CHAPTER 545

MOTIONS, ORDERS

545.01 Superseded by Rules of Civil Procedure, Rules 6.04 and 7.02.

545.02 MOTIONS, WHERE NOTICED AND HEARD

HISTORY. RS 1851 c 82 s 16; PS 1858 c 72 s 16; 1867 c 67 s 4; GS 1878 c 66 s 87; 1881 c 7 s 1; 1885 c 267; GS 1894 s 5227; RL 1905 s 4124; 1909 c 433 s 1; GS 1913 s 7750; 1945 c 563 s 1.

Admissions by one who moves for judgment on the pleadings are admissions for the purpose of the motion only and if the motion is denied the mover is not denied the right of trying the issues of fact. Minneapolis Street Railway Co. v City of Minneapolis, 229 M 502, 40 NW(2d) 353.

545.03 EX PARTE MOTIONS

In a personal injury action brought against the owner and against the driver of an automobile which struck the plaintiff, where defendants moved for continuance on the ground that the automobile driver was in service, the trial court is vested with discretionary power to determine whether the ability of the automobile driver to conduct his defense would be materially affected by his absence, but such discretion should be exercised cautiously with the object in mind of giving effect to the purpose of the Soldiers and Sailors Civil Relief Act and to protect the civil rights of a person who, on account of his service in the armed forces, cannot be present at a trial or proceeding. A writ of prohibition may issue as well as to restrain the court from exceeding its legitimate powers in the matter over which it has jurisdiction as to restrain it from proceeding in a matter over which it has no jurisdiction, and such writ may lie to prevent an abuse of discretion where there is no other adequate remedy at law. State ex rel v Wilson, 234 M 570, 48 NW(2d) 513.

CHAPTER 546

TRIALS

546.01 ISSUES AND TRIALS

State and federal income tax statutes, notable differences. 38 MLR 1.

The demonstrated physical facts, fortified by the positive testimony of disinterested witnesses, must in the instant case prevail over the declarations of plaintiffs, who were vitally interested in securing a favorable outcome. It is manifest that the evidence, with its undisputed physical facts, so overwhelmingly and conclusively preponderates against the verdict as to negate the testimony of the plaintiffs and to leave the verdict without a reasonable basis for its support. Cofran v Swanman, 225 M 40, 29 NW(2d) 448.

Order sustaining a general demurrer to a complaint, but permitting plaintiff 30 days within which to file an amended complaint, became final upon the expiration of said 30-day period without interposition of the amended complaint in the absence of appeal or vacation of the order. Thereafter, under section 546.39, neither plaintiff nor the trial court may dismiss the action without prejudice, and the defendant is en-

titled to a judgment of dismissal on the merits. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 270.

Aside from any requirement of due process, the right to a trial includes a hearing, production of witnesses and documents, the taking of evidence, examination and cross-examination of witnesses, representation by counsel, presentation of arguments, and a decision upon the merits. State ex rel v Civil Service Board, 226 M 240, 253, 32 NW(2d) 574.

In action for personal injuries sustained by the plaintiff while helping defendant unload a fishhouse from a truck, issues of negligence and contributory negligence were for the jury; and where individuals are acting in concert in unloading from a vehicle an object of great weight and of such bulk that they are concealed from each other and cannot coordinate their efforts by visual observation, whether one of them owes a duty of giving others advance warning before performing an act which suddenly deposits on them a weight of such magnitude as will constitute a potential source of serious injury if they are not prepared to receive it, is for the jury. Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

On defendant's appeal the reviewing court must take the view of evidence most favorable to the plaintiff; and on renewal of a denial of a motion for judgment notwithstanding a verdict of a new trial, the court takes the view of evidence most favorable to the verdict; and on review of denial of motion for judgment notwithstanding the verdict of a new trial, the court takes that view of the evidence most favorable to the verdict. Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

Where parties by stipulation defined the issue and the court instructed the jury in line with the agreement, defendant may not complain on appeal as to the manner of submission of the issue. Henschke v Young, 226 M 339, 32 NW(2d) 854.

Where an employee who could give important testimony relative to issues in litigation is not present and his absence is unaccounted for by his employer, who is a party to the action, a presumption arises that the testimony of such employee would be unfavorable to his employer. The foregoing rule has no application, however, where such a witness is no longer in the employ of the party to the litigation and no obligation rests upon the latter under such circumstances to present the former employee as a witness, particularly where the burden of proof is upon the opposing litigant. Held that trial court erred in permitting over objection counsel for plaintiff to draw jury's attention to failure of defendant corporation to produce as a witness a former employee whose employment with such defendant had been terminated some four years prior to the trial, and to insist that defendant's failure in this respect warranted the jury in drawing unfavorable inferences against defendant because thereof. Ellerman v Skelly Oil Co., 227 M 65, 34 NW(2d) 251.

It is only the clearest cases where the facts are undisputed and it is plain that reasonable men can draw but one conclusion from them that the question of contributory negligence becomes one of law for the court. Hagerty v Radle, 228 M 487, 37 NW(2d) 819.

The matter of reopening a case to permit taking of additional or newly-discovered evidence rests largely in the discretion of the trial court. Schumacher v Schumacher, 229 M 382, 39 NW(2d) 604.

A "res gestae" statement must be contemporaneous with the act or transaction of which it is a part and it is sufficient if made so soon after the act or transaction that it may fairly be regarded as a part or incident thereof. In determining whether an utterance or statement is a part of the res gestae, the trial court has a wide discretion which is not absolute. State v Gorman, 229 M 524, 40 NW(2d) 347.

Where a standard kitchen appliance, reasonably safe for its intended purpose, is put to an improper, unauthorized and unnecessary use by a domestic servant and such use is one which the master cannot be expected to have foreseen, the master is not negligent or liable for injuries to the servant. McDonald v Fryberger, 233 M 156, 45 NW(2d) 260.

Hypothetical questions asked of a structural engineer to establish that the two plaintiffs on top of a scaffold could not have caused it to tip by distribution of their

weight alone, that some structural defect caused the scaffold to tip and that such tipping of the scaffold as would enable plaintiffs to tip it over by distribution of their weight alone would have been apparent to a person on the floor below were objectionable as assuming facts which were not in evidence. Hanrahan v Safway Steel Scaffold Co., 233 M 171, 46 NW(2d) 243.

If the evidence as a whole so overwhelmingly preponderates in favor of a party as to leave no doubt as to the factual truth, he is entitled to a directed verdict as a matter of law even though there is some evidence which if standing alone would justify a verdict to the contrary. Hanrahan v Safway Steel Scaffold Co., 233 M 171, 46 NW(2d) 243.

Although a trial court's finding of reasonable value does not coincide with the valuation figure of any particular witness, if such finding is within the valuation limitations established by the various witnesses or by the evidentiary figures as to cost, and is otherwise reasonably supported by the evidence as a whole, the finding must be sustained. Lovrenchich v Collins, 233 M 183, 45 NW(2d) 264.

In an action brought by the employee of a general contractor to recover from the crane owner for injuries sustained by plaintiff when the crane, which had been rented together with its operator by plaintiff's employer, came into contact with an electric power line while plaintiff was holding some steel trusses fastened to the boom of the crane by means of a steel hoisting cable, the evidence establishes that plaintiff's employer had such right of control over the acts of the crane operator as would justify consideration of the operator as a loaned servant and imposed liability for the operator's negligence, not on the crane owner, but under the doctrine of respondeat superior, upon the plaintiff's employer. When one company employee negligently injures his fellow-employee, it is no defense to assert that they were both employed under one master. Nepstad v Lambert, 235 M 1, 50 NW(2d) 614.

Where objection was sustained to the question as to whether witness had on numerous occasions smelled liquor on the breath of defendant's stable manager and riding instructor, it was improper for counsel to press the matter, but refusal to grant a new trial on the ground of persistence in asking similar questions of two other witnesses after such objection had been sustained, was not an abuse of discretion. Harris v Breezy Point Lodge, ... M ....., 56 NW(2d) 655.

In personal injury action, where defendants failed to object to admission of a certain audit filed with plaintiff's income tax return showing his net earnings for year in which injury occurred, submitted by plaintiff on question of damages, but subsequently objected to audits less favorable to defendants, for later years, admission of all such audits for purpose of showing complete picture of plaintiff's earnings during years involved was within trial court's discretion. Dix v Harris Machinery Co., ... M ....., 60 NW(2d) 628.

546.02 ISSUES, HOW JOINED

NOTE: The first sentence is superseded by Rules of Civil Procedure, Rule 7.01.

Neither the plaintiff nor the court may dismiss an action without prejudice after the final submission of the case. Christiansen v City of Duluth, 225 M 486, 31 NW(2d) 277.

In an action against a father who owned the automobile, and against the son who was permitted by the father to use the automobile, to recover for death of one who accompanied the son on the trip, whether the son was driving the automobile at the time of a fatal accident, or whether deceased was driving as contended by the son, was for the jury, although the son had made admissions that he was driving at the time of the accident. Manahan v Jacobson, 226 M 505, 33 NW(2d) 606.

546.03 ISSUES OF LAW, HOW TRIED

NOTE: The second and third sentences are superseded by Rules of Civil Procedure, Rules 38.01, 39.01, and 39.02.

A stipulation as to what evidence shall be considered in deciding a particular question excludes the consideration of other evidence. Lappinen v Union Ore Co., 224 M 395, 29 NW(2d) 8.

A verdict may be directed only in those unequivocal cases where it clearly appears to the court that it would be its manifest duty to set aside a contrary verdict as not justified by the evidence, but as contrary to the law applicable to the case. A motion for a directed verdict presents a question of law only. It admits for the purposes of the motion the credibility of the evidence for the adverse party and every inference which may fairly be drawn from such evidence. On motion for a directed verdict, that view of the evidence most favorable to the adverse party must be taken. Olson v Evert, 224 M 528, 28 NW(2d) 753.

Where varying inferences may be drawn from testimony, the case is for the jury, a motion for directed verdict presents a question of law only. A verdict may be directed only where the court's manifest duty would clearly be to set aside a contrary verdict as not justified by the evidence or contrary to law. On motion for a directed verdict, the view most favorable to the adverse party must be taken. Olson v Evert, 224 M 528, 28 NW(2d) 753.

A verdict directed for defendant on sole ground of plaintiff's contributory negligence will be upheld, though finding of contributory negligence as a matter of law is not sustained, if there is nothing to sustain finding of defendant's negligence. Olson v Evert, 224 M 528, 28 NW(2d) 753.

On motion for directed verdict, view of evidence most favorable to the adverse party must be taken. The motion presents a law question only. A verdict may be directed only where it would be the trial court's duty to set aside a contrary verdict as not justified. Fandel v Parish of St. John, 225 M 77, 29 NW(2d) 817.

Whether the agent represented the house as modern, with city water and sewer and gas connections, and whether or not the purchaser relied on those representations was for the jury. Erickson v Midgarden, 226 M 55, 31 NW(2d) 918.

Plaintiff, who was injured when she tripped over the upturned edge of a cement block of a public sidewalk, brought action against the city of Duluth for negligently maintaining the sidewalk, and the property owners for negligently back-filling a trench after installing water and gas service pipes and before putting in a cement sidewalk block over the fill. The evidence supports the verdict of the jury who returned a verdict against the city but found in favor of the property owners. Molis v City of Duluth, 226 M 79, 32 NW(2d) 147.

The issue of negligence is generally a fact question for the jury to determine and in the instant case it was for the jury to determine whether there was evidence of any negligence on the part of the defendant which proximately caused or contributed to the accident. Delyea v Goosen, 226 M 91, 32 NW(2d) 179.

An instruction that the jury may not base its verdict upon speculation, conjecture, guess work and the like, is cautionary in nature, and whether such cautionary instruction should be given rests in the sound discretion of the trial court. Mattfeld v Nester, 226 M 106, 32 NW(2d) 291.

What is a reasonable use of land in disposing of surface waters, is a question of fact to be resolved according to the special circumstances of each particular case. Enderson v Kelehan, 226 M 163, 32 NW(2d) 286.

When an action is tried by a court without a jury its findings of fact are entitled to the same weight as the verdict of the jury and will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. Evidence in the instant case sustains the findings of the trial court. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

Administration of trusts is equitable in character. The court having jurisdiction of a trust will allow the beneficiary wide latitude in cross-examination of the trustee. In acting proceedings the trustee must make the fullest measure of disclosure. In an action against trustees for an accounting a trial by jury is not granted as a matter of right. Plunkett v Lampert, 231 M 484, 43 NW(2d) 489.

Where the district court had excellent jurisdiction over inter vivos and testimentary trusts as a proceeding in rem, and the beneficiary thereafter began actions against trustees for an accounting and the trustees filed a petition in the same court for the allowance of their accounts, refusal to enjoin hearings on the trustee's petitions until the determination of the beneficiary's action was not an abuse of discretion. Plunkett v Lampert, 231 M 484, 43 NW(2d) 489.

A motion for judgment notwithstanding the verdict accepts view of the evidence most favorable to the verdict and admits every inference reasonably to be drawn from such evidence, as well as the credibility of testimony for the adverse party, and if application of this rule, in the light of evidence as a whole, discloses a reasonable basis for the verdict, the motion must be denied. The question of credibility of witnesses is for the jury. A verdict will not be disturbed on appeal unless manifestly contrary to the evidence even though the fact in issue must be proved by clear and convincing evidence. Sorlie v Thomas, 235 M 509, 51 NW(2d) 592.

The law imposes a greater burden of proof upon those seeking to set aside property transfers on the ground of undue influence than upon those bearing the burden of proving other fact issues. It is not sufficient to show that the party benefited by property transfers had motive and opportunity to exert such influence. There must be evidence that undue influence was in fact exerted. Sorlie v Thomas, 235 M 509, 51 NW(2d) 592.

In an action for the value of labor and material furnished in well-drilling operations, where the testimoney of experts called by both parties fixed the reasonable rental value of plaintiff's equipment at between $5.50 and $12 per hour, the evidence sustained a finding that the reasonable rental value of the equipment was $5.65 per hour. Lacey v Duluth, Messabe & Iron Range Ry. Co., 236 M 104, 51 NW(2d) 831.

Where prima facie negligence in violating a statute is a proximate cause of an accident, a directed verdict against the violator is in order. Tschida v Dorle, 235 M 461, 51 NW(2d) 561.

Where the evidence as a whole overwhelmingly preponderates in favor of a party so as to leave no doubt as to factual truth, he is entitled to a directed verdict as a matter of law even though some evidence standing alone might support a verdict to the contrary. Van Tassel v Patterson, 235 M 152, 50 NW(2d) 113.

A motion for a directed verdict is properly granted where, in the light of evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as manifestly against the evidence. Crea v Wuellner, 235 M 408, 51 NW(2d) 283.

Where plaintiffs had traveled for some distance for the purpose of trial and had been at considerable expense to procure witnesses, the trial court did not abuse its discretion in denying defendant's request for a continuance so that he might retain other counsel in place of the counsel he had discharged at the close of the testimony. Kothe v Tysdale, 233 M 163, 46 NW(2d) 233.

A motion for judgment notwithstanding the verdict, whether made with respect to negligence or contributory negligence, accepts the view of evidence most favorable to the verdict and admits every inference reasonably to be drawn from such evidence, as well as the credibility of the testimony for the adverse party, and if application of rule, in the light of evidence as a whole, discloses reasonable basis for the verdict, the motion must be denied. LaCombe v Minneapolis St. Ry., 236 M 86, 51 NW(2d) 839; State v Paskewitz, 233 M 452, 47 NW(2d) 199; Yeager v Chapman, 233 M 1, 45 NW(2d) 776.

A motion for a directed verdict should be granted only in those unequivocal cases where, in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict, or contrary to the law applicable to the case. Hanrahan v Safway Steel Scaffold Co., 233 M 171, 46 NW(2d) 243; Foster v Bock, 229 M 428, 39 NW(2d) 862.

The granting of a continuance is a matter in the discretion of the trial court and its action will be sustained unless there is a clear abuse of discretion. In the instant

case where the wife sought continuance in a proceeding to revise a divorce decree as to alimony for the purpose of allowing her to take a deposition which would allegedly show that the husband's real income was greater than the tax returns disclosed and it appeared that the wife had not exercised due diligence in attempting to secure such evidence, it was not error to refuse the continuance. Kath v Kath, 234 M 402, 48 NW(2d) 551.

When the evidence as a whole so overwhelmingly predominates in favor of a party as to leave no doubt to the factual truth, a directed verdict as a matter of law is in order, even though there was some substantial evidence that might justify a verdict to the contrary. Kath v Kath, ... M ....., 55 NW(2d) 691.

Where the city charter contains the following provision: "Such appeal shall be tried by the court, without a jury, at a general or special term without pleading, other than above stated," one appealing from an assessment laid for a local improvement is not entitled to trial by jury as a matter of right. The constitution guarantees the right to a trial by jury as it existed at the time the state was admitted to the Union. That right to trial by jury did not extend to the trial of an appeal from the assessment or benefits for local improvements. OAG Sept. 19, 1949 (6).

546.04 Superseded by Rules of Civil Procedure, Rules 42.01 and 42.02.

Annotations relating to superseded section 546.04.

Separate judicial proceedings may be integrated so as to afford the parties the relief to which the law entitles them and in such case the interests of justice are served thereby. State ex rel v Civil Service Board, 226 M 240, 252, 32 NW(2d) 574.

Where there is a consolidation of trials there is no loss of identity in any action; but where there is a consolidation of actions there is a merger of the civil actions into one whereby each loses its separate identity. Chellico v Matire, 227 M 74, 34 NW(2d) 155.

Aside from the statute the court has inherent power in its discretion to consolidate the trials of four separate actions, which though involving independent causes of action, involved the same issues and the same evidentiary facts. Anderson v Connecticut Fire Insurance, 231 M 469, 43 NW(2d) 807.

546.05 NOTICE OF TRIAL

NOTE: All of this section except the last three sentences is superseded by Rules of Civil Procedure, Rules 38.03 and 40.

If no statutory notice of trial is given, the other litigant is entitled to have the verdict set aside and a new trial granted regardless whether prejudice has resulted or not unless such notice has been waived; but in the instant case a verbal stipulation of the parties constitutes a waiver by defendants of the statutory notice. Anderson v Connecticut Fire Insurance Co., 231 M 469, 43 NW(2d) 807.

546.07 ORDER OF TRIAL; ABSENCE OF PARTIES

Unfavorable inference from failure to call a witness. 33 MLR 423.

The striking of a case from the calendar is not a dismissal of the action or proceeding. Jasperson v Jacobson, 224 M 76, 27 NW(2d) 788.

546.08 CONTINUANCE

Defendant's motion for a continuance of an action for damages sustained in an automobile accident pending his appeal to the supreme court from an order denying his motion for a new trial after the jury's verdict for the appellee in the action previously brought against him by appeal, should have been granted to avoid multiplicity of actions. State ex rel v District Court, 237 M 33, 54 NW(2d) 5.

The grant of a continuance is a matter within the discretion of the trial court. Baker v Connelly Cartage Corp., ... M ....., 57 NW(2d) 657.

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

Where it appeared in an automobile collision action that an insurance company was interested to some extent, the action of the court in making it clear that the company might or might not have an interest in the outcome of the case and merely asking the jury panel whether any of them had stock in the company, was not error. Hardware Mutual v Danberry, 234 M 391, 48 NW(2d) 567.

546.095 Superseded by Rules of Civil Procedure, Rule 47.02.

546.10 CHALLENGES

Refusal of plaintiff's motion for a mistrial made at the close of the case on the ground that two of the jurors were members of the board of county commissioners, was not an abuse of discretion, where plaintiff knew of official status of such jurors when he accepted them, and also that county employees were to testify. Moose v Vesey, 225 M 64, 29 NW(2d) 649.

The plaintiff employed by a transfer railway company was injured when struck by an automobile operated by defendant. Defendant struck a timber which plaintiff was lifting out of a space next to a rail of a switch track which crossed a public street. The trial court erred in refusing to permit counsel for the defendants to inquire of jurors as to their interest, if any, in the railway company, but since there was no showing or intimation that the jury was not in all respects a fair jury, no prejudice resulted. Mickelson v Kernkamp, 230 M 488, 42 NW(2d) 18.

546.11 ORDER OF TRIAL

Where an attorney during the trial of a case exhibited a photograph to the mother and sister of the deceased child, causing them to burst into tears, while such action was misconduct it was not such as would necessitate a new trial. Harning v City of Duluth, 224 M 299, 28 NW(2d) 659.

The demonstrated physical facts, fortified by the positive testimony of disinterested witnesses, must in the instant case prevail over the declarations of plaintiffs, who were vitally interested in securing a favorable outcome. It is manifest that the evidence, with its undisputed physical facts, so overwhelmingly and conclusively preponderates against the verdict as to negate the testimony of the plaintiffs and to leave the verdict without a reasonable basis for its support. Cofran v Swanman, 225 M 40, 29 NW(2d) 448.

No prejudice resulted to the defendant where the trial court expressly instructed the jury to disregard an improper argument of plaintiff's counsel, and it was obvious that the trial court's instruction was obeyed. Koenigs v Thome, 226 M 14, 31 NW(2d) 534.

Any practice which, after the close of the evidence, has the purpose of creating a primary impression on the minds of the jury is of doubtful propriety; reading to the jury excerpts of the evidence from the reporter's transcript rests in the discretion of the trial court. Aasen v Aasen, 228 M 1, 36 NW(2d) 27.

An amended or superseded pleading is admissible against the party interposing it even though signed only by counsel, although the party against whom it is admitted for the purposes of impeachment may show that he did not have knowledge of its contents. Such proof goes to the weight of the evidence but does not affect its admissibility. Krumholz v Rusak, 230 M 178, 41 NW(2d) 177.

The prestige of the trial judge, based on public confidence in his fairness, creates an obligation to refrain from any act, word, gesture or inflection of voice, the effect of which shows favorable leanings to either side of the controversy. Hansen v St. Paul City Railway, 231 M 354, 43 NW(2d) 260.

Where the evidence establishes only one cause that could constitute a proximate cause of injury in a legal sense, it was not prejudicial to instruct the jury that the defendant's negligence must be found to be "the sole, direct and proximate cause" or "the" proximate cause. Where two or more causes combined to produce an injury a person is not relieved from liability because he is responsible for only one of such causes. Leebens v Baker Co., 233 M 119, 45 NW(2d) 791.

In order to obtain a review of misconduct of counsel in argument, generally, there must be an objection at the time of the misconduct or a request by the party claiming to be prejudiced for appropriate corrective action and there must be a failure of the trial court to rule or act. Barnes v NW Airlines, 233 M 410, 47 NW(2d) 180.

In an action against a street railway company for death of a pedestrian, a statement in the plaintiff's agreement to the jury that the company had investigators scouring the couuntryside within a few hours after the accident, though improper, was not prejudicial where the trial court gave appropriate instruction to the jury. LaCombe v Minneapolis Street Ry. Co., 236 M 86, 51 NW(2d) 839.

Counsel in summing up must be given considerable latitude in pointing out to the jury inferences which may reasonably be drawn from the evidence, but where he asked the jury to draw inferences not justified by the evidence, it is permissible for the trial court to caution the jury that such inferences are not warranted by the evidence. Tilbury v Welberg, ... M ....., 55 NW(2d) 605.

The right of a litigant to have a fact issue argued orally to the jury is a fundamental one and not dependent upon the sufferance of the trial judge. If the trial court, without first giving the parties the first opportunity to give their arguments to the jury, inadvertently proceeds to give the charge to the jury, and at the beginning of the charge informs the jurors that arguments by counsel are in effect unnecessary and will not be given, prejudicial error results which cannot reasonably be cured by the court's offer to permit belated arguments at the close of the charge. Givans v Chicago, St. Paul, M. & O. Ry., ... M ....., 56 NW(2d) 306.

It is only in the clearest of cases, when the facts are undisputed, and it is plain that all reasonable men can draw only one conclusion from them, that the question of contributory negligence becomes one of law. In the instant case the issues of negligence and contributory negligence were for the jury. Donato v Minneapolis Street Ry. Co., ... M ....., 56 NW(2d) 308.

In an action by automobile passenger against host and owner and driver of the other automobile for injuries received in headon collision, question whether wrecking service operator's testimony that he had met an automobile traveling south on wrong side of highway at about 50 miles per hour prior to accident and that host automobile resembled the automobile he had seen previously was of sufficient probative value as to be admissible was matter resting in sound discretion of the trial court, and admission of such evidence was not an abuse of such discretion. Katlaba v Pfeiffer, ... M ....., 56 NW(2d) 725.

Lawsuits are tried on the facts and ridicule should not be injected into counsel's argument for the purpose of arousing prejudice and the court cannot overlook the impropriety of unnecessary and undesirable tactics. Manteuffel v Hamm Brewing Co., ... M ....., 56 NW(2d) 310.

It is within the discretion of the trial court to determine the matter of arguments of counsel under each situation before it, keeping in mind that no unfair advantage be taken against any litigant which would result in a miscarriage of justice. Tripplet v Hernandez, ... M ....., 56 NW(2d) 645.

Where the substance of the request is adequately covered in the court's general charge, it is not error on the part of the court to refuse a requested instruction. Devall v Leonard, ... M ....., 57 NW(2d) 835.

Though requested instructions may be correct, they frequently present a partial, argumentative, and misleading view of the law. Swanson v LaFontaine, ... M ....., 57 NW(2d) 262.

546.12 VIEW OF PREMISES; PROCEDURE

Where a view of the locus in quo is ordered by the trial court in a criminal case, an official court reporter should be present at such time. State v Shetsky, 229 M 566, 40 NW(2d) 337.

The denial of plaintiff's motion for a dismissal of his action without prejudice before he had rested his case in chief was not an abuse of discretion. The granting to the jury of a view of the premises is discretionary with the trial court. Certain expert testimony by plaintiff was properly excluded. The trial court's supplemental instructions to the jury present no grounds for reversible error. Erickson v Northern Minnesota National Bank, 235 M 232, 50 NW(2d) 489.

The granting of a jury view is discretionary with the trial court; and in an action for injuries where at the conclusion of all testimony plaintiff moved that the jury be permitted to view the premises where the injury occurred, denial of the motion was not an abuse of discretion. Erickson v Northern Minnesota National Bank, 235 M 232, 50 NW(2d) 489.

546.14 Superseded by Rules of Civil Procedure, Rule 51.

Annotations relating to superseded section 546.14.

Where several issues of fact are tried and any one of them is erroneously submitted to the jury and a general verdict is returned for the plaintiff, defendant is entitled to have the verdict set aside and have a new trial unless it conclusively appears as a matter of law that the plaintiff was entitled to the verdict upon other grounds. Ohrmann v Chicago, Northwestern Ry., 223 M 580, 27 NW(2d) 806.

Where the instructions given fully and fairly covered the matters involved, refusal to give requested instructions concerning the same matters was not error. Eichten v Central Minnesota Assn., 224 M 180, 28 NW(2d) 862.

It was not error in an action by a pedestrian against the city for injuries sustained from a fall on a city sidewalk, for the court in its charge to be explicit as to what constituted contributory negligence, or state what the pedestrian's duties were to avoid injury. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

In the instant case the trial court's instruction as to passenger's claimed contributory negligence was error, there being no evidence upon which to predicate such contributory negligence. Kordiak v Holmgren, 225 M 134, 30 NW(2d) 16.

An instruction to the effect that both defendants were liable if their negligence contributed in some degree toward the collision was not objectionable as permitting recovery for slight negligence, where the instruction also stated that negligence is the failure to exercise due care and there is no liability for negligence unless it was "a direct or proximate cause of the injuries complained of." Kopla v Lehti, 225 M 325, 30 NW(2d) 687.

A charge that presents to the jury the applicable law in clear, precise, and intelligible form so as to leave no reasonable likelihood for drawing erroneous inferences therefrom is sufficient, and it need not be buttressed by express exclusion of nonapplicable principles of law. Nubbe v Hardy, 225 M 496, 31 NW(2d) 332.

The trial court committed no reversible error in instructing the jury, in terms of a statute which did not apply to streetcars, as to the degree of care required of streetcar motormen, since the statutory standard given by the court was merely declaratory of the common law, and the common law standard of care required of operators of streetcars substantially the same as that embodied in the statute submitted to the jury. Peterson v Mpls. St. Ry., 226 M 27, 31 NW(2d) 905.

At the close of the charge the court asked "Anything further?" and there being no response from counsel, the charge of the court as given became the law of the case. Molis v City of Duluth, 226 M 79, 32 NW(2d) 147.

It is not error for a trial judge to assume in his charge the existence of facts which, in view of the conclusiveness of the evidence before the court, present no

issue for the jury. The court accordingly charged that the building contract in suit had been substantially performed. Sward v Nash, 230 M 100, 40 NW(2d) 829.

Instruction that evidence that an automobile skidded, standing alone, is not evidence of negligent operation thereof, unless such skidding could have been prevented by exercise of ordinary care, when read together with instructions as a whole, adequately stated applicable law in an action for injuries sustained where defendant's automobile skidded into an automobile driven by plaintiff who had stopped in obedience to a traffic light. The doctrine of res ipsa loquitur does not apply. Cohen v Hirsch, 230 M 512, 42 NW(2d) 51.

Where the attendant circumstances allowed a jury to find that a contract in itself does not express the true relationship of the parties thereto, the jury may determine from the facts presented relative to the conduct of the parties, whether an independent-contractor relationship existed as to a party thereto. Barnes v Northwest Airlines, 233 M 410, 47 NW(2d) 180.

All that is required in the way of instruction is that the charge as a whole conveyed to the jury a clear and correct understanding of the law of the case. Part of the instructions, which, standing alone, might be considered erroneous, furnishes no ground for reversal if taken in connection with the whole charge, no reversible error appears. Barnes v Northwest Airlines, 233 M 410, 47 NW(2d) 180.

A requested instruction proferred orally at the conclusion of a charge comes too late, and this rule is particularly applicable where a requested instruction is not essential to the jury's consideration of non-controlling issues in the case. Nepstad v Lambert, 235 M 1, 50 NW(2d) 614.

Failure of the trial court to give separate instructions regarding a husband's right to recover for the loss of the wife's services and medical expenses and damage to the husband's automobile, in the event of the wife's contributory negligence, was not ground for granting a new trial where the husband did not request separate instructions and said he did not have an questions or additions to make when invited by the court to do so at the conclusion of the charge to the jury. Chapman v Dorsey, 235 M 25, 49 NW(2d) 4.

The trial court's charge to the jury must be reviewed in its entirety. O'Neill v Mund, 235 M 112, 49 NW(2d) 812.

Argumentative instructions and criticisms are condemned. Erickson v Northern Minnesota National Bank, 235 M 232, 80 NW(2d) 489.

A commercial airline providing service for and on behalf of the United States pursuant to a written contract did not solely by virtue of such contract become the agent of the United States so as to gain governmental immunity. Where evidence in actions against the commercial airline warranted a finding that the pilot was negligent the court's instruction as to plaintiff's contention that the action was due primarily to the fact that the pilot let the airplane get too low as it approached the airport was not erroneous in view of the general instructions. Orchard v Northwest Airlines, 236 M 42, 51 NW(2d) 645.

In an action to recover for personal injuries sustained by plaintiff when he was pinned by defendant's automobile against the rear of his truck, which was parked at an angle to the curb, the jury question was presented under the evidence as to the proximate relationship between plaintiff's violation of a city ordinance requiring parallel parking and the collision, and therefore it was proper to instruct the jury with respect to such ordinance. Damrow v Zauner, 236 M 447, 53 NW(2d) 139.

All that is required of a court in its instructions is to convey to the jury a clear and correct understanding of the law and the case as it pertains to all parties involved. Moeller v Hauser, 237 M 368, 54 NW(2d) 639. Percansky v Levine, 237 M 206, 54 NW(2d) 110. Schiro v Raymond, 237 M 271, 54 NW(2d) 329.

The evidence failed to establish that the minor riding a bicycle out of a farm driveway was confronted by an emergency not of her own making and that she followed one of two or more courses of action open to her. It was not error for the

trial court to refuse to instruct the jury on the rule pertaining to emergencies. Tilbury v Welberg, ... M ....., 55 NW(2d) 605.

A court when instructing a jury must not assume the existence of the facts in controversy nor should it place too much emphasis on particular facts, nor on the testimony of particular witnesses. Leman v Standard Oil Co., ... M ....., 57 NW(2d) 814.

546.16 VERDICT, WHEN RECEIVED; CORRECTING SAME; POLLING JURY

Where a jury returned a general verdict in a personal injury case against three defendants it had no jurisdiction to apportion the amount of the verdict among the defendants, and the apportionment suggested by them may be disregarded as surplusage without vitiating the general verdict. Bakken v Lewis, 223 M 329, 26 NW(2d) 478.

A verdict must be fairly construed so as to, if possible, give effect to the intent of the jury. Chevalier v Rogers, 230 M 540, 41 NW(2d) 872.

The credibility of witnesses and the weight to be given their testimony is for the trier of fact. In the instant case the evidence sustained the defendant's conviction of a violation of a Minneapolis city ordinance against lewd and indecent conduct. State v Brown, 236 M 333, 52 NW(2d) 761.

The right to poll a jury is not affected by an agreement that the jury may return a sealed verdict. Where a jury, after deliberating less than 12 hours in a civil case, seals a verdict and separates, and subsequently when the jury is polled in open court one of the jurors dissents, the verdict is a nullity. In the absence of unusual circumstances or improper conduct during separation, the jury should be sent out for further deliberation. Weatherhead v Burau, ... M ....., 55 NW(2d) 703.

Where in a prior action an issue covered by the pleadings is withheld from determination by stipulation of the parties, by action of the court, or otherwise, it cannot be said to have been adjudicated, and the judgment in such action will not constitute a bar to the determination of the issue thus withheld in a subsequent action between the parties. This is an exception to the general rule that a judgment on the merits constitutes a bar in a subsequent action between the same parties as to the issues. A statement in the findings of the court that in a prior action it "has found it necessary to determine the rights" under a described mortgage clearly manifests that the issue with respect thereto was withdrawn from the determination. Nelson v Dorr, ... M ....., 58 NW(2d) 876.

Where a borrower did not disclose to the prospective lender that a prior loan transaction pursuant to which the borrower had executed a conveyance of realty and contract for deed was usurious, and the borrower requested the lender to advance money for the payment of the obligation evidenced by the prior transaction, and agreed that the lender accept as security therefor a conveyance of the title and assignment of the contract from the title holder under previous transactions, the borrower was estopped from asserting the invalidity of the prior action as against the lender. Nelson v Dorr, ... M ....., 58 NW(2d) 876.

546.19 VERDICT, GENERAL AND SPECIAL

A verdict directed for defendant on sole ground of plaintiff's contributory negligence will be upheld, though finding of contributory negligence as a matter of law is not sustained, if there is nothing to sustain finding of defendant's negligence. Olson v Evert, 224 M 528, 28 NW(2d) 753.

Regardless of whether or not a special verdict covered all the issues of fact, in an action to recover on the theory of quasi contract the reasonable value of services rendered under an oral contract to convey land, unenforceable under the statute of frauds, defendants were entitled to a jury trial in the absence of waiver thereof. Roske v Ilykanyics, 232 M 383, 45 NW(2d) 769.

A motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict. Hatley v Klingsheim, 236 M 370, 53 NW(2d) 123.

546.20 Superseded by Rules of Civil Procedure, Rules 49.01, 49.02.

Annotations relating to superseded section 546.20.

In an action for the recovery of the reasonable value of services under the theory of quasi contract plaintiff is entitled to a jury trial in the absence of a waiver thereof and submitted in such form that the jury may return a general verdict. An oral contract to convey land is within the statute of frauds and enforceable unless taken out of the statute by part performance, in which case recovery may be had on the theory of quasi contract. The measure of damages is the value of services less benefits received under the enforceable contract. Roske v Ilykanyics, 232 M 383, 45 NW (2d) 769.

Where in an action for breach of contract the contention is made by defendant that the verdict is perverse and the result of compromise, the contention will not be sustained if the verdict is the manifest result of calculation by the jury of the damage suffered by plaintiffs on the only ground upon which a verdict could be sustained. Janicke v Hilltop Farm Feed Co., 235 v 135, 50 NW(2d) 84.

A motion for a directed verdict is properly granted where, in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as manifestly against the evidence. Crea v Wuellner, 235 M 408, 51 NW(2d) 283.

The court may not disregard a jury verdict on specially submitted issues and make findings contrary to or inconsistent with the verdict. Such findings are as binding on the court as a general verdict. Sorlie v Thomas, 235 M 509, 51 NW(2d) 592.

The trial court's memorandum which was prepared after the perfection of this appeal, and which was made nunc pro tunc a part of the order from which this appeal is taken, is a nullity and cannot be considered on review since the trial court had no jurisdiction of the cause when the memorandum was made.

The legal requisites of a gift inter vivos are (1) delivery, (2) intent on the part of the donor to make a gift, and (3) absolute disposition of control and dominion by the donor of the thing which he purports to give to another.

A presumption is merely a procedural device and dictates a decision only where there is an entire lack of competent evidence to the contrary and the very moment substantial countervailing evidence appears from any source it ceases to have any function and vanishes completely from the cause as if it had never existed.

If the evidence as a whole so overwhelmingly preponderates in favor of a party as to leave no doubt as to the factual truth, he is entitled to a directed verdict as a matter of law, even though there is some evidence which, if standing alone, would justify a verdict to the contrary.

A transfer which is voidable as to defrauded creditors (as well as to bona fide assignees in whose favor an estoppel arises) but which, aside from the element of fraud as to creditors, is valid in other respects is binding and enforceable between the transferor and the transferee, and neither of them may assert the fraud as a bar to, or as a basis for legal or equitable relief against the other.

If a transfer is defective on non-fraudulent grounds, the fraudulent transferor may, as against the transferee, obtain a rescission by alleging and proving facts (such as want of consideration for a conveyance or mortgage, of lack of intent to make an absolute gift) which, irrespective of the element of fraud, renders the purported transfer ineffective. Kath v Kath, ... M ....., 55 NW(2d) 692.

546.22 JURY TO ASSESS RECOVERY

Plaintiff, while engaged in the performance of a construction job for defendant, negligently caused a fire to be started within the area where he was engaged in

doing his work adjacent to defendant's manufacturing plant. The fire wholly destroyed defendant's plant and contents together with the work done by plaintiff under his construction contract. In this action by the contractor for the foreclosure of his lien, and since the origin of the fire was directly traceable to the plaintiff, the plaintiff had the burden of showing that the fire had been extinguished, or that a subsequent efficient and intervening cause had broken the original chain of causation so as to isolate his original negligent act as a proximate cause. Willner v Wallinder Co., 224 M 361, 28 NW(2d) 682.

The evidence must afford a basis for relief over and above mere conjecture and be more than merely relevant to be admissible. Frame v Hohrman, 229 M 468, 39 NW(2d) 881.

Where evidence discloses that a large volume of gas escaped from a gas company's distribution system because of a break in its gas line and a qualified gas expert, using recognized methods, estimated the loss resulting therefrom, the company's damages, although difficult to ascertain with absolute certainty, were not so speculative as to warrant a denial of recovery. Willmar Gas Co. v Duininck, 236 M 499, 53 NW(2d) 225.

The evidence warranted the inference that the negligent injury to the bus passenger, resulting in immobility of right shoulder and arm which aggravated and accelerated pre-existing disease of osteoporosis, was the sole, proximate cause of the total and permanent disability of previously active woman, having a life expectancy of 8.52 as of her 71st birthday and the award of in excess of $26,000 was not excessive. Nelson v Twin City Motor Bus Co., ... M ....., 58 NW(2d) 561.

546.24 RECEIVING VERDICT

HISTORY. Amended, 1949 c 126 s 1.

A sealed verdict has no statutory basis, but is based on convenience and custom, having the function of providing evidence of status of deliberation when the jury separated in order that when the verdict is subsequently returned in open court there will be no question of improper conduct during separation if the jury then agrees to the sealed verdict. Weatherhead v Burau, 237 M 325, 55 NW(2d) 703.

The right to poll a jury is not affected by an agreement that the jury may return a sealed verdict. Where a jury, after deliberating less than 12 hours in a civil case, seals a verdict and separates, and subsequently when the jury is polled in open court one of the jurors dissents, the verdict is a nullity. In the absence of unusual circumstances or improper conduct during separation, the jury should be sent out for further deliberation. Weatherhead v Burau, 237 M 325, 55 NW(2d) 703.

546.25 ENTRIES ON RECEIVING VERDICT; RESERVING CASE; STAY

NOTE: That part of the section beginning with "or, in its discretion * * * " is superseded by Rules of Civil Procedure, Rule 58.02.

Defendant was convicted of the crime of rape on November 23, 1951. The trial court set December 15, 1951 as the date for the imposition of the sentence. Defendant perfected his appeal to the supreme court and was at liberty under an appeal bond in the sum of $5,000. Defendant applied for an order staying the imposition of sentence pending his appeal and alleged that he would be unable to procure a transcript of the testimony because of lack of time on the part of the court reporter. It is ordered by the supreme court that the proceedings in the district court be stayed and defendant admitted to bail. State v Wilson, 235 M 571, 50 NW(2d) 706.

546.26 Superseded by Rules of Civil Procedure, Rule 38.02.

Annotations relating to superseded section 546.26.

In an action for the recovery of the reasonable value of services under the theory of quasi contract plaintiff is entitled to a jury trial in the absence of a waiver thereof and submitted in such form that the jury may return a general verdict. An oral contract to convey land is within the statute of frauds and en-

forceable unless taken out of the statute by part performance, in which case recovery may be had on the theory of quasi contract. The measure of damages is the value of services less benefits received under the enforceable contract. Roske v Ilykanyics, 232 M 383, 45 NW(2d) 769.

Where a note of issue stated that action would be placed on the calendar for trial by the court, and counsel for both parties were notified and had knowledge of such fact, and defendant allowed almost two years to lapse before demanding a jury trial, and the demand was made when all the parties were in court prepared for trial and the court ready to commence, the trial judge properly denied the defendant a jury trial. Culhane v Burness, 236 M 256, 52 NW(2d) 451.

546.27 DECISION OF THE COURT

NOTE: The first sentence of this section is superseded by Rules of Civil Procedure, Rule 52.01.

Denial of a motion for a particular finding is a finding against the substance of the proposal. Marso v Graif, 226 M 540, 33 NW(2d) 717.

It was not an abuse of discretion where the trial judge refused to reopen a will contest, where it appeared from the affidavits that both the affiant and the counter affiant had testified at the trial. Re Schumacher's Estate, 229 M 382, 39 NW(2d) 604.

Where the findings state on their face that it was agreed and understood that all issues except the issue of damages should be tried to the court, the findings of the court are final. Zywiec v City of South St. Paul, 234 M 18, 47 NW(2d) 465.

Until it passes into judgment, a finding of a court or a verdict is no bar to the bringing of another action. Smith v Smith, 235 M 412, 51 NW(2d) 276.

Where the court denies a motion for amended findings of fact, that is equivalent to making finding negativing the facts asked to be found. Alsdorf v Svoboda, ... M ....., 57 NW(2d) 824.

To qualify as a "seminary of learning" an institution must offer some kind of a general educational program which, though it need not be as broad as that offered by the public educational system, and may feature particular subjects to be directed toward preparation for particular vocations, offers enough of a variety of academic subjects to qualify as a reasonable substitute for the usual program or course pursued by a student at the comparative level of the public system. Merely showing that limited courses offered by a private institution are also offered at public institutions is not sufficient. Graphic Arts Educational Foundation v State, ... M ....., 59 NW(2d) 841.

546.29 Superseded by Rules of Civil Procedure, Rule 12.01.

546.30 DECISIONS OUT OF TERM

NOTE: The first and third sentences of this section are superseded by Rules of Civil Procedure, Rules 77.01, 77.04.

546.33 TRIAL BY REFEREES, FEES PAID BY COUNTY

NOTE: The first paragraph of this section has been superseded by Rules of Civil Procedure, Rule 53.01.

A retired district judge appointed as referee under section 546.33, would not be "practicing law" within the purview of section 490.102. OAG March 24, 1950 (141-D-5).

546.34 Superseded by Rules of Civil Procedure, Rule 53.01.

546.36 Superseded by Rules of Civil Procedure, Rules 53.03, 53.04, 53.05.

Annotations relating to superseded section 546.36.

Where village incorporators relying upon an incorrect official county map, inadvertently include in their petition land already incorporated in an adjoining city, such inclusion is illegal and void ab initio; and, although this mistake does not vitiate the entire incorporation proceeding, a writ of ouster must issue as to the area illegally included. State ex rel Northern Pump Co. v Village of Fridley, 233 M 442, 47 NW(2d) 204.

Mandamus will not issue against a district judge to compel him to grant a restraining order against the entry of a judgment where it appears that the order of references was made December 3, 1951, prior to the effective date of the new Rules of Civil Procedure. In the instant case the reference to the referee was made prior to the effective date of the new Rules of Civil Procedure at which time the existing statute did not require that a transcript be furnished by the referee and provided that the report of the referee should stand as a decision of the court upon which judgment might be entered in the same manner as findings of the court. State ex rel v District Court of Hennepin County, 237 M 33, 53 NW(2d) 465.

546.38 Superseded by Rules of Civil Procedure, Rule 41.02.

Annotations relating to superseded section 546.38.

The order of the district court dismissing an action for want of prosecution is not appealable. Quevil v First National Bank, 226 M 102, 104, 32 NW(2d) 146.

Lot owners were not barred by laches or estoppel from seeking in 1947 to enjoin an erection of a synagogue in a residential district though the lots were purchased by defendant in 1941, and dedication ceremonies were conducted in 1946, in view of the fact that construction work was not started until 1947. Rose v Kenneseth Israel Congregation, 228 M 240, 36 NW(2d) 791.

Where a mistake had been made in computing interest on instalment notes secured by a mortgage and the payments made by the decedent were less than they should have been, a correction may be made. In the absence of agreement to the contrary the debtor has a right to apply payments as he sees fit.

A party who seeks to enforce a right because of a mistake is not chargeable with the laches until he discovers the mistake. He is chargeable with knowledge of the facts from which in the exercise of due diligence he ought to have discovered the error.

An essential element in the doctrine of laches is prejudice to the other party; and where both parties to an action were seeking affirmative relief against the other in reference to the same transaction, neither may assert that the other was guilty of laches. Steenberg v Kaysen, 229 M 300, 39 NW(2d) 18.

Where only strictly legal rights are in controversy and the action is brought within the time prescribed by the statute of limitations, the equitable doctrine of laches has no application. Laches is an equitable doctrine intended to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay. Application of the doctrine of laches depends to a large extent upon the facts in any particular case. Aronovitch v Levy, ... M ....., 56 NW(2d) 570.

546.39 Superseded by Rules of Civil Procedure, Rules 41.01, 41.02.

Annotations relating to superseded section 546.39.

Appeal and error; status of exceptions. 31 MLR 736.

Neither the plaintiff nor the court may dismiss an action without prejudice after final submission. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 277.

A judgment to be appealable, must be a final determination of the rights of parties in the action, but only in the sense of terminating the particular action. Neither the plaintiff nor the court is authorized to dismiss an action without prejudice after final submission. Where action for damages against a municipality is founded on nuisance or trespass and no allegations of negligence are set forth in

the complaint, the complaint need not allege that written notice was given to the city as required by statute as prerequisite to action against municipality based on negligence. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 270.

Order sustaining a general demurrer to a complaint, but permitting plaintiff 30 days within which to file an amended complaint, became final upon the expiration of said 30-day period without interposition of the amended complaint in the absence of appeal or vacation of the order. Thereafter, under section 546.39, neither plaintiff nor the trial court may dismiss the action without prejudice, and the defendant is entitled to a judgment of dismissal on the merits. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 270.

A dismissal at the close of plaintiff's opening statement is rarely granted, and the power to dismiss in such a case is to be sparingly exercised. Such motion is only granted in those cases where counsel has deliberately conceded facts which, if proved, would not entitle plaintiff to a verdict, and then only after counsel has been given every opportunity to qualify, explain, and amplify his statements. Johnson v Larson, 234 M 505, 49 NW(2d) 8.

The denial of plaintiff's motion for a dismissal of his action without prejudice before he had rested his case in chief was not an abuse of discretion. The granting to the jury of a view of the premises is discretionary with the trial court. Certain expert testimony by plaintiff was properly excluded. The trial court's supplemental instructions to the jury present no grounds for reversible error. Erickson v Northern Minnesota National Bank, 235 M 232, 50 NW(2d) 489.

Whether an additional party may be brought in as defendant is discretionary with the trial court; and where an additional party defendant is brought in on a motion by plaintiffs, the plaintiffs thereafter have the same right to dismiss as if the defendant had been originally sued, and other defendants are not in a position to object to such dismissal. Conradson v Vinkemeier, 235 M 537, 51 NW(2d) 651.

The supreme court will not sustain a verdict where the evidence is so overwhelmingly against the verdict that the testimony supporting it is not worthy of belief or where established physical facts require a conclusion contrary to the verdict. Whether there is a reasonable basis for the verdict of the jury must be decided upon in consideration of all the evidence in the light most favorable to the verdict. Price v Mackner, ... M ....., 58 NW(2d) 260.

546.40 Superseded by Rules of Civil Procedure, Rule 68.01.

546.41 Superseded by Rules of Civil Procedure, Rule 68.02.

Annotations relating to superseded section 546.41.

An order denying defendant's motion to dismiss which was made on the ground that defendant's tender of a sum sufficient to cover the amount of plaintiff's claim, plus costs, had been refused, was not a final order from which an appeal could be taken. Independent School District v Rittmiller, 235 M 556, 51 NW(2d) 664.

An order denying a motion to dismiss a cause of action is not appealable. Independent School District v Rittmiller, 235 M 556, 51 NW(2d) 664.

CHAPTER 547

NEW TRIALS

547.01 Superseded by Rules of Civil Procedure, Rule 59.01.

Annotations relating to superseded section 547.01.

Proximate cause in Minnesota. 34 MLR 185.