. 71 s. 33; P.S. 1858 c. 61 s. 33; G.S. 1866 c. 66 s. 216; G.S. 1878 c. 66 s. 234; G.S. 1894 s. 5378; R.L. 1905 s. 4182; G.S. 1913 s. 7812; G.S. 1923 s. 9308; M.S. 1927 s. 9308.

The jury was instructed to bring a general verdict, and special findings upon two questions specifically submitted. The jury left a sealed verdict, and the next morning the clerk entered it in his minutes, but before the jury was questioned, plaintiff's counsel called attention of the court to the fact that the verdict was general and there was no finding on the two questions, whereupon the court sent the jury back and they returned with answers to the two questions. Defendant objected. Held, no error. Tarbox v Gotzian, 20 M 139 (122).

That a verdict is read to the jury, and they asked if it is their verdict, before instead of after it is recorded in the minutes, and upon their assenting are discharged, and the verdict entered afterwards does not vitiate the verdict. State v Levy, 24 M 362.

When the jury returns a verdict which is not justified by the evidence and law of the case as embodied in its instructions, the court may refuse to accept it and require the jury to return and report a proper verdict. Craven v Skobba, 108 M 165, 121 NW 625; Strite v Lyons, 129 M 372, 152 NW 765; State v Talcott, 178 M 564, 227 NW 893.

Where in a tort action the jury brought in separate verdicts against two defendants charged as joint tortfeasors for $1,329, and three days after the jury was discharged plaintiff obtained affidavits from the jurors that the verdict meant $1,329 each, or $2,658 in all, the trial court not having sent the jury back

to reconsider the case, the judgment at $1,329 must stand. Cullen v City of Mpls. 201 M 102, 275 NW 414.

A sealed verdict was described by foreman of the jury as erroneous when read in court, whereupon forms of verdicts were resubmitted, and a verdict for plaintiff signed and the jury polled. This irregularity was not prejudicial to defendant. Hanse v St. Paul City Co. 217 M 432, 14 NW(2d) 473.

546.25 ENTRIES ON RECEIVING VERDICT; RESERVING CASE; STAY.

HISTORY. R.S. 1851 c. 71 s. 39; 1852 Amend. p. 11; P.S. 1858 c. 61 s. 39; G.S. 1866 c. 66 s. 222; G.S. 1878 c. 66 s. 240; G.S. 1894 s. 5384; R.L. 1905 s. 4183; G.S. 1913 s. 7813; G.S. 1923 s. 9309; M.S. 1927 s. 9309.

A stay for the purposes of a motion for a new trial is ordinarily granted as a matter of course. Eaton v Caldwell, 3 M 134 (80); Kimball v Palmerlee, 29 M 302, 13 NW 139.

Where there is a general verdict and a special finding of fact, if the court desire to reserve the case for further consideration, it must, at the coming of the verdict, enter an order reserving the case. Newell v Houlton, 22 M 19.

The special questions submitted were not sufficient to determine all the essential facts. Upon the return of the verdict, the court made no order reserving the case, but long afterwards made findings of fact upon essential matters not included in the findings of the jury, and directed that judgment be entered. Held, no error. Schmitt v Schmitt, 31 M 106, 16 NW 543.

On an application by defendant for stay of proceedings after verdict against him, the court may require him, as a condition of the stay, to renew the security for final judgment. Dennis v Nelson, 55 M 144, 56 NW 589.

After a verdict against the defendants for the purchase price of logs sold to them by plaintiffs, third parties asserted title to the logs, and defendants asked for a stay until the claims of the third parties be determined. The court denied the stay on condition plaintiff execute to defendants a bond indemnifying them against such third party claims. Graves v Backus, 69 M 532, 72 NW 811.

Where a stay of proceedings is granted for the purpose of giving the defeated litigant the right allowed by law for correcting or receiving 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 M 353, 143 NW 975.

The municipal court did not err in suspending sentence for a certain time of a person convicted of selling drugs without being a registered pharmacist. State v Fjolander, 125 M 529, 147 NW 273.

Findings of fact and conclusions of law should be stated separately. Pioneer v Bernard, 156 M 422, 195 NW 140; Toresdahl v Armour, 161 M 266, 201 NW 423.

The failure of plaintiff to adduce proof through a misapprehension of the effect of the admission should not result in judgment non obstante but a new trial. Schendel v Chgo. Milw. 168 M 152, 210 NW 70.

Where there is a mere arithmetical error, plainly appearing, in reckoning the amount found by the jury to be due plaintiff, the correction should be made in the trial court. Barnard v Mpls. Dredging, 200 M 327, 274 NW 229.

546.26 TRIAL BY JURY, HOW WAIVED.

HISTORY. R.S. 1851 c. 71 s. 40; P.S. 1858 c. 61 s. 40; G.S. 1866 c. 66 s. 223; G.S. 1878 c. 66 s. 241; G.S. 1894 s. 5385; R.L. 1905 s. 4184; G.S. 1913 s. 7814; G.S. 1923 s. 9310; M.S. 1927 s. 9310.

A party waives all right to a jury trial by proceeding to trial before the court without objection. Davis v Smith, 7 M 414 (328); Gibbens v Thompson, 21 M 398; Smith v Barclay, 54 M 47, 55 NW 827; Banning v Hall, 70 M 89, 72 NW 817;

Or by consenting to a reference. St. P. & S. C. v Gardner, 19 M 132 (99); Deering v McCarthy, 36 M 302, 30 NW 813.

The modes of waiving a jury prescribed by statute are not exclusive. Waiver by conduct is not favored. St. P. & S. C. v Gardner, 19 M 132 (99); Wittenberg v Onsgard, 78 M 342, 81 NW 14; Poppitz v Germ. Ins. 85 M 118, 88 NW 438.

In an action of a legal nature the parties may agree, the court consenting, that a part of the issues be tried by the court and a part by the jury. Lane v Lenfest, 40 M 375, 42 NW 84.

A party waives all right to a jury trial by consenting, on the call of the calendar, that the case be set down as a court case. St. P. Distilling v Pratt, 45 M 215, 47 NW 789.

Bringing an action for rescission on the ground is not a waiver of the right to bring a separate action for damages and have them assessed by a jury. Marshall v Gilman, 47 M 131, 49 NW 688.

The waiver of a jury when a cause is called for trial is a waiver only as to issues then formed. McGeagh v Nordberg, 53 M 235, 55 NW 117.

A waiver on the first trial of an action in ejectment is not a waiver of a second trial under the statute. Cochran v Stewart, 66 M 152, 68 NW 972.

A party waives his right to a trial by jury by consenting that the jury be discharged and the case submitted to the court. Chezick v Mpls. & Northern, 66 M 300, 68 NW 1093.

The court may in its discretion in actions other than a contract disregard a waiver of a jury by the parties. A waiver not yet acted upon may be withdrawn with the consent of the court. A waiver agreed to with reference to the exigencies of a particular term will not be extended to a subsequent term. Wittenberg v Onsgard, 78 M 342, 81 NW 14.

A motion by each party that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury, or as an agreement to submit them to the trial judge in case the motion is denied. Stauff v Bingenheimer, 94 M 309, 102 NW 694.

Where plaintiff's counsel on the calling of the trial calendar acquiesces in a case being marked for the court calendar and thereafter requests resetting of the case as a court case, and later consents to the case being set as the last case on the court calendar, he waives a jury trial. Paynesville v Grabow, 160 M 414, 200 NW 481.

The trial of an action to set aside and invalidate a trust deposit in a savings account in a bank is not a jury case, even if the relief asked is the recovery of money in such account. Coughlin v Farmers & Mechanics, 199 M 102, 272 NW 166.

546.27 TRIAL BY THE COURT; DECISION, HOW AND WHEN MADE.

HISTORY. R.S. 1851 c. 71 s. 41; P.S. 1858 c. 61 s. 41; G.S. 1866 c. 66 s. 224; G.S. 1878 c. 66 s. 242; 1899 c. 156 s. 1; G.S. 1894 s. 5386; 1901 c. 47; R.L. 1905 s. 4185; G.S. 1913 s. 7815; G.S. 1923 s. 9311; M.S. 1927 s. 9311.

FINDINGS AND CONCLUSIONS

1. Generally

The object of the statute in requiring findings is to make it more easy to determine just what the court decided, and whether or not it erred in its decision.

Califf v Hillhouse, 3 M 311 (217); Abrahamson v Lamberson, 68 M 454, 71 NW 676; Pioneer Land v Bernard, 156 M 422, 195 NW 140.

The requirement that a court trying a cause without a jury shall file its decision within twenty days, is directory merely and not imperative. Vogle v Grace, 5 M 294 (232).

Findings are not a part of the record until signed and filed. Siebert v M. & St. L. 58 M 72, 59 NW 828; Pioneer Land v Bernard, 156 M 422, 195 NW 140.

Where issue is joined in a divorce suit, like proceedings should be had as in a civil action; and though a party waives a jury, by failing to appear, he does not thereby waive the making of findings of fact by the trial court. Newman v Newman, 68 M 1, 70 NW 776.

The judgment or order of the probate court cannot be attacked by the surety on the bond of the administratrix, 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 M 445, 148 NW 302.

The jurisdiction of the supreme court over a cause comes to an end when the remittitur is filed in the trial court. Hunt v Meeker Co. 130 M 530, 152 NW 866.

The insurance contract was void ab initio, and the trial court made findings and conclusions on which it properly based a direction that the certificate be adjudged null and void, on condition the defendant repay the moneys paid by defendant. Nat'l Council v Knights, 131 M 17, 154 NW 512.

Conceding that in a particular case the prevailing party may be entitled to propose and have settled and allowed a record containing the evidence and proceedings on the trial, the showing on the instant application for an order requiring the trial court to allow and sign the case proposed by relator is not such as to justify the order prayed for. Peavey v Jelley, 134 M 276, 159 NW 566.

It was error for another judge to hold that the findings and orders of the judge who tried the matter were equivalent to the findings which were requested and which the trial judge refused to make. Re Improvement of Third Street ,178 M 480, 227 NW 658.

Where the evidence is conflicting in respect to an amended finding asked for, it is not error to refuse it. Chamberlin v Twin Ports, 195 M 58, 261 NW 577.

A statement of the court relative to the basis for the ordinance, and manner of avoiding, while improper does not affect the judgment. State ex rel v Clausing, 198 M 42, 268 NW 844.

The provision that a judge shall file his decision within five months after a matter has been submitted to him, is directory and not mandatory. Wenger v Wenger, 200 M 436, 274 NW 517.

Mandamus will be denied where sought for improper purposes and not in good faith. State ex rel v St. Cloud Milk, 200 M 15, 273 NW 603.

An election contest is a special, not a civil action. Being tried to the court, where there is a determination on the merits, the court is required to make findings of fact and conclusions of law conformable to section 546.27. Hanson v Emanuel, 210 M 53, 297 NW 176.

The decision required by section 546.27, after trial without a jury, establishing and classifying the controlling facts and law of the case, should be self-explanatory, self-sustaining, and complete; and, where, as in this case, a motion for an amended finding is made requiring an affirmation upon the issue thus made, a denial thereof is equivalent to a finding contrary to the request. Martins v Martins, 211 M 369, 1 NW(2d) 356.

A party may move for a new trial after the court has definitely announced its decision and made it a matter of record, although findings of fact and conclusions of law have not been filed. Mitchell v Bazille, 216 M 368, 13 NW(2d) 24.

In this case involving an injury to a minor, there was adequate basis for the exercise of the court's discretion in vacating the order approving the settlement. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

2. Definitions and distinctions

This direction is a part of the "decision" of the court. It is not an order involving the merits. It is merely a direction that an act be done which does involve the merits. Ryan v Kranz, 25 M 362.

The findings of fact and conclusions of law together constitute the decision of the court. Ashton v Thompson, 28 M 330, 9 NW 876; Ramaley v Ramaley, 69 M 491, 72 NW 694.

They are not the judgment of the court, but rather the authorization or basis of the judgment. Wagner v Nagel, 33 M 348, 23 NW 308; Ramaley v Ramaley, 69 M 491, 72 NW 694.

A memorandum attached to, but not expressly made part of, the order or decision, may be referred to when it furnishes a "controlling reason for the court's decision" but not to impeach or contradict express findings of fact, or conclusions necessarily following from the decision. Kipp v Klinger, 97 M 135, 106 NW 108.

There must be a decision in writing stating separately the findings of fact, and the conclusions of law. Pioneer Land v Bernard, 156 M 422, 195 NW 140.

Plaintiff did not move for more specific findings; but to have findings prepared by himself substituted. His proposed findings were such that court could not find them true. As a result the findings of the court though not in proper form, must stand. Harmer v Holt, 157 M 102, 195 NW 637.

In a criminal case tried by the court without a jury, specific findings of fact are not necessary. State v Graves, 161 M 422, 201 NW 933.

The failure to file findings made by a district judge until the day after he ceased to hold office did not affect the validity of the findings. Sheehan v First National, 163 M 294, 204 NW 38.

On appeal to the district from the probate court, under the provisions of testator's will and the issues and proofs, appellant was entitled to specific findings as to the income of the entire estate and the disbursements thereof up to the time of the death of the testator's surviving widow, she being entitled to the income of the entire estate during her natural life. Snow v Jones, 166 M 315, 207 NW 629.

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 new matter in the return. State ex rel v Barlow, 129 M 181, 151 NW 970.

The trier of fact is not bound by testimony containing, upon the record, improbabilities, contradictions, inconsistencies, or which is irreconcilable to the facts shown by the record. Weber v Arend, 176 M 120, 222 NW 646.

Dismissal and directed verdict in Minnesota. 23 MLR 367.

3. When findings necessary

It is not necessary to make findings as to immaterial issues. Brainard v Hastings, 3 M 45 (17); Lowell v North, 4 M 32 (15).

Nor as to facts admitted by the pleadings. Brainard v Hastings, 3 M 45 (17); Dickinson v Kinney, 5 M 409 (332); Palmer v Pollock, 26 M 433, 4 NW 1113; Fenske v Nelson, 74 M 1, 76 NW 785.

Nor when judgment is ordered on demurrer. Dickinson v Kinney, 5 M 409 (332).

If the action is dismissed by the court for insufficiency of the evidence to warrant findings and judgment for the plaintiff, findings are unnecessary. Thompson v Myrick, 24 M 4; Miller v Miller, 47 M 546, 50 NW 612.

It is not alone issues made by the pleadings on which findings must be made. If the parties by consent or without objection litigate issues not made by the pleadings, it is the duty of the court to make findings on such issues. Jones v Wilder, 28 M 238, 9 NW 707; Olson v St. P. Mpls. 38 M 479, 38 NW 490; Dean v Hitchings, 40 M 31, 41 NW 240; Warner v Foote, 40 M 176, 41 NW 935; Dieber v Lohr, 44 M 451, 47 NW 50; Abbott v Morrissette, 46 M 10, 48 NW 416; Fergestad

v Gjertsen, 46 M 369, 49 NW 127; Village of Wayzata v Gt. Northern, 50 M 438, 52 NW 913; Ahlberg v Swedish-American, 51 M 162, 53 NW 196.

It is not necessary to make findings as the basis of an interlocutory order. Wildner v Ferguson, 42 M 112, 43 NW 794; Wells v Penfield, 70 M 66, 72 NW 816; Sjoberg v Sec. Svgs. 73 M 203, 75 NW 1116; London v St. P. Park, 84 M 144, 86 NW 872; Mpls. Trust v Menage, 86 M 1, 90 NW 3; Barbaras v Barbaras, 88 M 105, 92 NW 522.

But a court has no right to dismiss an action without findings on the ground that the plaintiff has failed to establish a cause of action, except where the evidence adduced by the plaintiff would not have justified findings in his favor. Thorolson v Wyman, 58 M 233, 59 NW 1009; Keene v Masterman, 66 M 72, 68 NW 771; Herrick v Barnes, 78 M 475, 81 NW 526; Hamm Realty v New Hampshire, 80 M 139, 83 NW 41; Heim v Heim, 90 M 497, 97 NW 379; Mpls. v Jones, 95 M 127, 103 NW 1017; Ness v March, 95 M 301, 104 NW 242.

If the parties by consent or without objection litigate issues not made by the pleadings it is the duty of the court to make findings on such issues, and order judgment accordingly granted as full measure of relief as if the issues had been made by the pleadings. Bassett v Haren, 61 M 346, 63 NW 713.

Whenever the main issues of fact in an action are tried by the court findings of fact must be made. Newman v Newman, 68 M 1, 70 NW 776.

The trial court made findings of fact and conclusions of law and added: "Let a peremptory writ of mandamus issue accordingly." There was no order directing a judgment to be entered. Under the present practice an appeal will not lie from such an order, but there must be a formal judgment. The appellate court holds, however, that as it follows the old practice, and although irregular, an appeal will lie. State ex rel v Copeland, 74 M 371, 77 NW 221.

Where the court expressly declines to pass on a question of fact involved, it is unnecessary after decision filed to apply for amended findings covering the question. State ex rel v Germania Bank, 103 M 129, 114 NW 651.

It is not necessary for the court in a will contest to make specific findings of the facts upon which the right of the objector to contest the will depends. Crowley v Farley, 129 M 460, 152 NW 872.

The refusal of the trial court to make additional findings will not be reversed, unless the evidence is conclusive in favor of such proposed findings; nor where the proposed finding is in conflict with those already made. Kent v Costin, 130 M 450, 153 NW 874.

The court did not err in denying defendant's application to vacate a stipulation made in the course of the litigation upon the ground of the incompetency of one of the parties; and in determining such application it was not necessary to make findings of fact, nor were findings necessary as a basis for the judgment, the entry of which was stipulated in the event of the denial of the application to vacate the stipulation of settlement. Fletcher v Taylor, 148 M 366, 182 NW 437.

The defendant was entitled to a finding and conclusion relative to the practice and custom of trade. Toresdahl v Armour, 161 M 266, 201 NW 423.

In a criminal case tried by the court without a jury, specific findings of fact are not necessary. State v Graves, 161 M 422, 201 NW 933.

Under the provisions of testator's will and the issues and proofs, appellant was entitled to specific findings as to the income of the entire estate and the disbursements thereof up to the time of the death of testator's surviving widow, she being enitled to the income of the entire estate during her natural life. Roberts' Estate, 166 M 315, 207 NW 629.

Where issues of fact are tried it is the duty of the court to make findings of fact as in other cases, but failure to do so may be deemed waived where the decision necessarily decided the disputed fact. Waggner's Estate, 172 M 217, 214 NW 892.

In a trial to the court without a jury, there must be findings of fact and conclusions of law if there is a determination on the merits. It is not proper practice to order judgment on the merits when the defendant rests. Failure to make findings and conclusions requires a reversal or a remanding of the case for that purpose. Hawkins v Fossberg, 175 M 252, 220 NW 951.

The refusal to make new or additional findings will not be reversed unless the evidence is conclusive in favor of the proposed findings, nor if the proposed findings are of only evidentiary facts which would not change the conclusions of law. Kehrer v Seeman, 182 M 596, 235 NW 386.

A court is not required to make an additional specific finding in conflict with those already made. National Surety v Wittich, 186 M 93, 242 NW 545.

Where in an action to reform deeds on the ground of mutual mistake in omitting certain lands there is evidence which would have justified the trial court in finding that the mistake was established by clear and convincing proof, and that a third-party purchaser from the vendor took title to the omitted property with full knowledge of the grantee's claims of title, it was error to dismiss the action. Czanstkowski v Motter, 213 M 257, 6 NW(2d) 629.

4. Nature of facts to be found

The facts which the court must find and state separately are the ultimate, issuable facts; the facts put in issue by the pleadings or actually litigated as issuable facts by consent or without objection. Bazille v Ullman, 2 M 134 (110); Butler v Bohn, 31 M 325, 17 NW 862; Conlan v Grace, 36 M 276, 30 NW 880; Payne v Payne, 46 M 467, 49 NW 230; Newman v Newman, 68 M 1, 70 NW 776; Fetchette v Victoria Land, 93 M 485, 101 NW 655.

The findings must include all the facts essential to the judgment and on which it is based. Lowell v North, 4 M 32 (15); Hodge v Ludlum, 45 M 290, 47 NW 805; Miller v Chatterton, 46 M 338, 48 NW 1109.

The findings should not contain evidentiary facts, arguments, explanation, or comment of any kind. McMurphy v Walker, 20 M 382 (334); Wagner v Nagel, 33 M 348, 23 NW 308; Conlon v Grace, 36 M 276, 30 NW 880; Payne v Payne, 46 M 467, 49 NW 230; Bates v Johnson, 79 M 354, 82 NW 649.

The test is, would they be sufficient to authorize a judgment if presented in the form of a special verdict. Conlon v Grace, 36 M 276, 30 NW 880.

The findings must be so full that the facts on which the judgment rests may be ascertained with clearness without resort to the evidence. Hodge v Ludlum, 45 M 290, 47 NW 805.

There was no error in amending the findings of fact, as the evidence sustains the amendment. Moriarty v Maloney, 121 M 285, 141 NW 186.

The evidence sustains the findings and the findings the conclusion. Green v Fashender, 122 M 17, 141 NW 789; Fryberger v Anderson, 122 M 97, 142 NW 1; Betcher v Hastings, 131 M 249, 154 NW 1072.

In an action for rescission, the evidence supports the findings that plaintiff entered into the contract relying on defendant's representations; that these were false; that plaintiff offered to rescind timely; and that plaintiff should recover. Pennington v Roberge, 122 M 295, 142 NW 710.

Findings fatally defective as regards contingencies prescribed by statute as conditions precedent to the right to file the lien statements. Kenny v Duluth Log, 128 M 5, 150 NW 216.

Where title to real estate is in controversy, a finding that one party is the owner thereof is a finding of the ultimate fact, and a finding of the evidentiary facts which result in such conclusion is unnecessary. Luck Land v Dixon, 132 M 144, 155 NW 1038.

A finding of notice to the mortgagee of the officer's purpose is essential to a judgment for plaintiff. The appellate court cannot assume the existence of such notice without a finding, unless the evidence is conclusive to that effect. Gross Iron v Paulle, 132 M 160, 156 NW 268.

That parts of a finding of fact may be immaterial does not require a new trial, or a change in the conclusions of law. Wandersee v Wandersee, 132 M 321, 156 NW 348.

The court has power to supply an omission in the findings even after judgment. Rockey v Joslyn, 134 M 468, 158 NW 787.

The court gave judgment to the mortgagor for rents for substantially the whole of the year of redemption. The findings of the court on the facts are con-

strued to mean that one quarterly instalment was paid to the mortgagor, on such findings judgment for the full amount cannot be sustained. Orr v Bennett, 135 M 443, 161 NW 165.

The practice of making findings of fact consisting, by reference alone, of all or part of a pleading, is disapproved and is not a compliance with the statute. War Finance v Erickson, 171 M 276, 214 NW 45.

5. Sufficiency of particular findings

In the instant case the denial in the answer is a negative pregnant and raises no material issue; and generally a finding that the party on whom the burden rests has not proved false representations negatives such representations. McMurphy v Walker, 20 M 382 (334).

When in a pleading facts are specifically set forth which, if established, would entitle a party to relief as a legal conclusion, a finding by the court of the truth of the allegations in the pleading is sufficient. Knudson v Curely, 30 M 433, 15 NW 873; School District v Wrabeck, 31 M 77, 16 NW 493; Crosson v Olson, 47 M 27, 49 NW 406; Moody v Tschabold, 52 M 51, 53 NW 1023; Combination Steel v St. P. City Ry. 52 M 203, 53 NW 1144; Abrahamson v Lamberson, 68 M 454, 71 NW 676; Norton v Wilkes, 93 M 411, 101 NW 619; Ripa v Hogan, 127 M 502, 150 NW 167; Johnson v Hulm, 137 M 5, 162 NW 679.

Where the complaint does not state facts sufficient to constitute a cause of action, a finding that the allegations of the complaint are true is not sufficient to support a judgment for the plaintiff. Knudson v Curley, 30 M 433, 15 NW 873.

A finding "that the allegations of fact in the complaint are not proved" is sufficient to sustain a judgment for the defendant. Hewitt v Blumenkranz, 33 M 417, 23 NW 858.

A finding by the court that the allegations of the complaint are not established by the evidence is equivalent to a general finding that the facts are not as alleged. Reynolds v Reynolds, 44 M 132, 46 NW 236.

A finding that there is no evidence as to a particular issue is a finding against the party having the affirmative of the issue. Watson v C. M. & St. P. Ry. 46 M 321, 48 NW 1129.

A finding that the allegations of the complaint are true is insufficient if there are issues formed on new matter in the answer. Bohnsen v Gilbert, 55 M 334, 56 NW 1117.

A finding that all the "material" allegations of the complaint are true is insufficient. Abrahamson v Lamberson, 68 M 454, 71 NW 676.

A general finding that each and all of the allegations of the complaint are untrue is equivalent to a special finding as to each allegation that it is untrue. Fidelity v Crays, 76 M 450, 79 NW 531.

Defendant's motion for amended findings properly refused. Sandstone Spring v Kettle River, 122 M 510, 142 NW 885.

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. Mpls. Gas Light v City of Mpls. 123 M 231, 143 NW 728; Fryberger v Anderson, 125 M 322, 147 NW 107.

Finding that "the allegations set forth in the complaint of the plaintiff herein are true" is sufficient basis for a judgment against a surety on a bond. Benson v Barrett, 171 M 305, 214 NW 47.

Where the findings of the trial court are decisive of all issues presented, a new trial will not be granted on the ground that more specific findings covering particular items and claims could have been made. Gerlich v Thompson, 177 M 425, 225 NW 273.

A finding that there was an agreement to pay interest cannot be contradicted by a memorandum of the trial judge not made part of the findings. Riebel v Mueller, 177 M 602, 225 NW 924.

A finding that all the material allegations in the complaint are true is insufficient to support a judgment for plaintiff. Chilson v Travelers, 180 M 10, 230 NW 118.

A finding of good faith, coupled with refusal to find insolvency, is the equivalent of a finding of solvency. Nat'l Surety v Wittich, 186 M 93, 242 NW 545.

Where findings upon sufficient evidence negative those requested, there is no error in denying the latter. Schmidt v Koecher, 196 M 178, 265 NW 347.

Where the court's findings and decision necessarily decide all facts in dispute, the findings are sufficient; and where a party moves for amended and additional findings of fact and the court refuses to make such amended and additional findings, the refusal is equivalent to finding against the party so moving. Lafayette v Roberts, 196 M 605, 265 NW 802.

Failure of the court to comply with section 546.27 was cured by the filing of a memorandum which states the facts found and the conclusions of law separately. Trones v Olson, 197 M 21, 265 NW 806.

While part of the order which denies amendment of the findings is not appealable, the part which denies a new trial is, and upon such appeal the verdict and any finding may be challenged as not sustained by the evidence. Schoedler v N. Y. Life, 201 M 327, 276 NW 235.

Trial court's findings that mortgage and assignment thereof to defendant were valid and that defendant had such an interest therein as to justify foreclosure thereof are sufficient to sustain conclusion and judgment dismissing plaintiff's action to have the assignment adjudged null and void and to enjoin defendant's foreclosure of the mortgage. Hammond v Flour City, 217 M 427, 14 NW(2d) 452.

6. Findings and conclusions must be stated separately

Where the court tries a cause, without a jury, it should state the facts found and conclusions of law, separately. Baldwin v Allison, 3 M 83 (41); Minor v Willoughby, 3 M 225 (154); Califf v Hillhouse, 3 M 311 (217); Pioneer v Bernard, 156 M 422, 195 NW 140.

The referee's findings were: "Therefore I find, as a matter of fact, that the defendant has not proved the false representation". The quoted findings sustains the conclusion that the plaintiff is entitled to judgment. McMurphy v Walker, 20 M 382 (334).

Where the issues of fact are all tried to the court, the plaintiff was entitled to have the facts found and the conclusions of law separately stated in writing and judgment entered accordingly. Morrissey v Morrissey, 172 M 72, 214 NW 783.

Where the apportionment of amount recovered under the employers liability act is not made by the jury, but by the court, and an issue of fact is raised, there should be a decision stating the findings of fact and conclusions of law separately. Lepper v Chic. Burl. 176 M 130, 222 NW 643.

A statement that the "evidence fails to establish the cause of action set out in the complaint" is a mere legal conclusion from the evidence, and not a decision in writing with the findings of fact and conclusions of law "separately stated". Palmer v First Mpls. Trust, 179 M 381, 230 NW 257.

When an issue of fact or of law and fact is tried and determined by the judge, section 546.27 requires separately stated findings of fact. Midland Loan v Temple Garage, 206 M 434, 288 NW 853; State ex rel v Riley, 208 M 6, 293 NW 95.

7. Effect of finding a fact as a conclusion of law

Whether the purchase of securities or other property, or the execution of a collateral contract by the borrower in connection with a loan, and as a part of the consideration and inducement therefor, will make the transaction usurious, is ordinarily to be determined as a question of fact in the trial court. Chase v N. Y. 49 M 111, 51 NW 816.

A fact found by the court, although expressed as a conclusion of law, will be treated as a finding of fact. Cushing v Cable, 54 M 6, 55 NW 736.

Where there is a loan of money, the mere fact that the contract is in form contingent will not exempt the transaction from the taint of usury if the contingency thereof is not real, but colorable, and a mere device to evade the statute; and in the instant case the evidence is sufficient to justify a finding that a contract was usurious. Missouri v McLachlan, 59 M 468, 61 NW 560.

A conclusion of law found by the trial court which is based upon specific findings of fact cannot be referred to or treated as a finding of fact. Kinney v Mathias, 81 M 64, 83 NW 497.

"We have examined the evidence contained in the record and reach the conclusion that the findings cannot be disturbed. The evidence is not clearly and palpably against the conclusions of the trial court, and, within the rule the appellate court cannot interfere." Town of Campbell v Waite, 84 M 257, 87 NW 782.

8. Findings must be definite and specific

The findings of fact in the instant case are so vague and indefinite that the court would not be justified in construing them as amounting to definite and positive findings, so as to justify ordering final judgment for appellants upon the facts found. Lesher v Getman, 28 M 93, 9 NW 585.

The finding of the court should definitely determine an issue presented. Smith v Benefit Ass'n, 187 M 202, 244 NW 817.

The objects of section 546.27 are to abolish the doctrine of implied findings; to make definite and certain just what is decided, not only for the purposes of the particular action, but also for the purpose of applying the doctrine of estoppel to future actions; and to separate questions of law and fact for apparent reasons. Fredsall v Minn. State Life, 207 M 18, 289 NW 780.

9. Findings must cover all issues

It was error for the court to order judgment against the plaintiffs without finding as a fact that the defendants were purchasers in good faith, and for a valuable consideration, or facts equivalent to such a finding. Rossain v Patten, 46 M 308, 48 NW 1122.

"As the trial court filed no memorandum, we are not advised upon what theory of the law he ordered judgment for the plaintiffs, or upon what ground he afterwards granted defendant's motion for a new trial; but as the findings of fact are insufficient to support a judgment in favor of plaintiffs, and the appellate court cannot supply findings not made by the trial court, it follows that the order granting a new trial must be affirmed." McCarthy v Groff, 48 M 328, 51 NW 218.

The court made findings upon every ultimate issue of fact necessary to sustain the judgment; and having done so need not find upon issues of fact which could not affect the judgment. Foshay v Mercantile Trust, 175 M 115, 220 NW 551.

While counsel, after trial without a jury, is entitled to findings of fact fully responsive to their sincere contentions, there need not be reversal where, although the findings leave some controlling things to implication, they fairly negative the findings moved for below by the defendant litigant. Mienes v Lucker Sales, 188 M 166, 246 NW 667.

10. Findings must be within the issues

A judgment upon findings of fact, not responsive to the issues, cannot be sustained against an objection properly and timely taken. The findings in this case considered and held irresponsive and insufficient. Cochrane v Halsey, 25 M 52.

An application by the defendants for an additional finding of fact was properly denied by the court as not within the issues tendered by the pleadings. Fergestad v Gjertsen, 46 M 369, 49 NW 127.

The court having by order restricted the trial, in the first instance, to a particular issue, not embracing the whole matter in controversy, and thereupon having found material facts upon an issue not involved in such trial, and having directed judgment thereon, the party prejudiced thereby is entitled to a new trial as to facts so found. Cobb v Cole, 51 M 48, 52 NW 985.

The case having been tried on the theory that the statement taken from the books was in dispute, the findings of the court, that there were mistakes in the books themselves, such claim being not within the pleadings, were wholly immaterial, and outside of the issues in the case. Cobb v Cole, 55 M 235, 56 NW 828.

Under an allegation in the answer that there was no consideration for the notes, it was improper to show, or for the court to find, that there was an illegal consideration therefor. Babcock v Murray, 58 M 385, 59 NW 1038.

The cause of action established by the trial court's findings, which was the basis of its judgment, is not the cause of action alleged in the complaint. Joannin v Barnes, 77 M 428, 80 NW 364.

It is the adjudication which makes a finding in a former action res judicata; and if a finding, without a judgment having been entered, is ever a bar in subsequent litigation, it must be upon an issue in the case where it is made, and there must be something equivalent to an estoppel operating against the party seeking to assert the contrary to it. State v Brooks-Scanlon, 137 M 71, 162 NW 1054.

The claim that a finding is not sustained by the evidence nor within the issues formed by the pleadings cannot be raised on appeal where the record fails to show that it contains all the evidence. Riebel v Mueller, 177 M 602, 225 NW 924.

Immaterial findings which do not affect the conclusions of law may be disregarded. Kendall v Loven, 181 M 570, 233 NW 243.

The court is required to strike out a finding of fact only when the finding has no sufficient support in the evidence or when it goes beyond or outside of any issue actually litigated. Kehrer v Seeman, 182 M 596, 235 NW 386.

Where the decisive findings of fact are sustained by the evidence and sustain the conclusions of law, it is not error for the court to refuse to strike out its findings or refuse to make additional or substituted findings and conclusions. Jarvaise v St. P. Institute, 183 M 507, 237 NW 183.

Findings of special damages for detention of property was not within the issues framed nor were they sustained by the evidence. Brown v Wyoming, 183 M 619, 237 NW 188.

Where the defense of breach of implied warranty is neither pleaded nor litigated by consent, it comes too late when suggested for the first time by defendant's motion for amended findings or a new trial. Allen v Central Motors, 204 M 295, 283 NW 490.

11. Effect of finding only evidentiary facts

All the issuable facts must be found directly and not inferentially. It is insufficient to find the evidentiary facts from which the issuable facts might be inferred. Lesher v Getman, 28 M 93, 9 NW 585; Wagner v Nagel, 33 M 348, 23 NW 308; in re Shotwell, 43 M 389, 45 NW 842; Miller v Chatterton, 46 M 338, 48 NW 1109; Martini v Christensen, 60 M 491, 62 NW 1127.

A judgment based upon findings of evidence as distinguished from issuable facts cannot be sustained. Wagner v Nagel, 33 M 348, 23 NW 308; Schneider v Ashworth, 34 M 426, 26 NW 233; Benjamin v Levy, 39 M 11, 38 NW 702; Noble v Gt. Northern, 89 M 147, 94 NW 434.

The findings of fact were sufficient and not mere legal conclusions of law from the facts. Findings should not contain evidentiary facts. A correct result was reached by the trial court. Arntson v Arntson, 184 M 66, 237 NW 820.

12. Judgment must be justified by the findings

The findings are the sole authority for the judgment and constitute the basis on which it must rest. If the judgment is not justified by the findings the objection may be raised for the first time on appeal. Lesher v Getman, 28 M 93, 9 NW 585; Knudson v Curley, 30 M 433, 15 NW 873; Wagner v Nagel, 33 M 348, 23 NW 308; Schneider v Ashworth, 34 M 426, 26 NW 233; Benjamin v Levy, 39 M 11, 38 NW 702; In re Shotwell, 43 M 389, 45 NW 842; Wolfort v Farnham, 44 M 159, 46 NW 295; Hodge v Ludlum, 45 M 290, 47 NW 805; Smith v Nat'l Credit Insur. 79 M 486, 82 NW 976; Noble v Gt. Northern, 89 M 147, 94 NW 434.

The supreme court cannot draw inferences of fact in order to sustain a judgment. St. P. & Dul. v Village of Hinckley, 53 M 398, 55 NW 560.

The findings of the court evidenced that a quarterly instalment had been paid. The judgment for the full amount disregarded that finding. A new trial is granted. Orr v Bennett, 135 M 443, 161 NW 165.

In determining the merits of an application to vacate a stipulation on the ground of incompetence of one of the parties, it is not necessary to make findings of facts, nor are findings necessary as a basis for judgment based upon a stipulation. Fletcher v Taylor, 148 M 366, 182 NW 437.

The court's findings upon matters not decisive of the controversy will not overthrow the judgment. Westman v Siedow, 173 M 145, 216 NW 782.

On an appeal by the surety from a judgment obtained by the state in an action to recover from its assistant purchasing agent and his surety for his conversion of personal property owned by the state, the findings of fact support the conclusions of law. State v Waddell, 187 M 647, 246 NW 471.

A judgment entered upon findings of fact and conclusions of law must be reversed upon appeal if the findings of fact call for conclusions of law and judgment in favor of the party against whom it is rendered. Robitshek v Maetzold, 198 M 586, 270 NW 579.

Since plaintiff's motion was to amend only the conclusion of law, she cannot recover more than the findings of fact warrant unless facts are admitted in the pleadings which, together with those found, required the conclusion of law to be amended. Hosford v Board, 203 M 140, 280 NW 859.

13. Construction of findings

Where the case was tried by the court without a jury, and there is no settled case or bill of exceptions, this court will presume that at the trial the parties by consent litigated all the matters of fact in the findings, including some not within the issues of the pleadings. Baker v Byerly, 40 M 489, 42 NW 467.

A finding that the defendant is impotent implies and includes every essential element constituting impotency. Payne v Payne, 46 M 467, 49 NW 230.

Findings of fact must be fairly construed with reference to the pleadings and the manifest intention of the trial court. Fenske v Fenske, 74 M 1, 76 NW 785.

Where the specific facts are found in detail by the trial court, a general conclusion which is clearly an inference from such specific findings must be controlled thereby. Wheeler v Gorman, 80 M 462, 83 NW 442; Ware v Squyer, 81 M 388, 84 NW 126.

The trustee having failed to make any report or accounting of his transactions, the cestui que trust was not guilty of such laches as to bar him from enforcing the trust. Landerton v Youmans, 84 M 109, 86 NW 594.

Where the trial court found ultimate and decisive facts, but has added thereto a statement that it would, but for certain conditions, have reached a different conclusion, to give value to such qualifying inference the facts to support the same should be embraced in the bill of exceptions; and unless the findings contain the essential facts they will be disregarded. St. P. Trust v Kittson, 88 M 38, 92 NW 500.

While the memorandum of the trial court is not a substantive part of the findings, it is required to be returned, and may, if necessary, be resorted to for the purpose of interpreting the meaning of the findings. Johnson v Johnson, 92 M 167, 99 NW 803.

This section applied to all issues of fact tried in the district court without a jury and consequently in every such case, however arising, which is tried and disposed of on the merits, there must be a decision in writing stating separately the findings of fact and conclusions of law. Pioneer v Bernard, 156 M 422, 195 NW 140.

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter simply because his interests have changed, assume a contrary position. Sorenson v School District, 122 M 63, 141 NW 1105.

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 M 380, 152 NW 774.

Denial of a motion to alter and amend findings of fact is equivalent to findings negativing facts asked to be found. Mason v MacNeil, 186 M 278, 243 NW 129.

A denial of a motion for an amended finding is the equivalent of a finding contrary to that requested. Smith v Benefit Ass'n, 187 M 208, 244 NW 817.

Remarks of the court to the effect that plaintiff must come into court with clean hands, made at the close of the testimony, were not such as to indicate that the court found facts by a wrong application of the law. Thorem v Thorem, 188 M 153, 246 NW 674.

14. By whom made

Only the judge who tried the cause can make or amend findings. There is no exception in the case of death or termination of office. Bahnsen v Gilbert, 55 M 334, 56 NW 1117; Aultman v O'Dowd, 73 M 58, 75 NW 756.

After an action was tried but before it was decided, the county wherein it was tried was attached to a different judicial district. The judge who tried the action was authorized to render a decision. Darelius v Davis, 74 M 345, 77 NW 214.

546.28 ASSESSMENT OF DAMAGES WITHOUT ANSWER.

HISTORY. R.S. 1851 c. 82 s. 48; 1852 Amend. p. 15; P.S. 1858 c. 72 s. 48; G.S. 1866 c. 66 s. 67; G.S. 1878 c. 66 s. 81; G.S. 1894 s. 5221; R.L. 1905 s. 4122; G.S. 1913 s. 7748; G.S. 1923 s. 9245; M.S. 1927 s. 9245.

546.29 PROCEEDINGS ON DECISION OF ISSUE OF LAW.

HISTORY. R.S. 1851 c. 70 s. 134; P.S. 1858 c. 60 s. 142; G.S. 1866 c. 66 s. 128; G.S. 1878 c. 66 s. 145; G.S. 1894 s. 5387; R.L. 1905 s. 4186; G.S. 1913 s. 7816; G.S. 1923 s. 9312; M.S. 1927 s. 9312.

A demurrer to a complaint upon an equitable cause of action was overruled. In such case no final judgment could properly be ordered without taking proofs in respect to the alleged fact. Deuel v Hawke, 2 M 50 (37).

In an action of tort, the plaintiff is not entitled to proceed under General Statutes 1894, Section 5387 (section 546.29) to assess his damages, without notice to a defendant who has appeared in the action, and a judgment entered on an irregular assessment will be set aside. Davis v Red River, 61 M 534, 63 NW 1111.

Where a demurrer to a petition for mandamus was overruled and thereafter judgment was entered without notice, but no application was made to the trial court either for leave to answer or to vacate the judgment, the question of defendant's rights cannot be considered by the supreme court. Clark v Jack, 126 M 370, 148 NW 306.

This section does not dispense with the duty to give notice after a demurrer has been overruled. Kemerer v State Farm Mutual, 206 M 325, 288 NW 719.

546.30 COURT ALWAYS OPEN; DECISIONS OUT OF TERM.

HISTORY. R.S. 1851 c. 70 s. 135; P.S. 1858 c. 60 s. 143; G.S. 1866 c. 66 s. 129; G.S. 1878 c. 66 s. 146; G.S. 1894 s. 5388; R.L. 1905 s. 4187; G.S. 1913 s. 7817; G.S. 1923 s. 9313; M.S. 1927 s. 9313.

An order to show cause, in matters proper for the district court, in vacation, but not for a judge in chambers, is not rendered invalid by requiring the party to show cause before the judge at his chambers. Yale v Edgerton, 11 M 271 (184).

A decision may consist either of an order or a direction for an order or judgment; if an order, the clerk upon its being filed must pursue its terms; if a direction for an order, the order directed must be entered by the clerk, and its terms then followed. Aetna v Swift, 12 M 437 (326).

An appeal cannot be taken from a mere direction. Ryan v Kranz, 25 M 362.

The district court is always open. Rollins v Nolting, 53 M 232, 54 NW 1118; Hoskins v Baxter, 64 M 226, 66 NW 969; Johnson v Veloe, 86 M 47, 90 NW 126.

No appeal lies to the supreme court from an order made by a court commissioner. 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 v Niles, 131 M 129, 154 NW 748.

On the facts, and owing to lack of notice, it was within the discretion of the trial court to vacate the judgment and permit plaintiff to serve and file the complaint. Strand v Chic. G. W. 147 M 3, 179 NW 369.

Neither the district rules, nor section 546.30, provides a notice that will start running the time within which plaintiff must consent to the reduction of a verdict ordered as a condition of not granting a new trial; and to start the time running a notice must be served upon the plaintiff by the adverse party. Turnbloom v Crichton, 189 M 588, 250 NW 570.

546.31 TRIAL UNFINISHED AT END OF TERM.

HISTORY. R.S. 1851 c. 70 s. 136; 1852 Amend. p. 10; P.S. 1858 c. 60 s. 144; G.S. 1866 c. 66 s. 130; 1867 c. 66 s. 1; G.S. 1878 c. 66 s. 147; G.S. 1894 s. 5389; R.L. 1905 s. 4188; G.S. 1913 s. 7818; G.S. 1923 s. 9314; M.S. 1927 s. 9314.

546.32 TRIAL IN VACATION BY CONSENT.

HISTORY. R.S. 1851 c. 70 s. 137; P.S. 1858 c. 60 s. 145; G.S. 1866 c. 66 s. 131; G.S. 1878 c. 66 s. 148; 1885 c. 125; G.S. 1894 s. 5390; R.L. 1905 s. 4189; G.S. 1913 s. 7819; G.S. 1923 s. 9315; M.S. 1927 s. 9315.

546.33 TRIAL BY REFEREES; REFERENCE BY CONSENT; FEES WHEN PAID BY THE COUNTY.

HISTORY. R.S. 1851 c. 70 ss. 138, 140; P.S. 1858 c. 60 ss. 146, 148; G.S. 1866 c. 66 ss. 132, 134; G.S. 1878 c. 66 ss. 149, 151; 1881 c. 63 s. 1; G.S. 1894 ss. 5391, 5393; R.L. 1905 s. 4190; G.S. 1913 s. 7820; 1921 c. 279 s. 2; G.S. 1923 s. 9316; M.S. 1927 s. 9316.

The statute authorizing the trial by referees is constitutional. Carson v Smith, 5 M 78 (58); St. P. & Sioux City v Gardner, 19 M 132 (99).

The consent to a reference must be clear and explicit. St. P. & S. C. v Gardner, 19 M 132 (99).

The report of a referee has the effect of a special verdict. Frankman v Balduc, 179 M 176, 228 NW 614; State ex rel v City of Chisholm, 199 M 403, 273 NW 235.

Modernizing court procedure. 8 MLR 84.

546.34 COMPULSORY REFERENCE, WHEN.

HISTORY. R.S. 1851 c. 70 s. 139; P.S. 1858 c. 60 s. 147; G.S. 1866 c. 66 s. 133; G.S. 1878 c. 66 s. 150; G.S. 1894 s. 5392; R.L. 1905 s. 4191; G.S. 1913 s. 7821; G.S. 1923 s. 9317; M.S. 1927 s. 9317.

A compulsory reference in a legal action cannot be ordered simply because a long account is involved. St. P. & S. C. v Gardner, 19 M 132 (99); Fair v Stickney, 35 M 380, 29 NW 49.

A cause of action the trial of which will, as the pleadings show, involve the taking and adjustment of complicated accounts between the parties, is of equitable cognizance, and the court may order a reference to take and state the accounts. Fair v Stickney, 35 M 380, 29 NW 49; Bond v Wellcome, 61 M 43, 63 NW 3.

Ordinarily no oral testimony should be received on the hearing of a motion, but the trial court, in the exercise of a sound discretion, may permit the trial of an issue of fact, involved in a motion, on oral testitmony, as if the issue had been raised by the pleadings, or it may on its own motion direct a referee to ascertain and report the facts. State v Egan, 62 M 280, 64 NW 813; Strom v Montana Central, 81 M 349, 84 NW 46.

In quo warranto proceedings the supreme court may appoint a referee to take and report the facts; and such referee may find upon every issue raised by the pleadings. State ex rel v City of Chisholm, 199 M 403, 273 NW 235.

Where a case has been settled, the findings of the referee in a disbarment proceeding are not conclusive, and the petitioner or prosecutor may challenge the same as contrary to the preponderance of the evidence; and in the instant

case the findings of the referee are vacated and the charges against the respondent determined by the court upon the settled case. In re McDonald, 204 M 61, 282 NW 677, 284 NW 888.

546.35 SELECTION OF REFEREES; MAJORITY MAY ACT.

HISTORY. R.S. 1851 c. 70 ss. 140, 143; P.S. 1858 c. 60 ss. 148, 151; G.S. 1866 c. 66 ss. 134, 136; G.S. 1878 c. 66 ss. 151, 153; 1881 c. 63 s. 1; G.S. 1894 ss. 5393, 5395; R.L. 1905 s. 4192; G.S. 1913 s. 7822; G.S. 1923 s. 9318; M.S. 1927 s. 9318.

546.36 TRIAL AND REPORT; POWERS; EFFECT OF REPORT.

HISTORY. R.S. 1851 c. 70 s. 142; P.S. 1858 c. 60 s. 150; G.S. 1866 c. 66 s. 135; G.S. 1878 c. 66 s. 152; G.S. 1894 s. 5394; R.L. 1905 s. 4193; G.S. 1913 s. 7823; G.S. 1923 s. 9319; M.S. 1927 s. 9319.

A referee must state his findings of fact and conclusions of law separately. Bazill v Ullman, 2 M 134 (110); Baldwin v Allison, 3 M 83 (41); Calif. v Hillhouse, 3 M 311 (217); McMurphy v Walker, 20 M 382 (334).

He must find on all the material issues. Bazille v Ullman, 2 M 134 (110).

He need not find on immaterial issues or facts admitted by the pleadings. Brainerd v Hastings, 3 M 45 (17).

He may reopen a case for further evidence. Cooper v Stinson, 5 M 201 (160).

Where all the issues are submitted to him he must report a judgment, that is, he must specify in his conclusions of law the exact nature of the judgment to which the successful party is entitled and order its entry. Caldwell v Arnold, 8 M 265 (231); Griffen v Jorgensen, 22 M 92.

If the judgment entered by the clerk is not authorized by the report, the proper remedy is an application to the court for a correction and not an appeal from the judgment. Piper v Johnston, 12 M 60 (27).

Judgment may be entered by the clerk on the report of the referee as of course and without notice. Piper v Johnston, 12 M 60 (27); Leyde v Martin, 16 M 38 (24).

The referees' control over the order of proof is the same as that of the court and the rules of evidence and the rules governing the examination and cross-examination of witnesses are the same as on a trial before the court. Thayer v Barney, 12 M 502 (406).

He must follow a stipulation of the parties as to the facts. Hatch v Burbank, 17 M 231 (207).

He must not go beyond the material issues. O'Brien v City of St. P. 18 M 176 (163); Cochrane v Halsey, 25 M 52; Lundell v Cheney, 50 M 470, 52 NW 918.

He may dismiss an action on the trial for failure of proof or other cause in the same manner as the court. McCormick v Miller, 19 M 443 (384).

Where by order of reference the whole issues are referred, the referee is substituted for the court. The trial is to be conducted in the same manner as a trial by the court and the referee's report stands as the decision of the court. He must make findings in the same manner as the court. McMurphy v Walker, 20 M 282 (334); Lundell v Cheney, 50 M 470, 52 NW 918; Kelso v Youngren, 86 M 177, 90 NW 316; Ferch v Hiller, 209 M 124, 295 NW 504.

In entering judgment the clerk must follow the report with strictness. Ramaley v Ramaley, 69 M 491, 72 NW 694.

The referee does not lose jurisdiction by the mere fact of filing his findings of fact and conclusions of law. He has authority to revise and amend his findings and conclusions to the same extent possessed by a trial court, until judgment has been entered or until he has been removed as referee by the court. Kelso v Youngren, 86 M 177, 90 NW 316.

A referee appointed to report a judgment has substantially the same powers as a trial judge. He may not entertain a motion for a new trial, but has authority to amend and revise his findings until judgment has been entered. If appointed to report the facts, his report has the effect of a special verdict. Sons v Sons, 151 M 334, 186 NW 809.

Report of referee in disbarment proceedings. In re McGinley, 168 M 224, 209 NW 870; In re Dunn, 173 M 274, 217 NW 142; In re McDonald, 204 M 65, 282 NW 677.

Appointment for the purpose of determining the facts only. Frankman v Balduc, 179 M 175, 228 NW 614.

In original proceedings in the supreme court where a referee is appointed to make findings of fact, such findings have the effect of a special verdict of a jury. State v City of Chisholm, 199 M 403, 273 NW 235.

546.37 MINORS MAY BE EXCLUDED, WHEN.

HISTORY. R.S. 1851 c. 70 s. 155; P.S. 1858 c. 60 s. 163; G.S. 1866 c. 66 s. 142; G.S. 1878 c. 66 s. 159; G.S. 1894 s. 5401; R.L. 1905 s. 4194; G.S. 1913 s. 7824; G.S. 1923 s. 9320; M.S. 1927 s. 9320.

546.38 DISMISSAL FOR DELAY.

HISTORY. 1919 c. 56 s. 1; G.S. 1923 s. 9321; M.S. 1927 s. 9321.

Laws 1919, Chapter 56 (section 546.38) does not affect the inherent power of the district court to dismiss an action for plaintiff's failure to prosecute it with due diligence. Wheeler v Whitney, 156 M 362, 194 NW 777.

The spirit of our laws and public policy require reasonable diligence in bringing litigation to a close. The power so to dismiss is inherent in the court and exists independently of statute. Davis v Northern Pacific, 179 M 225, 229 NW 86.

Under the statute there need be no showing of actual prejudice resulting from the delay. Conrad v Certified Ice, 201 M 366, 276 NW 286; Helmer v Nagle, 202 M 59, 277 NW 359.

Under the statute, the court may refuse to dismiss for delay, where the reason is satisfactorily explained to the court. State v Johnson, 216 M 427, 13 NW(2d) 26.

An order denying a motion to dismiss an action for laches in its prosecution is not appealable. Dady v Peterson, 219 M 198, 17 NW(2d) 322.

546.39 DISMISSAL OF ACTION.

HISTORY. 1860 c. 70 ss. 3, 4; G.S. 1866 c. 66 ss. 149, 150; 1871 c. 66 s. 1; G.S. 1878 c. 66 ss. 166, 167; G.S. 1894 ss. 5408, 5409; R.L. 1905 s. 4195; G.S. 1913 s. 7825; G.S. 1923 s. 9322; M.S. 1927 s. 9322.

1. Dismissal by plaintiff before trial
2. Dismissal by court before trial
3. Dismissal by consent before trial
4. Voluntary nonsuit
5. Dismissal for failure to prove cause of action
6. Dismissal for failure of plaintiff to appear
7. Certain modes of dismissal abolished
8. Effect of dismissal
9. Generally

1. Dismissal by plaintiff before trial

The plaintiff may dismiss on appeal from the justice court. Fallman v Gilman, 1 M 179 (153).

At any time before trial the plaintiff may dismiss his action, at least once, if a provisional remedy has not been allowed or counter-claim made or affirmative relief demanded in the answer. Fallman v Gilman, 1 M 179 (153); Phelps v Win. & St. P. 37 M 485, 35 NW 273; Koerper v St. P & N. 40 M 132, 41 NW 156.

If a plaintiff neglect unreasonably to perfect a judgment to which he is entitled, the defendant may have an order of dismissal. Deuel v Hawke, 2 M 50 (37).

The property claimed in a former action, not having been taken possession of by the officer, there was no allowance of a provisional remedy within the meaning of the statute regulating dismissal of actions. Blandy v Raguet, 14 M 491 (368).

It is not necessary that there should be an entry of judgment or payment of costs. Blandy v Raguet, 14 M 491 (368); Page v Mitchell, 37 M 368, 34 NW 986; Nichols v State Bank, 45 M 102, 47 NW 462; Althen v Tarbox, 45 M 18, 50 NW 1018.

The entry of dismissal may be made either by the clerk at the request of the plaintiff or by the attorney of the plaintiff. Blandy v Raguet, 14 M 491 (368); Nichols v State Bank, 45 M 102, 47 NW 462.

In an action of claim and delivery when the property is taken by the plaintiff and returned to the defendant on a proper bond, a provisional remedy has been allowed. Williams v McGrade, 18 M 82 (65).

Where the defendant pleads a counter-claim, plaintiff cannot dismiss as of right. Griffin v Jorgenson, 22 M 92; Hirschman v Healy, 162 M 328, 202 NW 734.

When a cause has been called for trial in its order, and a jury has been called to try the cause, the trial has begun, even though the jury has not been sworn. St. Anthony v King, 23 M 186.

Merely calling a cause for trial is not the commencement of a trial. Scheffer v Nat'l Life, 25 M 534; Matthews v Taaffe, 44 M 400, 46 NW 850.

Where in an action to recover personal property defendant obtained an order of interpleader and the appointment of a receiver to take possession of the property, the question whether plaintiff could dismiss of right was raised but not determined. Hooper v Balch, 31 M 276, 17 NW 617.

The phrase "before the trial" means before the commencement of the trial and not before the final submission of the case to the court or jury. Bettis v Schreiber, 31 M 329, 17 NW 863.

A demand for affirmative relief without allegations of facts authorizing it is not enough to defeat the right to dismissal. Curtis v Livingston, 36 M 312, 30 NW 814.

The plaintiff may dismiss after a new trial is ordered. Phelps v Win. & St. P. 37 M 485, 35 NW 273.

To constitute affirmative relief the answer must be in the nature of a cross-action. Relief which is simply conditioned on recovery by plaintiff is not affirmative. Koerper v St. P. & N. 40 M 132, 41 NW 156.

Plaintiff may dismiss without the consent of his attorney. Anderson v Itasca, 86 M 480, 91 NW 12; Gibson v Nelson, 111 M 183, 126 NW 731.

An entry made and signed by the plaintiff's attorneys in the clerk's register, that "the above action is hereby dismissed" is effectual as a dismissal of the action. Nichols v State Bank, 45 M 102, 47 NW 462.

The proviso in the statute against more than one dismissal as of right is merely prohibitory and a dismissal forbidden thereby does not in itself operate as a determination of the action on the merits. Walker v St. P. City Ry. 52 M 127, 53 NW 1068.

Plaintiff cannot dismiss as of right after demurrer and the due submission by both parties of the issues presented thereby to the court. Day v Mountin, 89 M 297, 94 NW 887.

Where defendant has obtained a decision or verdict on the merits, plaintiff cannot as a matter of right, after obtaining an order granting a new trial, dismiss to the prejudice of defendant's right to review the order. Floody v Gt. Northern, 104 M 517, 116 NW 107, 932.

The court on a mistaken theory indicated he would enter a dismissal, and asked attorney for plaintiff if he wished a stay. Held, that by stating to the court, "No, your honor, I think I will commence the action right over again. The plaintiff's case may be dismissed", he is estopped from appealing from the order. Kappa v Levstik, 123 M 533, 144 NW 137.

In an action relating to ownership of corporate stock the answer set up a right to and prayer for affirmative relief in such fashion as to prevent an ex parte dismissal by the plaintiff. Burt v State Bank, 186 M 189, 242 NW 622.

Section 546.39 has no application in case where an applicant to register title dismisses even though there is an answering defendant. Hiller v Smith, 191 M 272, 253 NW 773.

The attempted dismissal of the action by plaintiff, after the complaint in intervention had been served, did not affect the intervenor's rights. Scott v Van Sant, 193 M 466, 258 NW 817.

Dismissal by plaintiff entered on the minutes of the court was effective to terminate the action, defendant being present. No notice and no entry of judgment was required. Haffner v Fawcett, 204 M 614, 284 NW 873.

Parties to an action in divorce, may dismiss at any time, and when the suit is dismissed the power of the court to grant attorney's fee is at an end. Johnson v Johnson, 217 M 436, 14 NW(2d) 617.

Effect of second voluntary dismissal before trial. 20 MLR 228.

2. Dismissal by court before trial

If a plaintiff neglect unreasonably to perfect a judgment to which he is entitled, the defendant may have an order of dismissal. Deuel v Hawke, 2 M 50 (37); Sherrard v Frazier, 6 M 572 (406).

The court may at any time before trial, upon the application of the plaintiff and sufficient cause shown, dismiss an action, although the defendant has made a counter-claim or demanded affirmative relief in his answer. Matthews v Taaffe, 44 M 400, 46 NW 850.

While the district court may at any time before trial, upon application by the plaintiff and sufficient cause shown, dismiss an action, yet such cause must relate to and affect the legal rights of the parties litigant; and in the instant case no cause is shown for the dismissal. Wollenschlager v Mpls. & St. P. 149 M 220, 183 NW 144.

Upon an uncontradicted affidavit as to the existence of a foreign statute, the court was justified in dismissing the action although by virtue of an unverified reply the existence of the statute was in issue in the case. Pride v Bank, 170 M 120, 212 NW 3.

3. Dismissal by consent before trial

An order, setting aside a stipulation between the parties for the dismissal of an action, is within the exclusive jurisdiction of the court; and where relief is sought against a stipulation by one of the parties on the mere grounds of mistake, the mistake must have been one which ordinary care would not have prevented. Rogers v Greenwood, 14 M 333 (256); Eastman v St. Anthony, 17 M 48 (31).

A discontinuance being but a species of dismissal, a mere submission to arbitration, though followed by an award, is not a discontinuance of an action, not being one of the exclusive modes of dismissal prescribed by statute. Hemsden v Churchill, 20 M 408 (360).

A stipulation, signed by the plaintiffs and some of the defendants to an action, for a settlement and dismissal of the action, is not such an appearance as entitles the defendants to notice of further proceedings in the action. Grant v Schmidt, 22 M 1.

Where, upon a stipulation for a judgment of dismissal without costs, or notice, a judgment was entered with costs, an order vacating the allowance of costs, but refusing to set aside the judgment will not be reversed by the appellate court because made with leave to defendant to proceed upon notice to retax such costs. Herrick v Butler, 30 M 156, 14 NW 794.

A written stipulation, before trial, that an action be dismissed, without costs, does not authorize an entry of judgment as upon the merits, such as would bar a subsequent action for the same cause. Rolfe v Burlington, 39 M 398, 40 NW 267.

A judgment of foreclosure, upon default, rendered against the "defendants" is a judgment only against the defendants named in the caption of the judgment, and does not affect a defendant in the action not thus named, or otherwise designated in the judgment; the plaintiff, in his affidavit of default and application for judgment, having alleged that the action has been dismissed as to that defendant. Banning v Sabin, 41 M 477, 43 NW 329.

Where issues have been made by the pleadings in an action of ejectment, and thereafter judgment has been entered upon a stipulation of the parties that the action shall be dismissed "on its merits", it cannot be regarded as an ordinary

statutory dismissal by consent of parties. Such judgment is upon the merits of the case. Cameron v Chic. Milw. 51 M 153, 53 NW 199.

The stipulation was endorsed as filed and put in the files of the case. Presumably the proper entry was made in the register. This was sufficient. Muellenberg v Joblinski, 188 M 398, 247 NW 570.

A defendant is not prejudiced because some plaintiffs and defendants are dismissed by consent, and the trial continued to judgment. Bauman v Katzenmeyer, 204 M 240, 283 NW 242.

A judgment of voluntary dismissal by agreement of the parties of an action is not an adjudication that the restraining order was improvidently or erroneously issued. Amer. Gas v Voorhees, 204 M 209, 283 NW 114.

4. Voluntary nonsuit

The right of a plaintiff to take a voluntary nonsuit or in the language of the statute to "abandon" his action is not well defined by the decisions. Schlender v Corey, 30 M 501, 16 NW 401.

It is settled that if the plaintiff asks the court to be permitted to take a dismissal it is discretionary with the court to grant or deny the application. Althen v Tarbox, 48 M 1, 50 NW 828; Kremer v Chgo. Milw. 51 M 15, 52 NW 977; In re Iron Bay Co. 57 M 338, 59 NW 346; Lando v Chgo. St. P. 81 M 279, 83 NW 1089.

A judgment entered upon the dismissal of an action on motion of the defendant at the close of the plaintiff's testimony for insufficiency of evidence is not res judicata. County v Lejenberg, 124 M 495, 145 NW 380.

Where both 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 warranty, it was not error to dismiss the action as to all the plaintiffs except the assignee. Allis v Foley, 126 M 14, 147 NW 670.

Upon the record the case was properly on the calendar and was properly dismissed for want of prosecution. Lovell v Village of St. Clair, 126 M 108, 147 NW 822.

When counsel in his opening statement to the jury makes a deliberate concession as to 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 defendants' motion for dismissal if, with such facts conceded, there can be no recovery under the complaint. St. P. Motor v Johnston, 127 M 443, 149 NW 667.

An appeal from an award may be dismissed by the petitioner. Mpls.-St. P. v Goodspeed, 128 M 66, 150 NW 222.

A misnomer of the defendant railroad company by adding to its corporate name the words "Relief Department" was not a ground for dismissal. Jurisdiction having been acquired, the defect was amendable as of course, and will be disregarded. Wise v Chgo. Burlington, 133 M 434, 158 NW 711.

While the trial was in progress the court, on motion of plaintiffs, dismissed their cause of action. The dismissal did not prevent the trial of the counter-claim. Trainer v Lammers, 152 M 419, 188 NW 1013.

Under section 546.39 the plaintiff has the right voluntarily to dismiss the action after denial of a motion by the defendant under section 605.06 for judgment notwithstanding the disagreement of the jury. An order denying a motion under section 605.06 is not reviewable on appeal under section 605.09 (1) from a judgment of dismissal entered under section 546.39. Bolstad v Paul Bunyan, 215 M 166, 9 NW(2d) 346.

5. Dismissal for failure to prove cause of action

Admitting additional evidence to defeat a motion to dismiss is discretionary. Caldwell v Bruggerman, 8 M 286 (252); Ullman v Lion, 8 M 381 (338); Johnson v City of Stillwater, 62 M 60, 64 NW 95.

Error in denying motion may be cured by evidence subsequently introduced. Cole v Curtis, 16 M 182 (161); Berkey v Judd, 22 M 287; Deacon v Chgo. Milw. 27 M 303, 7 NW 268; Keith v Briggs, 32 M 185, 20 NW 91; McRoberts v McArthur, 62 M 310; 64 NW 903; Manahan v Halloran, 66 M 483, 69 NW 619; Ingalls v Oberg, 70 M 102, 72 NW 841.

It is the duty of the court to order a dismissal when:

(a) plaintiff fails to prove any or all of the essential facts of his cause of action by evidence which could reasonably satisfy the jury and it would consequently be the obvious duty of the court to set aside a verdict in his favor as not justified by the evidence. Searles v Thompson, 18 M 316 (285); McCormick v Miller, 19 M 443 (384); Merriman v Ames, 26 M 384, 4 NW 620; Abbett v Chgo. Milw. 30 M 482, 16 NW 266; McDonald v Newstone, 187 M 237, 244 NW 806; L'Hommedieu v Wolfson, 187 M 333, 245 NW 369;

(b) the evidence in favor of defendant so manifestly preponderates that it would be the obvious duty of the court to set aside a verdict for plaintiff as not justified by the evidence. Searles v Thompson, 18 M 316 (285); Farrell v St. P. & N. 38 M 394, 38 NW 100;

(c) plaintiff fails to produce any evidence of some fact essential to his cause of action. McCormick v Miller, 19 M 443 (384); Volmer v Stagerman, 24 M 434; Merriman v Ames, 26 M 384, 4 NW 620;

(d) there is a fatal variance. Cowles v Warner, 22 M 449; Irish-American Bank v Bader, 59 M 329, 61 NW 328; Gaar, Scott v Fritz, 60 M 346, 62 NW 391;

(e) the evidence disclosed some fact which, as a matter of law, defeats plaintiff's right to recover. La Riviere v Pemberton, 46 M 5, 48 NW 406; Kirwin v Sabin, 50 M 320, 52 NW 642; Iselin v Simon, 62 M 128, 64 NW 143; Von Hegne v Thompkins, 89 M 77, 93 NW 901.

The practice of ordering a nonsuit for failure of proof is the same whether the cause is being tried by court, referee, or jury. McCormick v Miller, 19 M 443 (384); Berkey v Judd, 22 M 287; Volmer v Stagerman, 24 M 434; Merriman v Ames, 26 M 384, 4 NW 620; Sloan v Becker, 31 M 414, 18 NW 143; Miller v Miller, 47 M 546, 50 NW 612; Thoralson v Wyman, 58 M 233, 59 NW 1009.

Effect of evidence on the motion to dismiss. Warner v Rogers, 23 M 34; Merriman v Ames, 26 M 384, 4 NW 620; Emery v Mpls. Indust'l, 56 M 460, 57 NW 1132; Blexrud v Kuster, 62 M 455, 64 NW 1140.

When the motion may be made. It is not error for the court to refuse a motion to dismiss at the close of plaintiff's testimony; and then grant it after the evidence is all in. Merriman v Ames, 26 M 384, 4 NW 620; Dunham v Byrnes, 36 M 106, 30 NW 402; Farrell v St. P & N. 38 M 394, 38 NW 100.

The relief sought is no part of the cause of action and does not determine its character. If plaintiff makes out a cause of action either legal or equitable, within the allegations of his complaint, he cannot be non-suited. Greenleaf v Egan, 30 M 316, 15 NW 254; Canty v Lattimer, 31 M 239, 17 NW 385.

Dismissals where there are several parties. Woodling v Knickerbocker, 31 M 268, 17 NW 387; Weisner v Young, 50 M 21, 52 NW 390; Bunce v Pratt, 56 M 8, 57 NW 160; Masterman v Lumbermen's Nat'l, 61 M 299, 63 NW 723.

In an action triable to the court certain issues were submitted to the jury in the form of specific questions. An affirmative answer from the jury being essential to plaintiff's right of recovery, if the evidence did not warrant such affirmative answer the court may properly dismiss. Sloan v Becker, 31 M 414, 18 NW 143.

If, when the plaintiff rests, he has failed to prove a cause of action, the defendant may move to have the action dismissed on that ground, notwithstanding that he has set up a counter-claim in his answer. Slocum v Mpls. Miller's, 33 M 438, 23 NW 862.

If there is some evidence tending to prove all the essential facts of a cause of action and on all the evidence adduced the court or jury might reasonably find for plaintiff or defendant, it is error to dismiss the case when plaintiff rests. Craver v Christian, 34 M 397; Robel v Chgo. Milw. 35 M 84, 27 NW 305; Bennett v Syndicate Ins. 39 M 254, 39 NW 488; Emery v Mpls. Industrial, 56 M 460, 57 NW 1132; Thoralson v Wyman, 58 M 233, 59 NW 1009; Sexton v Steele, 60 M 336, 62 NW 392; Keene v Masterson, 66 M 72, 68 NW 771; Herrick v Barnes, 78 M 475, 81 NW 526; Hamm v New Hampshire, 80 M 139, 83 NW 41; Henninger v Burch, 90 M 43, 95 NW 578; Heim v Heim, 90 M 497, 97 NW 379; Mpls. Threshing v Jones, 95 M 127, 103 NW 1017.

When plaintiff has established a cause of action for nominal damages it is error to dismiss where the recovery of nominal damages would carry costs. Potter

v Mellen, 36 M 122, 30 NW 438; Harris v Kerr, 37 M 537, 35 NW 379; Farmer v Crosby, 43 M 459, 45 NW 866.

The mere fact that there is a preponderance of evidence in favor of defendant does not authorize a dismissal. Farrell v St. P. & N. 38 M 394, 38 NW 100.

The right to dismiss is properly regarded as a corollary of the right to grant a new trial. If it is perfectly obvious that the court cannot permit a verdict for the plaintiff to stand, there is no good reason for giving the jury an opportunity to find such a verdict. Giermann v St. P. Mpls. 42 M 5, 43 NW 483.

The right to order a dismissal involves the duty to do so. A motion for a dismissal is not addressed to the discretion of the court. Scheiber v Chgo. St. P. 61 M 499, 63 NW 1034; Blexrud v Kuster, 62 M 455, 64 NW 1140.

The court will not grant a new trial merely because plaintiff may have been entitled to nominal damages. United States Exp. v Koerner, 65 M 540, 68 NW 181.

A person cannot be allowed to make himself a party, on paper, to an action pending against others for the purpose of objecting to a trial thereof or moving to dismiss. Hunt v O'Leary, 84 M 200, 87 NW 611.

The statutory dismissal for failure of proof is the same as a common law nonsuit. Cartwright v Hall, 88 M 349, 93 NW 117.

An action cannot be dismissed by the court without verdict or findings of fact, unless evidence would not sustain verdict or findings for plaintiff. Du Breuille v Town of Ripley, 106 M 510, 119 NW 244; Murray v Mulligan, 135 M 471, 160 NW 1032; Nesbitt v Twin City, 145 M 276, 177 NW 131; Todd v Mayer, 152 M 556, 188 NW 735.

If the evidence when both parties rested justified findings for plaintiff, no reversible error can be asserted upon the court's refusal to dismiss when plaintiff rested. Carpenter v Gantzer, 164 M 105, 204 NW 550.

Where neither complaint nor evidence shows facts sufficient to entitle plaintiff to relief, judgment of dismissal is correct. Cary v Satterlee, 166 M 507, 208 NW 408.

Where plaintiff introduces sufficient evidence upon which findings can be made in favor of defendants, but neither formally rests nor asks for permission to dismiss, the court is justified in concluding that the cause was submitted for findings and decision. Calhoun Beach v Mpls. Bldrs. 190 M 576, 252 NW 442.

The district court has discretionary power to determine whether an appellant should be relieved of a default for failure to file within the time designated by Laws 1935, Chapter 72, Section 169, the statements of the proposition of law and of fact upon which such appellant relies for reversal of an order of the probate court. Slingerland's Est. 196 M 354, 265 NW 21.

Action for specific performance properly dismissed when plaintiffs rested, since there was no evidence that plaintiffs had paid or tendered the amount agreed to be paid. Martineau v Czajkowski, 201 M 342, 276 NW 232.

When there is a failure of proof on plaintiff's part a dismissal should be ordered rather than a verdict directed. Willard v Kohen, 202 M 626, 279 NW 553.

The conduct of both parties shows that they submitted the issue as one of law for the court's determination and that the decision rendered was necessarily on the merits. Gans v Coca-Cola, 205 M 36, 284 NW 844.

By section 546.39 the court is authorized to dismiss a case if plaintiff fails to substantiate or establish his cause of action or right to recover, but in exercising this authority the court must give plaintiff the benefit of every reasonable inference that might be drawn from the evidence. Docken v Ryan, 213 M 209, 6 NW(2d) 98.

Dismissal and dircted verdict. 23 MLR 363.

6. Dismissal for failure of plaintiff to appear

When the plaintiff fails to appear at the trial, a trial and judgment are not authorized; but if the answer does not set up a counter-claim, the court may dismiss the action on the application of the defendant. Keator v Glospie, 44 M 448, 47 NW 52; Diment v Bloom, 67 M 111, 69 NW 700; Blandin v Brennin, 106 M 353, 119 NW 57.

Under Minnesota practice, where plaintiff, who has lost right to dismiss without prejudice and has burden of proof, fails or refuses to proceed to trial, court should enter judgment of dismissal with prejudice, since there is nothing for jury to determine. Hineline v Mpls. Honeywell, 78 F(2d) 854.

7. Certain modes of dismissal abolished

A discontinuance being but a species of dismissal, a mere submission to arbitration, though followed by an award, is not a discontinuance of an action, not being one of the exclusive modes of dismissal prescribed by our statute. Hunsden v Churchill, 20 M 408 (360).

The amendment found in Ex Laws 1891, Chapter 26, Section 1, relating to voluntary dismissals of actions by plaintiffs, is simply prohibitory, and a dismissal forbidden thereby does not in itself operate as a determination of the action on its merits. This applied in the instant case to an action brought after two dismissals. Walker v St. Paul City Ry. 52 M 127, 53 NW 1068.

8. Effect of dismissal

There can be no valid judgment without an action or proceeding in which to render it, and a dismissal of the action, though a previous judgment has been rendered therein, extinguishes action, judgment and all, leaving the parties in the position they were in before the action was commenced; and a second trial of an action in ejectment, obtained as of right under the statute, extends to all questions or issues presented by the pleadings. Holmgren v Isaacson, 104 M 84, 116 NW 205; Sammons v Pike, 105 M 106, 117 NW 244; Brennan v Keating, 128 M 49, 150 NW 397.

Defendant cannot question the dismissal of the action against its codefendant in whose favor a verdict has been returned and against whom defendant had no claim. Kitchin v Fashion Garage, 158 M 136, 196 NW 929.

It was error to dismiss the counter-claim without making findings on the issues presented. Hirschman v Healy, 162 M 328, 202 NW 734.

The error, if any, in denying a motion to dismiss made when plaintiff rests is cured where the evidence at the end of the trial, taken as a whole, is sufficient to sustain findings for the plaintiff. Enterprise v Pfieffer, 169 M 457, 211 NW 673.

In an equitable action the answer set up a right to and prayer for affirmative relief in such fashion as to prevent an ex parte dismissal of the action by plaintiff. Burt v State Bank, 186 M 189, 242 NW 622.

Denial of plaintiff's motion to dismiss did not involve an abuse of discretion. Halloran v Western Oil, 187 M 492, 246 NW 23.

An elimination of a portion of the amount claimed in the original action on a policy of insurance did not prevent later suit for the amount so eliminated. Garbush v Order of U. C. T. 178 M 535, 228 NW 148.

A dismissal of an action on defendant's motion at the close of plaintiff's evidence, where defendant has not rested and does not move for a directed verdict or a dismissal on the merits, is not a bar to a second suit. Mardorf v Duluth-Superior, 192 M 236, 255 NW 809.

9. Generally

A party instituting an election contest by appeal may dismiss it in a case where the answer of the contestee claims no affirmative relief, but is substantially a general denial. State ex rel v City of Waseca, 116 M 40, 133 NW 67.

If a corporation commences an action to cancel certain stock issued, and collusively plans to dismiss it, stockholders may intervene and continue the action. Nat'l Power v Rossman, 122 M 355, 142 NW 818.

A judgment for the defendants in a prior action in the federal courts to recover treble damages for alleged combination in restraint of trade, in violation of the Sherman anti-trust act, was not res judicata of plaintiff's right to maintain a common-law action for interference with their business by false representations, threats, and malicious prosecution. Virtue v Cr'y Pckge. 123 M 19, 142 NW 930.

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 defendant's testimony admits a certain amount, plaintiff may be given the option of accepting that amount in preference to taking a new trial. Stevens v Wis. Farm, 124 M 421, 145 NW 173.

Case within the rule of abatement for prior suit pending. Seeger v Young, 127 M 421, 149 NW 735.

An appellant cannot dismiss an appeal by merely serving a notice of dismissal on the respondent; and a penalty may be assessed where an appeal is taken for purposes of delay. Greenhut v Oreck, 134 M 464, 157 NW 327.

Either party to a divorce proceeding, who asks for an absolute divorce, may withdraw the demand any time before the decree is granted. After such withdrawal, the court has no authority to grant a divorce to such party. Brodsky v Brodsky, 164 M 102, 204 NW 915.

At any stage of trial defendant has absolute right to move for dismissal on ground complaint does not state facts sufficient to constitute a cause of action. Tergeron v Johnson, 165 M 482, 205 NW 888.

There was no error in refusing a dismissal without prejudice, nor in denying a judgment of dismissal on the merits, and proceeding with the trial to finding of fact and conclusions of law. Swanson v Alworth, 168 M 91, 209 NW 907.

The practice of ordering a dismissal with prejudice upon an objection to the introduction of evidence under the complaint, is disapproved. Kryzmack v Maas, 182 M 83, 233 NW 595.

Under the section of the pleading relating to sham pleadings (section 544.10) a complaint cannot be stricken as sham. Long v Mut. Trust, 191 M 163, 253 NW 762.

Where plaintiff dismissed her case against an insurance company while unaware that the time had elapsed for bringing suit, it was not an abuse of discretion for the trial court to vacate the dismissal; following Macknick v Switchmen's Union, 131 M 246, 154 NW 1099. Lillienthal v Carolina Ins. 189 M 520, 250 NW 73.

The city cannot question dismissal of action against property owner for they were not adverse parties and no liability was proved against property owner. McDonnough v City of St. Paul, 179 M 553, 230 NW 89.

The dismissal against one defendant joined by the error and inadvertence of counsel, had no effect on the issues. Kutina v Combs, 180 M 467, 231 NW 194.

After the trial had begun the refusal of the court to permit the plaintiff to dismiss without prejudice was not error. Halloran v Western Fuel, 187 M 490, 246 NW 23.

No reversible error appears in the denial of plaintiff's motion for leave to open case, and for leave to open case in order to dismiss, made after defendant had moved for a directed verdict. Abar v Ramsey Motor, 195 M 597, 263 NW 917.

An order dismissing a cause for lack of jurisdiction is appealable. Bulan v Bulan, 208 M 529, 294 NW 845.

Under this section, the plaintiff has the right voluntarily to dismiss the action after denial of a motion by the defendant under section 605.06 for judgment notwithstanding the disagreement of the jury. Bolstad v Paul Bunyan, 215 M 166, 9 NW(2d) 346.

An applicant in land title registration proceedings may dismiss without prejudice at any time before entry of final decree subject only to imposition by the court of terms as circumstances warrant. Mitchell v Bazille, 216 M 368, 13 NW(2d) 24.

Right of plaintiff to a dismissal without prejudice after trial begins. 17 MLR 674.

Appealable orders. 24 MLR 860.

546.40 OFFER OF JUDGMENT; COSTS.

HISTORY. R.S. 1851 c. 82 s. 8; 1852 Amend. p. 13; P.S. 1858 c. 72 s. 8; G.S. 1866 c. 66 s. 241; G.S. 1878 c. 66 s. 259; G.S. 1894 s. 5405; R.L. 1905 s. 4196; G.S. 1913 s. 7826; G.S. 1923 s. 9323; M.S. 1927 s. 9323.

In an action of "claim and delivery" notwithstanding the property claimed has been returned to the plaintiff, he is entitled (upon an answer admitting such property to be in him and a wrongful detention) to a judgment adjudging the right of property and awarding nominal damages at least. Oleson v Newell, 12 M 186 (114).

Where an offer of judgment is made, and served, the plaintiff has ten full days, excluding the day of service, in which to accept or reject. In case the trial is begun before the expiration of the period, without any action by plaintiff, it becomes ineffectual for any purpose. Mansfield v Fleck, 23 M 61.

When the defendant offers judgment in a specified amount, and costs, unless the plaintiff recover a more favorable judgment he cannot recover his costs, but they must be allowed to the defendant. Woolsey v O'Brien, 23 M 71; Watkins v Neiler, 135 M 343, 160 NW 864.

Upon acceptance of defendant's offer, the plaintiff's right to enter judgment carries with it the costs lawfully taxable. Petrosky v Flanagan, 38 M 26, 35 NW 665.

Where defendant failed to reduce the judgment within the offer, plaintiff may tax costs. Flaherty v Rafferty, 51 M 341, 53 NW 644; Grill v Blakeborough, 189 M 354, 249 NW 194.

The right of defendant to offer as under this section is purely statutory. Thompson v Ferch, 78 M 520, 81 NW 520.

Costs defined. Board v Board, 84 M 267, 87 NW 846.

546.41 TENDER OF MONEY IN LIEU OF JUDGMENT.

HISTORY. 1877 c. 119 ss. 1, 2; G.S. 1878 c. 66 ss. 260, 261; G.S. 1894 ss. 5406; 5407; R.L. 1905 s. 4197; G.S. 1913 s. 7827; G.S. 1923 s. 9324; M.S. 1927 s. 9324.

NOTE: Enactment of Laws 1877, Chapter 119, Sections 1, 2, was motivated by decision Mansfield v Fleck, 23 M 61.

Defendant cannot complain of any failure to keep the tender good where the tender was and would be futile because defendant had disqualified itself from accepting the tender by compliance with the condition imposed by the court. Johnson v Ind. School, 189 M 293, 249 NW 177.

A tender is unnecessary where it is known that such tender is futile. Section 546.41 does not require the tender to be made ten days before the term as required in offers of judgment under section 546.40. Wangensteen v Northern Pacific, 218 M 318, 16 NW(2d) 50.