statement in evidence is not unconstitutional as imposing an unreasonable, oppressive or arbitrary requirement which denies the equal protection of the laws or gives to one party an unfair advantage over the other or which in any way denies or violates the requirement of due process. Yeager v Chapman, 233 M 1, 45 NW(2d) 776.

The testimony of a highway patrolman as to admissions relating to an automobile collision made by the patrolman in a hospital shortly after the collision occurred was not inadmissible. Defendant's statement was not taken by an adverse party. The statute does not render such statements wholly inadmissible in any event. State v Gensmer, 235 M 72, 51 NW(2d) 680.

A release of all claims for non-injuries bars recovery for unknown consequences of known injuries, but it is not a bar to recovery for unknown injuries not within the contemplation of the parties at the time of contracting for such release. Whether the parties intended a release to cover unknown injuries is a question of fact. Aronovitch v Levy, ... M ....., 56 NW(2d) 570.

Section 602.01 relates to civil actions for damages and has no relation to evidence in a criminal case, and does not preclude the court from receiving evidence of a statement given by a person charged with crime to the sheriff on the trial of a criminal charge. OAG Oct. 15, 1948 (605-A-5).

CHAPTER 603

PROCURING EVIDENCE; INSPECTION

603.01 Superseded by Rules of Civil Procedure, Rules 34, 37.02.

APPEALS, REVIEWS; CIVIL ACTIONS

CHAPTER 605

APPEALS FROM DISTRICT COURT

605.01 APPEAL TO SUPREME COURT

Appealable orders in Minnesota. 37 MLR 309.

Time to appeal. 35 MLR 640.

The right to appeal is statutory. Wallace v County Board, 227 M 212, 35 NW(2d) 343.

Appeal from an order which was appealable in part and not appealable in part brings up for review only that part which is appealable. Storey v Weinberg, 226 M 48, 31 NW(2d) 912.

An order granting a motion to intervene in condemnation proceedings, determining that property has been taken, and appointing commissioners, is not appealable; and the merits of a nonappealable order cannot be reviewed in the supreme court by taking an appeal from an order denying a motion for amendment thereof or a new trial. The jurisdiction of the supreme court is not enlarged by consent or stipulation of the litigants. State v Bentley, 224 M 244, 28 NW(2d) 180.

Appeal from order setting aside verdicts for defendant and granting plaintiff new trial did not bring up for review non-appealable portion of such order denying

motion by one of defendants for dismissal on the merits as to that defendant. Storey v Weinberg, 226 M 48, 31 NW(2d) 912.

An appeal is a proceeding by which a case is removed from a lower court to a higher court for trial and de novo, either upon the record made in the lower court or upon evidence newly introduced. The so-called "appeal" in a civil action from the district court to the supreme court is, because of statutory provisions, an appeal governed by principles applicable to a writ of error and is in substance a writ of error. State ex rel v Civil Service Board, 226 M 240, 32 NW(2d) 574.

Where defendant did not make a motion for a new trial or otherwise lay a foundation for or take an appeal from a judgment in favor of the plaintiff, and an appeal was taken by plaintiff from an order denying a motion for new trial on the ground of insufficient damages, even if the contention of defendant that plaintiff was contributorily negligent as a matter of law or that defendant was free from negligence would be sustained, such conclusion would only be available to sustain the trial court's order denying a motion for a new trial and not to upset the verdict for the plaintiff. Olson v Moske, 237 M 18, 53 NW(2d) 562.

Order allowing attorneys' fees for services to a trust estate affected a substantial right of attorneys and was appealable or subject to modification by motion or other form of direct attach, but it could not be questioned or modified in a collateral proceeding. Atwood v Holmes, 229 M 37, 38 NW(2d) 62.

An appeal under MSA, Section 43.12 to the state civil service board from an allocation of an employee to a position by the civil service director entitles the employee-appellant to a public trial de novo before the state civil service board with all the incidents of a trial before a court of law, including the right of subpoena, production of witnesses and documents, or taking of testimony, examination and cross-examination of witnesses, representation by counsel, hearing, argument, decision on the merits, and the like. The meaning of the word "appeal" when used in granting a right of appeal depends upon the legislative intention. Strictly speaking, it is a proceeding by which a case is removed from a lower court to a higher court for a trial there de novo either upon the record made in the lower court, or upon evidence newly introduced; and an appeal in a civil action from the district court to the supreme court is governed by principles applicable to a writ of error and is, in substance, a writ of error. State ex rel v Civil Service Board, 226 M 240, 32 NW(2d) 574.

Statute authorizing county board to appropriate not to exceed $720 per year to provide clerk hire for county attorney is permissive and not mandatory, and no appeal will lie from action of county board in allowing or refusing to allow clerk hire for county attorney's office. Wallace v County Board of Commissioners, 227 M 212, 35 NW(2d) 343.

It is well settled that the parol evidence rule is not applicable to exclude evidence of fraudulent oral representations by which one party induces another to enter a written contract, provided the representations were such that the other party might reasonably rely upon them. Where a party to a contract has partially performed it before discovering the falsity of the representation which induced him to enter into it, he is not obliged to retrace his steps, but may complete performance without waiving the fraud and then bring an action for damages for deceit. Damages in an action for false representations and deceit are the natural and proximate loss sustained by the party because of reliance thereon. In cases where the fraud induced a purchase, the measure of damages is the difference in value between what was given and what was received. The burden of proving his loss is on plaintiff, and the amount of damages is a question of fact for the jury to determine from a consideration of all the facts of the case. Rosenquist v Baker, 227 M 217, 35 NW(2d) 346.

"Testamentary capacity" means that the testator at the time of making his will comprehended his relation to those who naturally have claims on his bounty, the extent and situation of his property, and the effect of the will disposing of it, and that he was able to hold these things in mind long enough to form a rational judgment concerning them. Where the evidence as to testamentary capacity and undue influence is conflicting, findings of the trial court with respect to such questions are

final, even though the appellate court, if it had the power to try the question de novo, might determine otherwise upon reading the record. In re Olson's Estate, 227 M 289, 32 NW(2d) 439.

The opportunity to exercise undue influence, or the existence of a confidential relation between testator and beneficiary are not, standing alone, proof of undue influence; and the fact that the lawyer drew the will and that the witnesses to the will observed no undue influence do not alone establish the absence thereof; and impeachment testimony consisting of prior statements of the witness out of court is not substantive proof of facts stated therein, but is purely negative for the purpose of impairing the credibility of the witness. Olson v Mork, 227 M 289, 35 NW(2d) 439.

The supreme court cannot review an order which is rendered moot by subsequent events. Where, subsequent to the return of a verdict in a tort action wherein no cross-claim was made between defendants, two of the defendants procured a release from claimant, the released defendants' appeal from orders denying their motion for a new trial on all issues was rendered moot. Muggenberg v Leighton, ... M ....., 60 NW(2d) 9.

605.02 TITLE ON APPEAL

Where the order or judgment appealed from is indivisible and must be affirmed, reversed, or modified as to all parties to action or proceeding, the appeal must be dismissed if they are not all made parties to the appeal. Peterson v Joint Independent Consolidated School District No. 116 of Nobles County and No. 136 of Jackson County, ... M ....., 58 NW(2d) 465.

605.03 REQUISITES OF APPEAL

Time to appeal. 35 MLR 640.

Only adverse parties are essential to appeal. Henderson v Northwest Airlines, 231 M 503, 43 NW(2d) 786.

An "adverse party" means the party whose interest in relation to the subject of the appeal is in direct conflict with a reversal or modification of order or judgment from which appeal is taken. Peterson v Joint Independent Consolidated School District No. 116 of Nobles County and No. 136 of Jackson County, ... M ....., 58 NW(2d) 465.

The Prudential Insurance Company of America entered into a contract with the city of Minneapolis through its board of park commissioners for the purchase of real estate owned by the city. The contract provided that the sale to be effective should be approved by the district court. The insurance company thereby became a party to the proceedings in the district court which resulted in the order from which the appeal was taken.

The notice of appeal was served upon the attorneys for the board of park commissioners acting for the city and upon the clerk of the district court, but none was served upon the insurance company. Since the order appealed from is indivisible and the interests of the appellant and the insurance company are in direct conflict, the insurance company was an adverse party upon whom it was necessary to serve a notice of appeal under the statute. The appeal dismissed. City of Minneapolis v Norman, ... M ....., 57 NW(2d) 245.

The use of the word "shall" in directing service on the adverse party with the notice of appeal is not mandatory so as to require dismissal of an appeal from a judgment of the district court affirming an order of the probate court allowing the final account of the executrix because of the fact that the notice of appeal served on the respondent did not have notice of appeal bond or notice of deposit attached thereto. In the instant case, notice of the bond was served about one month after the notice of appeal and was served as soon as the defect was discovered. Appellant acted in good faith and no prejudice to respondent was shown. Gelin v Gelin, 228 M 568, 37 NW(2d) 538.

The giving of statutory notice of appeal to both the adverse party and the clerk of the district court is a jurisdictional prerequisite. The power to permit curative amendments to cure defects in an appeal exists only after the statutory notice of appeal has been timely served and filed. Ullman v Lutz, ... M ....., 55 NW(2d) 57.

A defect in appeal which arises from failure to serve notice of appeal upon one of the parties who would be adversely affected by reversal or modification of the order or judgment from which appeal was taken was cured when such party voluntarily appeared in appellate court. Henderson v NW Airlines, 231 M 503, 43 NW(2d) 786.

605.04 RETURN TO SUPREME COURT

On appeal in action to restrain remodeling of garage in violation of village ordinance, record showing that counsel discussed effect a new ordinance would have on case and that court stated that case would remain in status quo until council acted on proposed ordinance did not sustain contention that parties stipulated, with court's consent, that if a special permit were granted under new ordinance, the case would be moot. Newcomb v Teske, 225 M 223, 30 NW(2d) 354.

Where the clerk of the trial court transmitted to the reviewing court the original record, the judgment roll and settled case, there was no absence of a settled case which would preclude consideration of whether findings were sustained by the evidence even though the trial court's order allowing a settled case was included in the printed record. State ex rel v Streeter, 226 M 458, 33 NW(2d) 56.

Good practice requires a complete printed record and, although it need not include the whole of a trial court's order for a settled case, it should contain at least a statement indicating date of its entry and fact that original will be forwarded to reviewing court. State ex rel v Streeter, 226 M 458, 33 NW(2d) 56.

Practical construction of a word is a fact which must be made to appear by the record and the courts do not take judicial notice of it. Hanson v Hayes, 225 M 48, 29 NW(2d) 473.

In reviewing an order or judgment of the trial court based exclusively upon the original records on file, a settled case or bill of exceptions is not necessary if the original file has been returned to the supreme court, but a litigant who desires the benefit of this rule bears the burden of taking the necessary steps to have original file forwarded to clerk of supreme court prior to date of argument. Viiliainen v American Finnish Workers Soc., 236 M 412, 53 NW(2d) 112.

Where order of trial court was based exclusively upon the original records on file, including affidavits which were a part thereof, a settled case or bill of exceptions was not necessary in view of fact that the original file had been returned to the supreme court. Holtberg v Bommersbach, 235 M 553, 51 NW(2d) 586.

The record made in the trial court is ordinarily conclusive on appeal and the appellate court generally will limit its consideration of the case not only to questions presented and decided by the trial court but also to the record upon which the decision of such question was based. Loth v Loth, 227 M 387, 35 NW(2d) 542.

Review on appeal must be limited to the record. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

Remarks allegedly made by defendant's counsel in final argument which did not appear in the settled case and were denied by defendant's counsel and were not recollected by trial court and to which no exceptions were taken or objections made either during or subsequent to argument would not be considered. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

Questions of misconduct involving statements of counsel cannot be raised on affidavits, but when the alleged error involves conduct rather than statements, such matters may be brought before the reviewing court by an affidavit of counsel and remarks of the court. Maher v Roisner, ... M ....., 57 NW(2d) 810.

Affidavit obtained and filed after order granting motion to set aside and quash service of summons and complaint were entitled to no place in appellate record and

brief and would not be considered as part of evidence by the supreme court. Holtberg v Bommersbach, 235 M 553, 51 NW(2d) 586.

Where an order of the trial court fails to specify clearly on what ground a new trial was granted, memorandum of the court, though not made a part thereof, may be examined for the limited purpose of clarification to enable the appellate court to discover the ground on which the new trial was granted. Kugling v Williamson, 231 M 135, 42 NW(2d) 534.

An assignment that the findings of fact are not sustained by the evidence and are contrary to law is wholly insufficient to challenge any specific finding of fact. Re Underwood, 231 M 144, 42 NW(2d) 416.

When there was a mere statement in plaintiff's brief on appeal that a certain affidavit was hearsay but there was no assignment of error on such point nor any argument or authority relating thereto, the matter was not presented to the supreme court for review. Keller v Wolf, ... M ....., 58 NW(2d) 891.

The question of improper argument by counsel was not presented for review on appeal, in the absence of a proper assignment of error in such respect. Rugg v Rugg, 235 M 238, 50 NW(2d) 486.

Ordinarily, where there is no assignment of error, there is nothing for the supreme court to review; but where respondent in his brief answers the arguments of appellant, the supreme court may in its discretion consider the merits of the appeal insofar as it is covered by the arguments. Linneman v Swartz, 235 M 107, 50 NW(2d) 47.

In an action for death of a motorist in a collision with an automobile from the opposite direction, finding implicit in the verdict in favor of plaintiff that defendant was negligent must stand, where no question concerning it was raised on appeal. Howard v Marchildon, 228 M 539, 37 NW(2d) 833.

Assignments of errors must be separately stated; but where appellants waived certain alleged errors by failing to assign the alleged errors properly, but respondent voluntarily argued the alleged errors, respondent waived objection to appellant's failure to assign errors properly and litigated the matters by consent. Marcum v Cloverleaf Co., 225 M 139, 30 NW(2d) 24.

Appellants must rely on their own assignments of error and cannot take advantage of assignments made by other appellants. The instruction given by the trial court is the law of the case unless error is assigned. Novotny v Bouley, 223 M 592, 27 NW(2d) 813.

Where assignments of error were insufficient to challenge verdicts in wrongful death action as excessive, but respondents argued the point without challenging the assignments, the question of excessiveness was before the supreme court. Moore v Palen, 228 M 148, 36 NW(2d) 540.

The following assignments present only the question whether the conclusions of law are sustained by the findings of fact:

(a) that the conclusions of law are not justified by the fact found and are contrary to law;

(b) that the findings of fact and conclusions of law are not justified by the evidence and are contrary to law;

(c) that the judgment entered herein is not justified by the evidence and is contrary to law.

Kiebach v Kiebach, 227 M 328, 35 NW(2d) 530.

Appellant's assignment of errors as to excessive damages and misconduct of counsel was insufficient to raise either question under the supreme court rules, where both questions were attempted to be raised by one assignment, and the question in regard to misconduct did not specify matters claimed to be misconduct. Assignments must be separately stated and as to matters of misconduct must definitely specify the misconduct. Marcum v Cloverleaf Creamery, 225 M 139, 30 NW(2d) 24.

Assignment of error complaining of a failure to couple with the charge as to negligence an instruction that the negligence must be the proximate cause of the injury to justify the verdict for the plaintiff, was insufficient to challenge any specific part of the court's charge. Swanson v Shiely, 234 M 548, 48 NW(2d) 848.

Where defendant appeals on ground that verdict is excessive, or was influenced by passion or prejudice, he must point out in what particulars the verdict was excessive or was so influenced. Perry v Reuter, 229 M 44, 38 NW(2d) 60.

Where defendant did not discuss or consider in his brief trial court's denial of his motion for a directed verdict at the close of plaintiff's case, defendant's assignment of error complaining of such action would be deemed waived. Scattergood v Keil, 233 M 340, 45 NW(2d) 650.

Assignment of error based on mere assertion and not supported by argument or authorities is deemed waived and will not be considered unless prejudicial error is obvious on mere inspection. Kugling v Williamson, 231 M 135, 42 NW(2d) 534.

605.05 POWERS OF APPELLATE COURT

Effect of dismissal for mootness upon a subsequent suit based upon a different cause of action. 35 MLR 506.

Res judicata effect of administrative determination in a subsequent judicial proceedings. Res judicata will apply to a determination of a court reviewing an administrative holding. 35 MLR 576.

Policy exceptions to res judicata. 36 MLR 169.

A so-called "appeal" in Minnesota is in the nature of a writ of error under which the function of the appellate court is not to try the case de novo but to determine whether error was committed in the trial court. Loth v Loth, 227 M 387, 35 NW(2d) 542.

On review, the court takes a view of the conflicting evidence most favorable to the verdict. Tripplet v Hernandez, ... M ....., 56 NW(2d) 645; Katlaba v Pfeifer, ... M ....., 56 NW(2d) 725; Hahn v City of Ortonville, ... M ....., 57 NW(2d) 254; Swanson v LaFontaine, ... M ....., 57 NW(2d) 262; Palmer's Estate, ... M ....., 57 NW(2d) 409.

In this action for compensation for injuries sustained the appellate court must take the view of conflicting evidence most favorable to the verdict. Woodring v City of Duluth, 224 M 580, 29 NW(2d) 484.

The findings of the triers of fact will on appeal be considered in the light most favorable to the prevailing party. Fewell v Tappan, 223 M 483, 27 NW(2d) 648.

On appeal from a judgment entered on a verdict in favor of plaintiff the evidence must be viewed in light most favorable to plaintiff. Delyea v Goosen, 226 M 91, 32 NW(2d) 179; Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

On appeal from an order denying joint motion of the plaintiffs for a new trial of an action arising out of a motor vehicle collision, the appellate court, in reviewing the record, is required to give verdicts in favor of the defendant the benefit of every reasonable inference in their support. Moore v Kujath, 225 M 107, 29 NW(2d) 883.

Where sole reason for reversing and remanding on prior appeal was supreme court's inability to determine from record whether trial court had properly applied law to evidence, subsequent appeal from order predicated upon same findings and same evidence would be dismissed, where record revealed that the trial court had in fact properly applied law in each instance. In re Hartz' Estate, ... M ....., 58 NW(2d) 57.

Questions raised by individual defendant's motion to dismiss appeal by defendant railway companies from order denying their motions for judgment notwithstanding verdict against them for personal injuries, or in the alternative, for judgment against individual defendant notwithstanding verdict in his favor or for a new trial on ground that order was not appealable as to the individual defendant and that

questions raised by appeal had become moot as against plaintiff as a result of settlement made by railway companies with plaintiff were of considerable importance and doubtful, and hence motion to dismiss would be denied without prejudice to renewal of motion at hearing of appeal on the merits. Muggenburg v Leighton, ... M ....., 57 NW(2d) 658.

A motion for dismissal of an appeal must be denied where the record discloses that the conclusions of the trial court are sound and no different result could be arrived at on appeal. Radabaugh v Just, 225 M 187, 30 NW(2d) 534.

Review will be had of the appealable part only where the appeal is from an order which is non-appealable in part. Cashen v Owens, 225 M 25, 29 NW(2d) 440.

When, pending an appeal, an event occurs which renders it impossible to grant any relief or which makes a decision unnecessary, the appeal will be dismissed. Mid-West Wine Co. v Ericson, 227 M 24, 34 NW(2d) 738.

Where defendant in a divorce action appealed a contempt order and the records strongly indicated that defendant had purged himself of contempt, the record being indefinite, the case would not be dismissed on the ground that it was moot. French v French, 236 M 444, 53 NW(2d) 218.

An appeal, involving a question whether the 1947 amendment to section 340.11 relating to liquor wholesaling and manufacturing licenses prohibited holders of licenses acquired prior to the amendment from selling wine after the amendment, was dismissed as presenting a moot question, where such licenses had expired and the amendment had been unconstitutional. Mid-West Wine Co. v Ericson, 227 M 24, 34 NW(2d) 738.

Where it does not appear that a timely request for appropriate corrective action was made, alleged misconduct of counsel in argument to jury ordinarily will not be reviewed. Flemming v Thorsen, 231 M 343, 43 NW(2d) 225.

Where instructions as a whole were substantially correct, and alleged error, in that charge gave undue emphasis to plaintiff's evidentiary contentions as compared to defendant's denials thereof, was not called to the attention of the trial court until notice of motion for a new trial, such error was not subject to review upon appeal. MacIllravie v St. Barnabas Hospital, 231 M 384, 43 NW(2d) 221.

The theory upon which a case is tried becomes the law of the case and must be adhered to in appeal; and a point raised for the first time on appeal will not be considered. Edelstein v Duluth M.I. Railway, 225 M 508, 31 NW(2d) 465.

A point not raised in the court below could not be assigned as error on appeal. Nelson v Hacking, 225 M 125, 29 NW(2d) 889.

Where reviewing court granted a new trial on another ground the question of materiality of prejudicial statements made by plaintiff's counsel need not be passed upon. Beckman v Schroeder, 224 M 370, 28 NW(2d) 629.

A party cannot raise for the first time on appeal a question not litigated at the trial or passed on by the trial court. Kratky v Andrews, 224 M 386, 28 NW(2d) 624.

Where issue as to the effect of commencement and trial of an action for cancelation of a mortgage while claim for amount due on mortgage was still pending in probate court was not litigated below, issue was not before the supreme court for review on appeal. Holden v Farwell, Ozmun, Kirk & Co., 223 M 550, 27 NW(2d) 641.

Where original motion papers bringing in an additional defendant as a party named the American Chain Company, and in all other proceedings throughout the court named American Chain & Cable Company, Inc., was used, and no objection was raised during the trial, there was no prejudice to anyone and it was too late to raise the question of the discrepancy on appeal. Gustafson v Johnson, 235 M 358, 51 NW(2d) 108.

Failure to present to trial court that of which it is charged with judicial knowledge does not preclude its consideration for the first time on appeal. Atwood v Holmes, 229 M 37, 38 NW(2d) 62.

An issue of illegality not presented to trial court, though it involves a mere error of law, may be considered for the first time on appeal if it involves a controlling legal principle or statute which, with respect to undisputed facts, the courts are judicially bound to know. Atwood v Holmes, 229 M 37, 38 NW(2d) 62.

Where, upon undisputed facts disclosed by the record, trial court is fully informed that pursuant to a prior and final adjudication the reasonable value of services to trust estate has been determined and paid for, affirmative defense of res judicata as a bar to a second allowance and payment for same service is within judicial knowledge of trial court and may be considered for first time on appeal. Atwood v Holmes, 229 M 37, 38 NW(2d) 62.

Theory upon which case is tried below becomes the law of the case and must be adhered to on appeal. Crawford v Woolrich Construction Co., ... M ....., 57 NW(2d) 648; Lovrenchich v Collins, 233 M 183, 46 NW(2d) 264; Edelstein v Duluth, M & I Ry. Co., 225 M 508, 31 NW(2d) 465.

In action against railroad as employer to recover damages for alleged wrongful discharge in violation of employment, where case was tried not only upon the theory that railroad employees' labor organization was statutory bargaining representative of plaintiffs under the Federal Railway Labor Act, but also that the Act governed as to all matters arising under the contract, case would be decided on appeal upon the same theory. Edelstein v Duluth, M & I Ry. Co., 225 M 508, 31 NW(2d) 465.

Objection that contract is within the statute of frauds may not be raised for first time on appeal. Borchardt v Kulick, 234 M 308, 48 NW(2d) 318.

Order allowing fees to an attorney for services in a trust cannot be questioned collaterally, but as it concerns a substantial right the order may be questioned by motion, appeal, or other direct attack. Atwood v Holmes, 229 M 37, 38 NW(2d) 62.

The failure of defendants to call attention of trial court to section 183.35 and their neglect to refer to the statute as one of the grounds supporting defendant's motion for a directed verdict, prevented this statute from being made the basis for the determination of issues on appeal. Swenson v Slawik, 236 M 403, 53 NW(2d) 107.

A party for the first time on appeal can raise the objection that the record shows conclusively as a matter of law (1) that the contract is illegal or contrary to public policy; (2) that the court is without jurisdiction of the subject matter, and (3) that the adverse party has no cause of action or defense on the merits. Lohman v Edgewater Holding Co., 227 M 40, 33 NW(2d) 842.

Where failure to raise objection in trial court that earnest money contract signed by prospective purchaser of realty varied from authorized terms, in that personalty was included which was not intended to be included in sale, was without explanation, and the point did not involve an obscure or complex point of law, the objection could not be raised for first time on appeal from judgment in broker's suit for commission for producing a purchaser. Lohman v Edgewater Holding Co., 227 M 40, 33 NW(2d) 842.

Where both parties to appeal argue in their briefs a question which is decisive of the case on its merits, the supreme court, in its discretion, may consider the case on its merits, though the assignments of error are inadequate. Wojtkowski v Peterson, 234 M 63, 47 NW(2d) 455.

On an appeal from an order the appellate court may not review intermediate orders. The appeal brings up for review only matters involved in the order. Zywiec v City of South St. Paul, 234 M 18, 47 NW(2d) 465.

An appeal from a judgment entered on an order sustaining a demurrer brings up for review order sustaining demurrer. Seagram Distillers Corp. v Lang, 230 M 118, 41 NW(2d) 429.

There being no error or irregularity in its issuance, the supreme court may not recall its remittitur or vacate its judgment if filed in the trial court. Kasal v Kasal, 228 M 570, 37 NW(2d) 711.

Upon appeal from a judgment, the supreme court will consider whether the conclusions of law are justified by the findings, though no bill of exceptions or proper motion for a new trial is involved. Lee v Delmont, 228 M 1, 36 NW(2d) 530.

Where there was no settled case or bill of exceptions, the appellate court's inquiry on appeal was limited to a consideration of whether the findings of fact sustained the conclusions of law and judgment was entered in conformity therewith. Johnson v Raddohl, 226 M 343, 32 NW(2d) 860.

On plaintiff's appeal from order denying motion to vacate order dismissing action for want of prosecution and for a new trial where there was no trial of any sort but simply a denial of the motions after hearing, plaintiff's motion for new trial would be ignored. Quevil v First National Bank of Windom, 226 M 102, 32 NW(2d) 146.

Appeal from an order which was appealable in part and not appealable in part brings up for review only that part which is appealable. Storey v Weinberg, 226 M 48, 31 NW(2d) 912.

On an appeal from a judgment entered on a verdict of the jury, where a motion for judgment non obstante or a new trial was denied and the record failed to disclose whether the motion specified any error other than that the court refused to order judgment non obstante and where no other errors in the ruling or trial proceedings were involved, the only question presented for review is whether the verdict is sustained by evidence; and where it is obvious that the evidence justifies a finding either way, it is useless to raise the question of the sufficiency of the evidence on appeal. Thelen v Gartner, 226 M 36, 31 NW(2d) 639.

Notwithstanding rule that an appeal must be decided solely upon evidence shown by record on appeal, supreme court, in order to sustain verdict and judgment, will permit omissions to be supplied by documentary evidence of a conclusive nature. Mattfield v Nester, 226 M 107, 32 NW(2d) 291.

An appeal must be decided solely upon evidence produced in the trial court, and fugitive papers or plats intended to illustrate cannot take the place of evidence. Moose v Vesey, 225 M 64, 29 NW(2d) 649.

Supreme court could not consider plat showing location of judicial ditch, which plat had not been introduced in evidence in trial court, for purpose of determining whether jury had correctly ascertained location of road right-of-way. Moose v Vesey, 225 M 64, 29 NW(2d) 649.

Where parties themselves by stipulation defined the issue and court instructed jury in line with the agreement, defendant could not complain on appeal as to manner of submission of issue. Hensche v Young, 226 M 339, 28 NW(2d) 766.

Question not presented for decision in trial court would not be considered on appeal. Mattfield v Nester, 226 M 106, 32 NW(2d) 291.

No question is presented to supreme court if appellant makes no assignment of error in supreme court, but the supreme court will consider a question argued by appellant if respondent voluntarily argues such question. Erickson v Midgarden, 226 M 55, 31 NW(2d) 918.

On an appeal in an action for malicious prosecution the appellate court is required to determine the issue of probable cause as a legal conclusion rather than as a mere question of fact. Survis v A Y McDonald Mfg. Co., 224 M 479, 28 NW(2d) 770.

Generally, when an appeal is taken from an order denying an alternative motion for amended findings and conclusions of law or a new trial, only that part of the order relating to the denial of a new trial is reviewable. In re Arnt's Estate, 237 M 245, 54 NW(2d) 333.

Where no motion to vacate findings of fact, conclusions of law, and order for judgment had been made, appeal from order refusing to vacate order striking answer as sham did not present for review any question as to refusal of trial court to vacate findings of fact, conclusions of law, and order for judgment, particularly

where defendant was in default at the time findings were made. Bennett v Johnson, 230 M 404, 42 NW(2d) 44.

On appeal from order denying motion for injunction restraining defendant, during pendency of action, from breaching collective bargaining agreement, supreme court would consider whether the trial court abused its discretion in denying the relief sought and whether it erred in refusing to admit certain evidence offered for proof by plaintiff. Hotel & Restaurant Employees Union v Tzakis, 227 M 32, 33 NW(2d) 859.

A riding academy is not an essential business paramount to the rights of homeowners in a residential district, nor is it dependent upon a fixed location. Where it may be removed without serious loss to the owners, the court may in its discretion order its complete abatement if the evidence establishes that it has been conducted so as to constitute a nuisance seriously affecting the personal and property rights of residents in its vicinity; and on appeal the appellate court's function is to determine whether from the evidence the trial court abused its discretion. Robinson v Westman, 224 M 105, 29 NW(2d) 1.

On appeal from an order overruling a demurrer to an answer which pleaded operations of a contract between the defendant and the United States for transport of army personnel, the appellate court as a matter of law cannot determine solely from the operations of the contract pleaded and other allegations in the answer that the responsibilities of the defendant were governed exclusively by the contract with the federal government, or that such portions of the contract so pleaded established conclusively the relationship that existed between defendant and the United States, or between defendants and pilots operating plane at time of accident. Alansky v Northwest Airlines, 224 M 138, 28 NW(2d) 181.

On appeal from order denying alternative motion for amended findings of fact and conclusions of law or a new trial, only that part of order denying a new trial was reviewable, but on such review, any finding of fact could be challenged as not sustained by the evidence. Graphic Arts Educational Foundation v State, ... M ....., 59 NW(2d) 841.

Where verdict for defendants was vacated and plaintiffs in a personal injury action were granted a new trial solely on the ground that an error had been committed in submitting the issue of plaintiff's contributory negligence to the jury, other errors assigned in plaintiff's motion for a new trial were properly before the appellate court for review. Damrow v Zauner, 236 M 447, 53 NW(2d) 139.

In a passenger's action against the owner and driver of an automobile, and where the defendants' rights and liabilities inter se were not litigated, and only the driver of the other automobile appealed from a judgment adverse to all of the defendants, consideration by the appellate court of the issue as to whether plaintiff's driver had been negligent as a matter of law is obiter dictum Even assuming that the trial court judge had erred in failing to so instruct the jury, appellant is not in position to complain. Norton v Nelson, 236 M 237, 53 NW(2d) 31.

A party must stand on the rights which he claims and asserts upon trial and may not shift his position on appeal. Lohman v Edgewater Holding Co., 227 M 40, 33 NW(2d) 842.

Theory of case which was not submitted to trial court should not have been raised upon appeal. Cooney v Equitable Life Assurance Soc. of U. S., 235 M 377, 51 NW(2d) 285.

If a cause of action actually exists, then usually the theory upon which the case was tried becomes the law of the case and must be adhered to in the supreme court, but where the record shows conclusively as a matter of law that, on the merits, there is no cause of action or defense, the supreme court will so determine no matter on what theory pleadings were framed or issues were tried. Behrendt v Rassmussen, 234 M 97, 47 NW(2d) 779.

In a business transaction the recipient of a fraudulent representation of a material fact is justified in relying upon its truth, although he might have ascertained its falsity had he made an investigation; and where the purchaser attempts to make

an investigation but entered into the transaction without completing it; there was no waiver of his right in relying upon defendant's representation. Where the trial court has made two or more independent findings of fact, and one of the findings was influenced or controlled by an error of law, no consideration need be given to the error if the other findings are sufficient upon which to base the decision. Speiss v Brandt, 230 M 246, 41 NW(2d) 561.

Where parties consent to try their case on a particular theory of what the law of the case is, such rule will be applied on appeal. Stabs v City of Tower, 239 M 552, 40 NW(2d) 362.

Litigants are usually bound upon appeal by theories, however erroneous or improvident, upon which the case was tried below, but appellate court has duty to, and upon its own motion may determine a case upon the grounds of illegality, though such ground was neither presented to nor considered by trial court, if such illegality is apparent upon undisputed facts, is in clear contravention of public policy, and if a decision thereon will be decisive of the controversy on its merits. Atwood v Holmes, 229 M 37, 38 NW(2d) 62.

Where a decision of the trial court is correct it need not be sustained by the supreme court for the same reason or for all reasons relied on by the trial court. Spiess v Brandt, 230 M 246, 41 NW(2d) 561.

A correct decision of the trial court will be sustained on appeal regardless of whether the trial court gave the right reason for the decision. Warner v E. C. Warner Co., 226 M 565, 33 NW(2d) 721.

The record must be viewed in the light most favorable to the decision of the trial court. Whitney v Leighton, 225 M 1, 30 NW(2d) 329.

On appeal error is never presumed but it must be made to appear affirmatively before there can be a reversal. Loth v Loth, 227 M 387, 35 NW(2d) 542; Potter v Potter, 224 M 29, 27 NW(2d) 784.

Where district court ordered judgment on pleadings in favor of respondent, fact alleged in appellants' statement of law and fact would be taken as true for purpose of the appeal. In re Kinkead's Estate, ... M ....., 57 NW(2d) 628.

On review of a directed verdict for defendant the appellate court will consider the evidence in a light most favorable to plaintiff. Olson v Evert, 224 M 528, 28 NW(2d) 753.

On appeal from order denying joint motion of plaintiff for new trial of action arising out of motor vehicles collision, the supreme court, in reviewing the record, was required to give verdicts in favor of defendant the benefit of every reasonable inference in their support. Moore v Kujath, 225 M 107, 29 NW(2d) 883.

On appeal a finding of the trial court is attended with every presumption of evidentiary support, and the rule also applies to divorce cases. Loth v Loth, 227 M 387, 35 NW(2d) 542.

On appeal by defendant from order denying a new trial, supreme court was required to view the evidence most favorable to the verdict. Kugling v Williamson, 231 M 135, 42 NW(2d) 534.

Appellate court on appeal by defendant from order denying defendant's motion for judgment notwithstanding the verdict or a new trial must view the evidence in a light most favorable to the verdict. Nubbe v Hardy, 225 M 496, 31 NW(2d) 332.

Granting or refusing temporary injunction rests in discretion of trial court to such extent that appellate court is not justified in interfering unless action of trial court is clearly erroneous and will result in injury which it is the duty of the court to prevent. Hotel & Restaurant Employees Union v Tzakis, 227 M 32, 33 NW(2d) 859.

Denial of plaintiff's motion to disqualify defendant's attorney, on ground that to permit him to serve as defendant's attorney after plaintiff had discussed facts with him as county attorney constituted a breach of attorney-client relationship and gave defendants an unfair advantage was not abuse of discretion in absence of showing

by the plaintiff that he was thereby prejudiced. Moose v Vesey, 225 M 64, 29 NW(2d) 649.

In a trial to the court without a jury it is given wide discretion as to admission of evidence that is not the best. There will be reversal only where prejudicial error is clearly shown. Otter Tail Power Co. v Village of Wheaton, 235 M 123, 49 NW(2d) 804.

Where a wrongful-death action in which defendant contends that the recovery, if any, should be reduced by the amount of the beneficiary's share thereof because the beneficiary's contributory negligence was a cause of death, and an individual action by the beneficiary against the same defendant based upon the same alleged negligence, in which defendant contends that the beneficiary is not entitled to recover because of his contributory negligence, are tried together, defendant is not prejudiced by the trial court's refusal to submit in the wrongful-death action the question whether the beneficiary was guilty of contributory negligence and by its adoption, in lieu of such submission, the general verdict in the beneficiary's individual action as a special finding with respect to the question. Mattfeld v Nester, 226 M 107, 32 NW(2d) 291.

Where there is a conflict between expert witnesses the jury in making its decision may consider the qualifications of each expert and the source from which he derives his information. Koenigs v Thome, 226 M 14, 31 NW(2d) 534.

The manner and scope of cross-examination is largely within the discretion of the trial court, whose exercise thereof constitutes no ground for reversal except in case of clear abuse of discretion. Flemming v Thorson, 231 M 343, 43 NW(2d) 225; Mattfield v Nester, 226 M 106, 32 NW(2d) 291.

On appeal, in considering whether plaintiff was free from contributory negligence, evidence most favorable to the prevailing parties must be accepted. Hatley v Klingsheim, 236 M 370, 53 NW(2d) 123; Rivera v Mandsager, 228 M 227, 36 NW(2d) 700; Flemming v Thorson, 231 M 343, 33 NW(2d) 225.

Where an action is tried to the court its findings are entitled to the same weight as the verdict of the jury and will not be reversed on appeal unless manifestly and palpably against the weight of the evidence. This rule applies whether appeal is from a judgment or from an order granting or denying a new trial. In re Estate of Borstad, 232 M 365, 45 NW(2d) 828; State v McCoy, 228 M 420, 38 NW(2d) 386.

In order to set aside a release for unilateral mistake there must be concealment or knowledge on the part of one party that the other party is laboring under a mistake. Improvidence in the making of a personal injury settlement imports an absence of calculation or a thoughtless exercise of discretion whereby a result is brought about which in equity and good conscience ought not to be allowed to stand. The statements in an affidavit made by an attorney familiar with the preparation of the case and purporting to set forth what evidence would have been produced, including matters which would have been testified to by witnesses, are admissible under a hearsay objection since the issue presented by this motion is the providence of the settlement in view of the probable evidence. Keller v Wolf, ... M ....., 58 NW(2d) 801.

A stipulation for settlement may, in the trial court's discretion, be set aside or avoided: (1) for fraud or collusion; (2) for mistake; or (3) where the stipulation was improvidently made and in equity and good conscience should not be allowed to stand. The function of the appellate court in reviewing an order refusing to set aside a stipulation for settlement is not to afford a hearing de novo or to substitute the appellate court's judgment for that of the trial judge but merely to determine if the evidence is legally sufficient to support the court's order. Keller v Wolf, ... M ....., 58 NW(2d) 801.

A conflict in evidence presenting a fact issue and the trial court's findings thereon will not be disturbed upon appeal unless they are manifestly and palpably contrary to evidence as a whole. Enderson v Kelehan, 226 M 163, 32 NW(2d) 286.

Trial court is sole judge of credibility of testimony where court tries case without a jury. Ostraum v City of Minneapolis, 236 M 378, 53 NW(2d) 119.

Conflict in opinions of expert witnesses is to be resolved by jury, and in determining comparative weight to be given respective opinions jury may consider qualifications of each expert and source of his information. Koenigs v Thome, 226 M 14, 31 NW(2d) 534.

Where facts are in dispute the appellate court does not make or amend findings, or direct that it be done. Shell Oil Co. v Kapler, 235 M 292, 50 NW(2d) 707.

Appellate court cannot ignore fact that verdict was approved by an experienced trial judge who heard the evidence and saw plaintiff's condition at the trial. Harris v Breezy Point Lodge, ... M ....., 56 NW(2d) 655.

Verdict must be so excessive as to be accounted for on no other basis than passion and prejudice in order to justify its disturbance on appeal. Flemming v Thorson, 231 M 343, 43 NW(2d) 225.

Where an unmarried nurse, 26 years old and gainfully employed, was injured in an automobile collision which left permanent scars on face, forehead, neck and knees, $15,740 was not an excessive verdict for injuries sustained. Nikkari v Jackson, 226 M 88, 32 NW(2d) 149.

$8,500 to 32-year-old man, earning at least $500 a year as a farm hand, for injuries, including fracture of lower jaw in two places, smashing of right cheek-bone, punctured lungs, and torn and sprained muscles and ligaments in upper part of back, was not excessive. Koenigs v Thome, 226 M 14, 31 NW(2d) 534.

On appeal findings of fact may be set aside if plainly controlled or influenced by an error of law. Olson v Olson, 236 M 363, 53 NW(2d) 29.

Function of supreme court is to determine whether there is any substantial evidence to sustain conclusions of trial court. Burman v Burman, 230 M 75, 40 NW(2d) 902.

Findings of fact based on conflicting evidence will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole, even if the appellate court might have found the facts to be different if it had the fact-finding function. Loth v Loth, 227 M 387, 38 NW(2d) 542.

Appellate court will not be bound by the findings of trial court and will review them if they are manifestly controlled or influenced by errors of law. Lee v Delmont, 228 M 101, 36 NW(2d) 530.

The trial court's findings of fact, based on conflicting evidence, will not be disturbed on appeal unless manifestly contrary to the evidence as a whole. Conflicting evidence must be resolved by the trier of facts. Baker v Baker, 224 M 117, 28 NW(2d) 164.

In action for unfair competition based upon alleged infringement of trade-name, trial court's findings must be sustained unless, taking the view of the entire evidence most favorable to prevailing party, such findings are manifestly and palpably contrary to the evidence as a whole. Howard Clothes, Inc. v Howard Clothes Corp., 236 M 291, 52 NW(2d) 753.

Where the action is tried by the court without a jury such findings of fact are entitled to the same weight as a verdict of the jury. There can be no reversal unless the findings are manifestly and palpably contrary to the evidence and this is true whether the appeal is from a judgment or from an order granting or denying a new trial and whether the evidence is oral or documentary. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

Appeal does not lie from order denying motion for amended findings. Order denying motion for new trial must be affirmed on appeal where motion specifies no grounds therefor, since there is nothing before the court to review. Radabaugh v Just, 225 M 187, 30 NW(2d) 534.

Supreme court will not reverse order of trial court, although it is technically wrong, if no substantial benefit is to be accomplished by reversal. Moose v Vesey, 225 M 64, 29 NW(2d) 650.

Where there was neither allegation nor proof by buyer of damages for breach of contract of sale, such as arose directly, the allegations and proofs related only to consequential damages not recoverable under the terms of the contract, the breach, if there was one, and failure to grant any relief therefor, presented no ground for reversal of the judgment in favor of the seller. Despatch Oven Co. v Rauenhorst, 229 M 436, 40 NW(2d) 73.

Under the maxim de minimis non curat lex a judgment for labor and materials will not be reversed because of an error of 95 cents. Sallblad v Burman, 225 M 104, 29 NW(2d) 673.

Where trial court, in a case tried by the court without a jury, errs as to the rule of law to be applied in considering the evidence in making its findings, appellate court should vacate the findings made and remand the case with directions to reconsider the entire record and make new findings in the light of the applicable rule of law. In re Hartz Estate, 237 M 313, 54 NW(2d) 784.

Where an issue is settled as a matter of law by the record, the case having been fully developed at the trial, the appellate court will determine such question of law and thus avoid the delay and expense of further litigation. It is not the function of the appellate court to determine the credibility of witnesses who testified in the trial proceedings. Arnt's Estate, 237 M 245, 54 NW(2d) 333; State ex rel v University of Minnesota, 236 M 452, 54 NW(2d) 122; Percansky v Levine, 237 M 206, 54 NW(2d) 110; Georgopolis v George, 237 M 176, 54 NW(2d) 137; Moeller v Hauser, 237 M 368, 54 NW(2d) 415; Randall v Goodrich-Gamble Co., ... M ....., 54 NW(2d) 769; Steinke v Indianhead Truck Line, Inc., 237 M 253, 54 NW(2d) 777; Hartz Estate, 237 M 313, 54 NW(2d) 784.

Where policy of automobile indemnity insurance exempted insurer from liability for personal injuries to any member of insured's family, an adult brother of insured living in same household was within the exclusionary clause. Whether the insured failed to co-operate with the insurer is a question of fact and the findings of trial court will not be disturbed on appeal if there is evidence to sustain the finding. Tomlyanovich v Tomlyanovich, ... M ....., 58 NW(2d) 855.

Where there was a showing that a passenger on a bus with knowledge that there was an accumulation of snow and ice on a step by means of which she attempted to alight without taking hold of a handrail or bar, slipped and fell, the evidence sustained a finding that passenger was guilty of contributory negligence and thus justified submission of that question to jury. Ball v Twin City Motor Bus Co., 225 M 274, 30 NW(2d) 523.

In absence of evidence of contributory negligence on part of passengers in automobile at time of collision with railroad train at crossing, appellate court would not disturb jury's finding absolving them from negligence causing or contributing to the accident. Blaske v Northern Pacific Ry. Co., 228 M 444, 37 NW(2d) 758.

In considering the question whether plaintiff was free from contributory negligence as a matter of law, on appeal, the evidence most favorable to prevailing parties must be accepted. Hatley v Klingsheim, 236 M 370, 53 NW(2d) 123.

A shoplifter apprehended by store detective was being escorted to manager's office and, while waiting for an elevator, broke away and as he ran down the aisle a customer was injured. There was no negligence on the part of the store and the customer cannot recover. Knight v Powers, 225 M 280, 30 NW(2d) 536.

Trial court erred in its instructions to jury imputing contributory negligence to plaintiff's decedent for alleged insufficient admonition to the driver relative to the speed at which he was driving. Kordiak v Holmgren, 225 M 134, 30 NW(2d) 17.

Where plaintiff suffered injuries in fall on public sidewalk and evidence indicated that she knew of defective condition and by exercise of due care might have avoided it, trial court did not err in submitting to the jury the question of plaintiff's contributory negligence. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

It is only where evidence of the absence of negligence or of the presence of contributory negligence is so clear as to leave no room for an honest difference of

opinion among reasonable men that the court may enter upon the province of the jury and set aside a verdict for the plaintiff. Sanders v Gilbertson, 224 M 546, 29 NW(2d) 358.

Where the parties executed a contract for a deed in which it is stated that the sum of $2,500 is to be paid at the time of execution of the instrument, "receipt of which is hereby acknowledged," it is a question of fact whether the parties intended that the down payment would constitute a condition precedent to the formation of a contract, and in the instant case, the evidence shows that such down payment did not constitute a condition precedent. The false recital of receipt of a down payment cannot be used to void the contract. The vendee's agreement to pay the consideration of the future is a sufficient consideration to support the contract. Craigmile v Sorenson, ... M ....., 58 NW(2d) 865.

Where the construction of a contract is erroneously left to jury for determination and its determination of the issue is such as the court ought to have made, no harm results and the error is without prejudice. Cement Co. v Agricultural Insurance Co., 225 M 211, 30 NW(2d) 342.

An order denying a motion of a defendant, appearing specially for that purpose, to set aside service of summons on him is an appealable order. Bubar v Dizdar, ... M ....., 60 NW(2d) 77.

Order denying a motion to vacate an order dismissing an action for want of prosecution, itself a non-appealable order, is non-appealable. Quevli v First National Bank, 226 M 102, 32 NW(2d) 146.

An amended pleading supersedes the original pleading and must be construed as the only pleading interposed so that an order sustaining the demurrer to the original complaint will not be considered on appeal from an order sustaining demurrers to both original and amended complaints. Berghuis v Korthuis, 228 M 534, 37 NW(2d) 809.

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

Motion for a new trial having been made solely on the ground that the evidence was insufficient to sustain the verdict and that the verdict was contrary to law, neither errors of law nor excessive damages may be assigned as errors in the appellate court. La Nasa v Pierre, 225 M 189, 30 NW(2d) 32.

Where plaintiff testified that his truck was laid up from Nov. 15, 1947 to Jan. 22, 1948, and the defendant made no objection to the testimony and did not cross-examine or assign as error the unreasonableness of the period of repair, the reasonableness of the period would not be considered by the supreme court. Where the plaintiff unsuccessfully attempted to find a truck to replace his truck while it was laid up for repairs, and on the trial the plaintiff testified that the value of the truck before the accident was $2,100, a verdict of $2,200 was not excessive. Kopischke v Chicago, St. Paul & Omaha Ry., 230 M 23, 40 NW(2d) 834.

Even though the fact at issue must be approved by clear and convincing evidence, a verdict will not be disturbed on appeal unless manifestly in error. Sorlie v Thomas, 235 M 509, 51 NW(2d) 592.

Where a pedestrian standing on a safety aisle was crushed when the safety aisle bumper block was struck by a motor vehicle and caused to tip upon him, the city was negligent as a matter of law in approving adoption of the plan of the safety aisle construction which contained such unnecessary and palpably dangerous defect that no reasonably prudent man would approve adoption, and the question of damages was the only submissible issue in an injury action. In view of the decision in Cowling v City of St. Paul, clarifying the supreme court's former decision of Paul v Faricy, plaintiffs are entitled to a directed verdict against the city on the issue of negligence and a new trial on the issue of damages only. Paul v Faricy, 234 M 333, 48 NW(2d) 525.

A judgment entered upon an order sustaining a demurrer to the complaint is determinative of the right of the parties even though it contains no provision for a

dismissal of the action or for costs and disbursements for the defendant. It is appealable before the entry of judgment but not afterward. Seagram v Lang, 230 M 118, 41 NW(2d) 429.

Question of reasonableness or constitutionality is a question of law for the court and the appellate court will pass on the question of the validity of a city ordinance under which a party is prosecuted. State v Clark Plumbing Co., ... M ....., 56 NW(2d) 657.

A party is entitled to a directed verdict as a matter of law where the evidence as a whole overwhelmingly preponderates in his favor; but this rule must be cautiously and sparingly exercised. Neither the trial court nor the appellate court is permitted to pass upon the credibility of witnesses, to weigh the evidence, or to exercise any discretion except in extreme cases where but one factual conclusion is possible. Van Tassel v Patterson, 235 M 152, 50 NW(2d) 113.

Where there is a finding of negligence against the defendant who, on appeal, seeks a reversal upon grounds other than the validity of such finding and the decisions of the questions raised goes against him, there must be an affirmance. Howard v Marchildon, 228 M 539, 37 NW(2d) 833.

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 that there is no liability for negligence unless it was "a direct or proximate cause of the injuries complained of." Kapla v Lehti, 225 M 325, 30 NW(2d) 686.

Where inadmissible evidence was erroneously received over plaintiff's objection, but evidence to the same effect had previously been offered and received without objection, the plaintiff's motion for a new trial was properly denied; and where any discovered evidence is cumulative only, the trial court has the discretion to determine whether the ends of justice require a new trial. Manahan v Jacobson, 226 M 505, 33 NW(2d) 606.

Assignments of error must be separately stated and must specify definitely the matter relied upon for reversal. Failing to properly assign errors is a waiver of such errors, but the respondent by voluntarily arguing the point may waive the failure to so assign. Marcum v Cloverleaf Co., 225 M 139, 30 NW(2d) 25.

The trial court has wide discretion for a new trial in determining the probable effect of evidence erroneously admitted; and in the instant case where the defendant testified at the trial that the deceased and not the defendant was driving the car at the time of the accident, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial, on ground of newly discovered evidence in a death action to the effect that one of the defendants had told the proposed witness that the defendant was driving the automobile at the time of the accident, where the evidence was cumulative to that given in the trial. Manahan v Jacobson, 226 M 505, 33 NW(2d) 606.

Although a divorced wife, who has custody of the minor children, is gainfully employed, it is the husband's primary obligation to support the children; and the record sustains the trial court's order increasing the husband's obligation for support of the children. Toebe v Toebe, 225 M 323, 30 NW(2d) 585.

The suggestion that there be a change in the custody of the minor children, which was not presented to the trial court, was not properly before the supreme court on appeal from an order modifying the divorce decree by increasing the award for the support of the minor children. Toebe v Toebe, 225 M 323, 30 NW(2d) 585.

605.06 JUDGMENT NOTWITHSTANDING VERDICT

First and second sentences superseded by Rules of Civil Procedure, Rule 50.02.

Appealable orders in Minnesota. 37 MLR 309.

Appeal from the "whole order." 37 MLR 363.

There is no objection to making an alternate motion for amended findings or for a new trial as each of the motions is made complete in itself. Marso v Graif, 226 M 540, 33 NW(2d) 717.

Where the only motion of defendant for a directed verdict was made at the close of the testimony of plaintiff, trial court properly held that defendant's motion for judgment notwithstanding verdict was wholly ineffectual, since a motion for a directed verdict at the close of all the testimony is a prerequisite to the making of a motion for judgment notwithstanding the verdict. Kugling v Williamson, 231 M 135, 42 NW(2d) 534.

A motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict. Hatley v Klingsheim, 236 M 379, 53 NW(2d) 123.

Defendant who failed to move for directed verdict at close of all the evidence was not entitled to move for a judgment notwithstanding the verdict. Dahlquist v Minneapolis & St. Louis Ry., 230 M 201, 41 NW(2d) 586.

Where defendant failed to move for a directed verdict at close of the evidence, defendant could not move for judgment notwithstanding the verdict for plaintiff. Krumholz v Rusak, 230 M 178, 41 NW(2d) 177.

A motion for judgment notwithstanding, whether based on negligence or on contributory negligence, should be denied unless the evidence in support of the verdict and all reasonable inferences to be drawn therefrom are so wholly incredible and unworthy of belief as to leave no room for honest difference of opinion among reasonable men. Lincoln v Cambridge, Radisson Co., 235 M 20, 49 NW(2d) 1.

What constitutes a reasonable basis for a verdict upon a motion for judgment non obstante must be determined in the light of the evidence as a whole and not by isolating and considering only the portion of evidence favorable to the verdict; and if the undisputed or conclusively shown physical facts negate the truthfulness or reliability of the testimony upon which a verdict is based, as in the instant case, the verdict is without foundation and must be set aside. Cofran v Swanman, 225 M 40, 29 NW(2d) 448.

Where the jury's finding of negligence may have rested upon anyone of several acts or omissions on the part of the defendant, it was an error for the court to hold that the jury's finding was limited to only one of such acts. Grabow v Hanson, 226 M 265, 32 NW(2d) 593.

In an action by a gas company against a road contractor for damages resulting from a break in its gas line allegedly caused the contractor's negligence in grading a city street, evidence as to the contractor's negligence presents a question of fact for the jury. It was error in the trial court to grant a judgment notwithstanding the verdict. Willmar Gas Co. v Duininck, 236 M 499, 53 NW(2d) 225.

Taking, as we must, the view of the evidence most favorable to the verdict, a motion for a judgment notwithstanding, whether based on negligence or on contributory negligence, should be denied unless the evidence in support of the verdict, and all reasonable inferences to be drawn therefrom, be so wholly incredible and unworthy of belief, or so conclusively overcome by other uncontradicted evidence, that the want of negligence or the presence of contributory negligence becomes so clear as to leave no room for an honest difference of opinion among reasonable men. Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

On an appeal involving only the sufficiency of the evidence to justify a verdict, it is not necessary for the supreme court to review and discuss the evidence to demonstrate the correctness of the verdict. The fact alone that the testimony of the plaintiff is opposed by that of two other witnesses is not enough to warrant setting aside a verdict based on the testimony of the plaintiff. In an action under the federal employers' liability act evidence that boards or blocks such as the plaintiff, a railroad brakeman, claimed to have tripped over while walking in a pathway to the switch were customarily used in railroad yards by the defendants' employees for blocking car wheels, justified the jury in drawing an inference that the brakeman tripped over such blocks, that the block was placed there through negligence of de-

fendants' employees and the defendant was charged with constructive knowledge of the presence of the block so as to be liable for injuries sustained by the plaintiff. Clark v Chicago & NW Ry. Co., 226 M 375, 33 NW(2d) 484.

In an action by an employee to recover a bonus from her employer, under the facts in the case the trial court's action in granting defendant judgment notwithstanding the verdict should not be reversed, since the evidence of a parol modification of a written contract was not clear and convincing. Kavanagh v The Golden Rule, 226 M 510, 33 NW(2d) 697.

Where partners agree to dissolve the partnership in a going concern on a future day certain, which was the end of the fiscal year when the annual audit was made, and one partner agrees to purchase the interest of the other as of the date on which the selling partner turns over the business to the purchasing partner, who assumes control, the implication is justified that the purchasing partner shall pay the other partner the reasonable value of his interest in the partnership although no price in dollars was fixed by the agreement. The agreement is not vulnerable to the contention that the minds of the partners did not meet because of the failure to state the exact price in dollars. Under such circumstances, the court should ascertain the reasonable value of such interest either by taking evidence or by reference. Included in such evaluation, the "going business" value, which is to be distinguished from "good will," should be included. Marso v Graif, 226 M 540, 33 NW(2d) 717.

It is only where the evidence of contributory negligence is so clear as to preclude an honest difference of opinion among reasonable men that the court may enter upon the province of the jury and direct a verdict for defendant. Foster v Bock, 229 M 428, 39 NW(2d) 862.

Plaintiff slipped and fell in an icy rut in defendant's used automobile lot and defendant's motion for judgment notwithstanding the verdict for the plaintiff or for a new trial was denied by the trial court. The supreme court held that the operator of a used automobile lot has the same duty to maintain safe conditions for customers as a merchant displaying goods indoors and that the plaintiff did not as a matter of law assume the risks arising from the condition of the lot and the question of defendant's negligence in failing to maintain safe conditions and whether the negligence was the proximate cause of plaintiff's injuries were questions for the jury. Schrader v Kriesel, 232 M 238, 45 NW(2d) 395.

Where defendant in sanding a highway drove his truck around a banked curve at a speed less than five miles per hour at a time when the highway was covered with glazed ice and the rear end of the truck slid across the center lane and collided with plaintiff's truck driven in the opposite direction, there was no showing of negligence and the trial court properly granted a motion for judgment notwithstanding the jury's verdict for the plaintiff. Thompson v Peterson, 235 M 142, 50 NW(2d) 53.

In a personal injury action, the trial court's order granting judgment notwithstanding the jury verdict for plaintiff must be affirmed where the evidence sustained the implied findings of fact necessary to support the order. Volding v Harnish, 236 M 71, 51 NW(2d) 658.

A motion for judgment notwithstanding the verdict, whether made with respect to negligence or contributory negligence, accepts the 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 the testimony for the adverse party; and if the application of this rule, in the light of the evidence as a whole, discloses a reasonable basis for the verdict, the motion must be denied.

Truthful testimony may come from a bad source, and there is no arbitrary rule for measuring its credibility or persuasive weight.

Although a formal exception need not be taken to an inadvertent omission or error in a trial court's instruction to the jury, such omission or error is no ground for granting a new trial unless the trial court's attention has been seasonably directed thereto in some manner.

The adequacy of evidence required to establish that a photograph accurately portrays actual conditions in issue, as a foundation for its admission into evidence, rests in the sound discretion of the trial court.

In the exercise of a sound discretion, the trial court may, by reason of passion and prejudice exhibited in the award of excessive (or inadequate) damages, grant a new trial upon the sole issue of damages when it appears upon the evidence that the other issues, wholly unaffected by passion and prejudice, have been thoroughly litigated and justly determined, so that a right of recovery has been clearly established. La Combe v Mpls. St. Ry. Co., 236 M 86, 51 NW(2d) 839.

In an action to recover damages for the death of plaintiff's decedent from the wrongful acts of defendant's agent, when an automobile transport, driven by the agent, collided with a meeting automobile driven by a decedent on a cement-paved trunk highway at night, the issues of defendant's negligence and decedent's contributory negligence were for the jury, and defendant was not entitled to a directed verdict or to judgments notwithstanding the verdict. Lewerenz v Wylie, 236 M 94, 51 NW(2d) 834.

Under the facts of the instant case where a railroad embankment gave way causing an accident, the issue of negligence was properly submitted to the jury. It was error to direct a verdict. Propper v Chicago, R. I. & P. Ry. Co., 237 M 386, 54 NW(2d) 840.

Under the federal decisions, it is only where defendant's evidence of explanation and exculpation in a res ipsa loquitur case is so legally absolute that no possible hypothesis of negligence can reasonably survive it on the facts and circumstances of the accident that a court is entitled to direct a verdict. Propper v Chicago, R. I. & P. Ry. Co., 237 M 386, 54 NW(2d) 840.

Where two automobiles collided at intersection and occupant of one automobile recovered verdict against both drivers, and trial court granted motion of one driver for judgment notwithstanding verdict, and denied motion of other driver for new trial, driver whose motion for new trial was denied was so prejudiced by action of court in granting judgment notwithstanding verdict in favor of other driver that motion to dismiss appeal as to driver whose motion for judgment notwithstanding verdict was granted would be denied. Bocchi v Karnstedt, ... M ....., 56 NW(2d) 628.

A directed verdict on the sole ground of contributory negligence of the plaintiff, may be upheld even though the findings of contributory negligence of plaintiff were not sustained, provided that upon an examination of the record there is nothing to sustain a finding of negligence against the defendant. Donato v Minneapolis Street Ry. Co., ... M ....., 56 NW(2d) 308.

A motion for judgment notwithstanding the verdict should be granted only in cases where in the light of the evidence as a whole it would clearly be the duty of the trial court to set aside the contrary verdict as being manifestly against the entire evidence. Beery v Northern States Power, ... M ....., 57 NW(2d) 838.

Where there is misconduct of counsel during opposing counsel's closing argument which involves the exposure to the jury of material evidence not properly received, such error is so fundamental and manifest as to require that the trial judge intervene on his own motion when he becomes aware of the situation and his failure to do so constitutes grounds for a new trial. Maher v Roisner, ... M ....., 57 NW(2d) 810.

Where the customer of a self-service store brought an action for injuries received caused by slipping upon a banana peel, and where the evidence viewed in a light most favorable to plaintiff fails to sustain the burden of proof of dangerous conditions within the knowledge of the defendant, the trial court properly granted defendant's motion for judgment notwithstanding the verdict. Messner v Red Owl Stores, ... M ....., 57 NW(2d) 659.

In an action for injuries sustained where plaintiff, while embarking on an airplane at defendant's airport, slipped on a rubber roller and fell between a removable stairway and the airplane to which it was adjacent, the evidence on the issue as to plaintiff's contributory negligence was for the jury, and an award of $50,000 to the

plaintiff who became afflicted with mutliple sclerosis was not excessive under the evidence which indicated that prior to the accident the plaintiff was young, healthy and capable of earning a substantial living as an accountant and capable of operating a profitable enterprise and that as a result of the accident he would be crippled for life. Weller v N.W. Airlines, ... M ....., 58 NW(2d) 739.

An unsuccessful defendant may challenge a verdict or ruling in favor of a codefendant, even though there is no cross-claim between them, because a judgment rendered on such a verdict or ruling conclusively and finally determines that such codefendant is not liable to claimant, thus precluding the unsuccessful defendant from ever recovering contribution from such codefendant. Muggenburg v Leighton, ... M ....., 60 NW(2d) 9.

Even though section 605.06 does not authorize an appeal from an order denying judgment notwithstanding the verdict in granting a new trial, there must be a compliance with the requirements of section 605.09 (4) which provides that an appeal to the supreme court may be taken from the order refusing or granting a new trial, if the court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon errors of law occurring at the trial and upon no other ground, and the court shall specify such errors in its order or memorandum. The order appealed from herein is not appealable. Schaumburg v Ludwig, ... M ....., 60 NW(2d) 12.

Only where evidence of absence of negligence or of the presence of contributory negligence is so clear as to leave no room for an honest difference of opinion among reasonable men may the court enter upon the province of the jury and set aside a verdict for the plaintiff. Those Siamese twins collectively called contributory negligence can have no existence unless both twins, known in legal parlance as (a) want of ordinary care and (b) causal connection, are present. Sanders v Gilbertson, 224 M 546, 29 NW(2d) 358.

Section 547.03, subdivision 2, which provides that "any adverse ruling or instruction of the court shall be deemed excepted to for all purposes," was not intended to obviate the necessity of seasonably calling the court's attention to inadvertent omissions or errors in the charge, but merely to eliminate the need for taking an exception where the court has acted adversely after its attention has been directed to the alleged error. Where a motion for a new trial is granted solely for errors of law and the errors specified by the trial court are inadequate, the order granting the motion may be sustained by showing other errors than those specified if such other errors are prejudicial and were properly raised. An appeal from an order setting aside a verdict for defendants and granting plaintiff a new trial does not bring up for review a nonappealable portion of such order which denied a motion by one of the defendants for a dismissal as to said defendant on the merits. Storey v Weinberg, 226 M 48, 31 NW(2d) 913.

The rule that a trier of fact cannot disregard positive testimony of an unimpeached witness until the record shows such improbability or inconsistency as furnishes a reasonable ground for so doing, has no application where witness' testimony is contradicted or where he is evasive. The trier of fact may reject the testimony of a witness where it is contradicted or where it is evasive. Grengs v Erickson, 225 M 153, 29 NW(2d) 881.

In a civil case where the appellant makes no assignment of errors on his appeal to the supreme court, no question is presented to it; but if the respondent voluntarily argues a question argued by the appellant, the appellate court will consider it. Erickson v Midgarden, 225 M 153, 31 NW(2d) 918.

If the trial court's decision in directing a verdict is sustained for any reason the fact that the trial court directed a verdict on another ground does not vitiate the decision. The defendant in this case was entitled to a directed verdict for the reason stated in the opinion which was, however, quite different from the reason announced by the trial judge. Bemboom v Nat'l Surety Corp., 225 M 163, 31 NW(2d) 1.

An order denying a motion for judgment notwithstanding the verdict is not an appealable order. Caswell v Minar Motor Co., ... M ....., 60 NW(2d) 263.

On appeal from an order denying a motion for new trial the question is not whether a new trial might properly have been granted but whether the trial court violated a clear legal right of the movant, or abused its judicial discretion in refusing to grant a new trial. While the law does not permit recovery of damages which are merely conjectural or speculative, it does not require proof to an absolute certainty. In an action to recover payments ordered in a divorce action for maintenance and support of defendant's minor children, conflicting evidence as to the amounts which plaintiff had received from defendant during the time involved presented questions for the jury, and the denial of defendant's motion for judgment notwithstanding the verdict in favor of plaintiff, was not error. Austin v Rosecke, ... M ....., 61 NW(2d) 240.

605.08 APPEAL, WHEN TAKEN

HISTORY. RS 1851 c 81 s 9; PS 1858 c 71 s 9; GS 1866 c 86 s 6; 1868 c 73; 1869 c 70 s 1; GS 1878 c 86 s 6; GS 1894 s 6138; RL 1905 s 4364; GS 1913 s 8000.

The six months rule of appeals to the supreme court. 35 MLR 641.

The 30-days rule in appeals to the supreme court. 35 MLR 645.

Appealable orders in Minnesota. There is no definition of "provisional remedies" except as are found in the supreme court decisions. The phrase is a "stalking horse" behind which appeals of all kinds of intermediate orders have crept. This, incidentally, delays action on the merits. The new rules may change the practice and create a new appeal formula. The present formula arose from the 1889 enactment and as yet contains no definition of "special proceedings" or "final order." 37 MLR 309.

An order under MSA, Section 65.01 appointing an umpire as a member of a board of appraisers to determine the amount of loss or damage caused by fire is premature and void where the insured has not rendered to the insurer written proof of loss, even though the insured was guilty of delay in failing to do so.

The district court has the power before judgment to review or vacate an order appointing an umpire under section 65.01 after the time to appeal from an order has expired. Boston Ins. Co. v Jacobson Co., 226 M 479, 33 NW(2d) 602.

An order refusing to vacate an unauthorized judgment is appealable, but one refusing to vacate a judgment authorized by order is not appealable. In such a case, the statutory appeal from the judgment itself is exclusive. Breslaw v Breslaw, 229 M 371, 39 NW(2d) 499.

An order of the district court denying a motion to vacate a prior order of the court is not an appealable order where it appears from the record that the original order was a final one and was not appealed from within the time limited by statute. In this case the appeal from denial by landowners' motions to revise the order of the district court confirming appraisal of realty by appraisers appointed by the court in proceedings to acquire land for park purposes was barred under the statute by the landowners' failure to appeal within the statutory period from the original order confirming the award. Kolb v City of Minneapolis, 229 M 483, 40 NW(2d) 619.

A second motion for a new trial may be made when it is based on grounds not included in the first motion and satisfactory reasons appear for the omission. Justification for omission of grounds in motion for a new trial to enable a party to file a second motion for the same relief will not be predicated merely on the fact that newly substituted attorneys received certain grounds of error which their predecessors had not recognized or had chosen to ignore. Trickel v Calvin, 230 M 322, 41 NW(2d) 426.

Where a motion for a new trial is denied and without a vacation of that order and after time for appeal therefrom has expired, a second motion for a new trial is denied, the last order is in substance nothing more than one refusing to vacate an appealable order, and is not appealable. Trickel v Calvin, 230 M 322, 41 NW(2d) 426.

Although limitations upon the time for taking an appeal are to be liberally construed to avoid a forfeiture of the right of appeal, neither the supreme court nor

the district court can extend the time for appeal by stay of proceedings or by an order designed to accomplish that purpose directly or indirectly. An order denying a motion to vacate a default judgment, and an order to show cause to obtain vacation of such order denying the motion to vacate could not be vacated for the purpose of extending the time of appeal as fixed by statute. Weckerling v McNiven Land Co., 231 M 167, 42 NW (2d) 701.

Where an appeal is taken from a nonappealable order or judgment it will be dismissed by the court notwithstanding the failure of respondent to move for a dismissal. An order of the district court denying a motion to vacate a prior order of the court is not an appealable order when it appears from the record that the original order was a final one and was not appealed from within the time limited by statute. An order denying a motion to file a supplemental paragraph to the complaint made before judgment is not appealable. Burkholder v Burkholder, 231 M 285, 43 NW(2d) 801.

Where the effect of an order cutting off a stay of proceedings was to foreclose defendant from taking a motion for a new trial, thereby also depriving it of advantages of broader review scope afforded by appeal from an order denying a new trial as compared with appeal from an adverse judgment, defendant was sufficiently prejudiced by the action of the court in entering such order to be entitled to an alteration writ requiring vacation of the order. Crawford v Woodrich, 236 M 547, 51 NW(2d) 822.

Notwithstanding the fact that time for appealing from an order has expired, an appeal from a judgment entered pursuant to an order sustaining a demurrer brings such order up for review. Viiliainen v American Finnish Workers Soc., 236 M 412, 53 NW(2d) 112.

The finality of an order awarding custody of children to the father was not affected by a subsequent order granting the mother certain visitation privileges. The thirty-day limitation still remains. McCrank v McCrank, ... M ....., 59 NW(2d) 309.

An appeal from an order may be taken within 30 days after written notice of the same from the adverse party. The statute is mandatory and neither the parties nor the court has power to grant an extension of such period. McCrank v McCrank, ... M ....., 59 NW(2d) 309.

605.09 APPEAL TO SUPREME COURT

HISTORY. RS 1851 c 81 s 11; 1856 c 5 s 18; PS 1858 c 71 s 11; 1861 c 22 s 1; 1866 c 66 s 302; GS 1866 c 86 s 8; 1867 c 63 s 1; GS 1878 c 66 s 340; GS 1878 c 86 s 8; 1889 c 106 s 2; GS 1894 s 5489, 6140; RL 1905 s 4365; 1913 c 474 s 1; GS 1913 s 8001; 1931 c 252; 1945 c 463 s 1.

Current legislation. 32 MLR 366, 376.

Final judgment as a basis of appeal from the federal district courts. 32 MLR 624.

Judicial review by means of extraordinary remedies in Minnesota. 33 MLR 570, 685, 712.

Proximate cause in Minnesota. 34 MLR 185.

Res judicata effect of an administrative determination in a subsequent judicial proceeding. 35 MLR 576.

Review of orders by appeal from the judgment. 35 MLR 646.

Appeal of orders after entry of judgment. 35 MLR 647.

Conditional and modified orders. 35 MLR 648.

Successive orders, rule of Barrett v Smith. 35 MLR 648.

Final orders in special proceedings. 35 MLR 652.

Appealability of judgment on less than all claims in an action. 36 MLR 403.

Appeal from final judgment. 36 MLR 407.

Attorney and client; privileged communications. 36 MLR 408.

Insanity defense as part of substantive due process; and right of defendant properly raising issue to procedural due process in its determination. 36 MLR 933.

A survey of past and present status of appealable orders. 37 MLR 309.

Appealable orders in Minnesota. There is no definition of "provisional remedies" except as are found in the supreme court decisions. The phrase is a "stalking horse" behind which appeals of all kinds of intermediate orders have crept. Incidentally this delays action on the merits. The new rules may change the practice and create a new appeal formula. The present formula arose from the 1889 enactment and as yet contains no definition of "special proceedings" or "final order." 37 MLR 309.

In determining proper scope of review the supreme court looks to the origin of the judgment. Shema v Thorpe Bros., ... M ....., 57 NW(2d) 157.

An appeal from an order which is appealable in part and non-appealable in part brings up for review only that part which is appealable. Storey v Weinberg, 226 M 48, 31 NW(2d) 912.

The merits of a non-appealable order cannot be reviewed in the supreme court by taking an appeal from an order denying a motion for amendment thereof or a new trial. State v Bentley, 224 M 244, 28 NW(2d) 770.

The supreme court has only appellate jurisdiction and cannot overlook the fact that an order is non-appealable. State v Bentley, 224 M 244, 28 NW(2d) 770.

The appellate jurisdiction of the supreme court may not be enlarged or conferred by consent or stipulation of the litigants. State v Bentley, 224 M 244, 28 NW(2d) 179, 770.

Ordinarily only parties to record or their privies may appeal. Petition of Schoenfelder, ... M ....., 55 NW(2d) 305.

The mother of an illegitimate child had a definite personal financial interest in the amount of award for support of child made by court in paternity proceeding and was an "aggrieved party" entitled to appeal from support order. State v Sax, 231 M 1, 42 NW(2d) 680.

Mother of illegitimate child did not waive her rights to present her case in proceeding to adjudicate a support order for child and to appeal from such order by requesting and holding an informal conference with trial judge. State v Sax, 231 M 1, 42 NW(2d) 680.

Special guardian of incompetent whose authority was limited to prosecution of appeal from order restoring ward to capacity and whose power was terminated by termination of appeal, has no function to perform, and no interest in final account of general guardian, and was not an "aggrieved party" entitled to appeal from order allowing final account of general guardian. Re Guardianship of Hudson, 236 M 550, 53 NW(2d) 136.

In an action by a surety against principals and their wives to recover judgment, set aside mortgages from the principals to their wives, and for the appointment of receiver of other nonexempt assets belonging to the principals, where the mortgages to the wives were declared to be regular and valid, litigation as to the wives was at an end, and the wives were not "aggrieved parties" who could appeal from a subsequent order of the court that the receiver turn over funds in his possession to the surety; and where the wives acquiesced in the validity of the receiver's appointment for over four years, they are not in a position to attack the appointment. London & Lancashire Indemnity Co. v Nelsen, 230 M 423, 41 NW(2d) 826.

Generally, no appeal lies from an ex parte order. McCrank v McCrank, ... M ....., 59 NW(2d) 309.

Order canceling notice of lis pendens is appealable under a statute providing for appeal from order granting or refusing a provisional remedy, granting, refusing,

dissolving, or refusing to dissolve an injunction, or vacating or sustaining an attachment. Rehnberg v Minnesota Homes, 234 M 419, 49 NW(2d) 197.

Order granting wife custody of spouses' minor child, support money therefor, and use of spouses' household furniture and effects pending husband's divorce suit and restraining him from interfering with wife and child, was appealable only as to part pertaining to application for monetary relief pendente lite, and part concerning child's custody was not appealable. Burkholder v Burkholder, 231 M 285, 43 NW(2d) 801.

Order denying motion to vacate non-appealable order denying motion to vacate authorized default judgment was non-appealable. Weckerling v McNiven Land Co., 231 M 167, 42 NW(2d) 701.

Ex parte orders are not appealable, since it is ordinarily supposed that a trial court, which may have acted erroneously on a one-sided application, will perceive and correct its error if an adverse party is heard. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Order granting a motion to intervene in condemnation proceedings, determining that property had been taken and appointing commissioners to ascertain damages, is not appealable. State v Bentley, 224 M 244, 28 NW(2d) 179, 770.

A judgment mandamusing state as a remedy for condemnation of lands omitted in original condemnation proceedings is appealable as involving a final adjudication on issue whether such lands were actually taken. State v Anderson, ... M ....., 58 NW(2d) 257.

Order which is finally determinative of an action so as to be appealable, relates to, and is decisive of, the fundamental issue on which the suit is based. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Ordinarily appeal is not allowed except from an order which is final as to matter which it determines, and when an appeal is allowed, it is done generally on the assumption that the order is final and conclusive and that the appeal is necessary to review and correct any error therein. Re Enger's Will, 225 M 229, 30 NW(2d) 694.

A "final order" is one that ends the matter of proceeding so far as the court making it is concerned. Re Enger's Will, 225 M 229, 30 NW(2d) 694.

Words "final" and "conclusive" when used in connection with judgment or order imply finality, termination or end of matter decided, except for appellate review, and mean that the matter decided is irrefutable and admits of no explanation or contradiction. Re Enger's Will, 225 M 229, 30 NW(2d) 694.

In two proceedings on petitions of trustees of inter vivos and testamentary trusts for allowance of their accounts, orders denying motions to consolidate the proceedings with beneficiary's actions against trustees for accounting based on alleged wrongful acts were not appealable. Plunkett v Lampert, 231 M 484, 43 NW(2d) 489.

Order releasing portion of a joint and several bank account from levy of execution by judgment creditor of one of the depositors is appealable as an order made in proceedings supplementary to execution. Park Enterprises v Trach, 233 M 473, 47 NW(2d) 197.

An order denying husband's motion to add supplemental paragraph to his complaint in divorce suit before trial thereof on merits and judgment therein, was not appealable. Burkholder v Burkholder, 231 M 285, 43 NW(2d) 801.

A judgment entered upon an order sustaining a demurrer to complaint adjudging that the court has sustained the demurrer is determinative of the rights of the parties, even though it contains no provision for a dismissal of the action or for costs and disbursements for the defendant. An order sustaining a demurrer to the complaint is appealable before the entry of a judgment but not afterwards. Seagram v Lang, 229 M 516, 41 NW(2d) 429.

Order granting motion to amend answer was not appealable. Allum v Federal Cartridge Co., 225 M 438, 30 NW(2d) 705.

Appeal does not lie from order denying motion for amended findings. Radabaugh v Just, 225 M 187, 30 NW(2d) 534; Blacque v Kalman, 225 M 258, 30 NW(2d) 599.

An order denying the motion of defendant appearing specially for that purpose objecting to the jurisdiction of the court, on the ground that defendant is a nonresident and that the court has not acquired jurisdiction either over him or over the property described in the complaint, is appealable. Curran v Nash, 225 M 571, 29 NW(2d) 436.

Order denying plaintiff's motion to strike out a pleading as sham, frivolous, or irrelevant is not appealable. Alansky v Northwest Airlines, 224 M 138, 28 NW(2d) 181.

Order denying motion to set aside service of summons upon a domestic corporation on ground that service was not made on an officer or managing agent as required by statute, is appealable. Dillon v Gunderson, 235 M 208, 50 NW(2d) 275.

Order denying motion to bring in additional parties is not appealable under this section relating to an order involving the merits of the action or some part thereof. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Order either granting or denying a motion for joinder of additional parties defendant or plaintiff in an injury action is not appealable on ground that it involves a "special proceeding" within this section. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Where verdict was returned for defendants, and at hearing on plaintiff's motion for new trial, one of defendants moved for dismissal on the merits, and such motion was denied by the same order which granted plaintiff's motion for new trial, portion of the order denying defendant's motion for dismissal on the merits was non-appealable. Storey v Weinberg, 226 M 48, 31 NW(2d) 912.

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 No. 84 of Redwood County v Rittmiller, 235 M 556, 51 NW(2d) 664.

Order denying motion for amended findings is not appealable. Urbanski v Merchants Motor Freight, ... M ....., 57 NW(2d) 686; Physicians & Hospitals Supply Co. v Johnson, 231 M 548; 44 NW(2d) 204.

Order denying motion for amended findings of fact or for additional findings of fact and additional conclusions of law is not appealable. Anderson v Tuomi, 230 M 490, 42 NW(2d) 204.

Order denying motion for amended findings is not appealable, hence, where alternative motion for amended findings or new trial is denied, only the order denying a new trial is reviewed. Marso v Graif, 226 M 540, 33 NW(2d) 717.

Ordinarily order denying motion for more definite and certain findings of fact is not appealable, but where the order was made after trial and before entry of judgment, it could be reviewed upon appeal from the judgment where no motion for a new trial has been made. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

Order denying motion for amended findings is not appealable, though accompanied by a motion for a new trial. Cashen v Owens, 225 M 25, 29 NW(2d) 440.

Order denying motion for judgment notwithstanding verdict but granting a new trial for errors of law, was an appealable order. Hicks v Northern Pacific Ry. Co., ... M ....., 58 NW(2d) 750.

A non-appealable order cannot be carried to the supreme court for review on the merits by means of an appeal from an order granting or refusing a motion to vacate such order. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Generally, a motion to vacate a non-appealable order can only cure an appealability defect which arises from an ex parte birth and not those which are otherwise inherent therein. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Orders which grant or deny motions for vacation of an order either denying or granting the joinder of additional parties to an action are not appealable. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Since an order dismissing an action for want of prosecution is non-appealable and an order refusing to vacate or vacating a non-appealable order is as a general rule also non-appealable, an order refusing to vacate an order dismissing an action for want of prosecution is within the general rule and is also non-appealable. Quevli v First National Bank of Windom, 226 M 102, 32 NW(2d) 146.

Order vacating both appealable and non-appealable orders is appealable so far as it relates to appealable orders. Re Enger's Will, 225 M 229, 30 NW(2d) 694.

An order vacating a judgment is appealable. Re Enger's Will, 225 M 229, 30 NW(2d) 694.

A judgment which is not appealable directly because it lacks finality may not be appealed from indirectly by appealing from an order denying motion to vacate it. State v Anderson, ... M ....., 58 NW(2d) 257.

Order denying motion to vacate order dismissing appeal by landowner from order of county board establishing a county ditch, was not appealable. Re Petition to Enlarge County Ditch No. 27 in Renville County, 232 M 329, 45 NW(2d) 555.

Order denying husband's motion to vacate previous orders in his divorce suit and award him parties' minor child's custody is not appealable, and an appeal therefrom should be dismissed, though defendant does not move for dismissal thereof. Burkholder v Burkholder, 231 M 285, 43 NW(2d) 801.

A district court order denying motion to vacate prior order, shown by record to be final and not appealed from within statutory time, is not an appealable order. Burkholder v Burkholder, 231 M 285, 43 NW(2d) 801.

Order refusing to vacate an unauthorized judgment is appealable. Weckerling v McNiven Land Co., 231 M 167, 42 NW(2d) 701.

The statutory appeal from judgment being exclusive method for reviewing an authorized judgment and correcting it if erroneous, the law does not permit of review by appeal from order denying a motion to vacate or modify judgment. Weckerling v McNiven Land Co., 231 M 167, 42 NW(2d) 701.

Orders denying vacation of an authorized default judgment were not appealable. Weckerling v McNiven Land Co., 231 M 167, 42 NW(2d) 701.

Order denying a motion to vacate a non-appealable order is not appealable. Bennett v Johnson, 230 M 404, 42 NW(2d) 44.

The supreme court would consider on its merits appeal from an order denying motion to vacate an order striking answer as sham, since rule permitting an appeal from order refusing to vacate an appealable order was in effect at the time appeal was taken. Bennett v Johnson, 230 M 404, 42 NW(2d) 44.

An order denying a motion to vacate an order which is itself appealable is not appealable. Bennett v Johnson, 230 M 404, 42 NW(2d) 44.

A non-appealable order cannot be carried to supreme court for review on the merits by means of an appeal from an order granting or refusing a motion to vacate such order. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Where motion for new trial is denied, and without a vacation of that order and after time for appeal therefrom has expired, a second motion for a new trial is denied, the last order is in substance nothing more than one refusing to vacate an appealable order, and is not appealable. Trickel v Calvin, 230 M 322, 41 NW(2d) 426.

Order refusing to vacate an unauthorized judgment is appealable, but one refusing to vacate a judgment authorized by order is reviewable only by appeal from the judgment. Breslaw v Breslaw, 229 M 371, 39 NW(2d) 499.

Orders denying motions to vacate judgment and decree in divorce suit were not appealable. Breslaw v Breslaw, 229 M 371, 39 NW(2d) 499.

Order refusing to strike order of trial court and part of its memorandum was not appealable. Allum v Federal Cartridge Corp., 225 M 438, 30 NW(2d) 705.

A judgment, to be appealable, must be a final determination of rights of parties in the action, but only in the sense of terminating the particular action. H. Christianson & Sons v City of Duluth, 225 M 486, 31 NW(2d) 277.

Where order, sustaining general demurrer to complaint, permitted plaintiff to file amended complaint within 30 days but it was not filed within that time, and thereafter trial court, on plaintiff's motion, made order dismissing action without prejudice, judgment entered pursuant thereto deprived defendant of its right to judgment of dismissal with prejudice and the judgment was final and appealable. H. Christianson & Sons v City of Duluth, 225 M 486, 31 NW(2d) 277.

On appeal from a judgment, any intermediate order involving merits or necessarily affecting the judgment appealed from may be reviewed. Shema v Thorpe Bros., ... M ....., 57 NW(2d) 157.

On appeal from a judgment after a new trial on question of damages alone, the supreme court may review any intermediate orders involving the merits necessarily affecting the judgment and this is true of intermediate orders which are appealable even though the time for appealing therefrom has expired before the appeal from the judgment. Zyweic v City of South St. Paul, 234 M 18, 47 NW(2d) 465.

An appealable order made after trial and before entry of judgment can be reviewed only upon appeal from judgment where no motion for new trial has been made. Frisbie v Frisbie, 226 M 435, 38 NW(2d) 23.

Order canceling a notice of lis pendens was appealable under paragraph (2) of this section relating to a provisional remedy, an injunction, and an attachment. Rehnberg v Minnesota Homes, 235 M 562, 49 NW(2d) 196.

An order of the district court requiring the defendant to return certain property to plaintiff, or in lieu thereof, to post bond to be an alternative temporary mandatory injunction, is appealable. Where defendant, during pendency of an equitable action, wrongfully, by self-help, gained possession of property which was the subject of the action, in violation of plaintiff's rights therein, and where it was shown that otherwise a judgment for plaintiff in the main action would be ineffectual because of defendant's insolvency, district court had jurisdiction under section 585.02 to grant an alternative temporary mandatory injunction to restore the status quo ante. Bellows v Ericson, 233 M 320, 46 NW(2d) 654.

In beneficiary's actions against trustees of inter vivos and testamentary trusts for accounting based on alleged wrongful acts, orders denying motions for order restraining trustees from proceeding with hearings on their own accounts as trustees was refusal of a provisional remedy for injunction and was appealable. Plunkett v Lampert, 231 M 484, 43 NW(2d) 489.

Order granting a new trial is not appealable. Waterhouse v Brandon, 234 M 351, 48 NW(2d) 330.

Where order granting motion for new trial was entered after judgment, such order in effect vacated judgment and was appealable. Weberg v C. M. St. P. & P. R. Co., ... M ....., 59 NW(2d) 317.

The slightest doubt as to judicial discretion renders order granting new trial unappealable. Von Bank v Mayer, ... M ....., 59 NW(2d) 307.

Where court did not expressly state, in order and memorandum, that new trial was granted exclusively for errors of law occurring at trial, but stated that irregularities before and during trial constituted clear abuse of discretion on part of court,

making particular mention of one such irregularity but not limiting the order to such ground, and that there might be other irregularities, unspecified, appearing in transcript, it did not clearly appear that no element of judicial discretion was exercised in granting new trial, and order granting new trial was non-appealable. Von Bank v Mayer, ... M ....., 59 NW(2d) 307.

Where jury implicitly found that driver of automobile was negligent, failure of trial court to instruct that driver was negligent as a matter of law was not prejudicial error, and trial court erred in granting new trial because of failure to give such instruction. Mutual Service Casualty Insurance Co. v Overholser, ... M ....., 58 NW(2d) 268.

On appeal from order vacating verdict for defendants in a personal injury action and granting plaintiff a new trial exclusively on ground that error had been committed in submitting issue of plaintiff's contributory negligence to the jury, other errors assigned in the motion for a new trial were properly before the appellate court for review. Damrow v Zauner, 236 M 447, 53 NW(2d) 139.

In order to render appealable order granting new trial the order or memorandum must either expressly state that the new trial was granted exclusively for specified errors of law occurring at the trial, or it must clearly appear that the new trial was granted upon specified errors of law occurring at trial and upon no other ground, and it must unmistakeably appear that no element of judicial discretion was exercised. Von Bank v Mayer, ... M ....., 59 NW(2d) 307.

Where order granting new trial, a memorandum expressly showed that new trial was granted exclusively upon errors of law occurring at trial and upon no other ground involving exercise of judicial discretion, order was appealable even though exact language of paragraph (4) of this section relating to an order granting a new trial was not followed. Weatherhead v Burau, 237 M 325, 54 NW(2d) 570.

Where alleged errors of law on which trial court based its order granting new trial were not expressly stated in order or memorandum as required by statute, order was not appealable, and appeal would be dismissed. Voller v Schmitz, 236 M 155, 52 NW(2d) 289.

Order denying plaintiff's motion for a new trial after the court had granted defendants' motion for judgment on the pleadings is appealable. Fox v Swartz, 228 M 233, 36 NW(2d) 708.

An amended pleading supersedes original pleading and must be construed as only pleading interposed, so that order sustaining demurrer to original complaint will not be considered on appeal from order sustaining demurrers to both original and amended complaints. Berghuis v Korthuis, ... M ....., 37 NW(2d) 809.

Order which denied motion to substitute representative plaintiffs for a disqualified representative plaintiff in taxpayers' suit, made subsequent to order for judgment in plaintiff's favor, was appealable under paragraph (5) notwithstanding appealed-from order did not prevent a judgment of dismissal in favor of defendants. Phillips v Brandt, 231 M 423, 43 NW(2d) 285.

Paragraph (5) relates to order which presents a specific judgment already ordered even though a judgment of dismissal in favor of opposite party may be entered and appeal taken therefrom. Phillips v Brandt, 231 M 423, 43 NW(2d) 285.

The phrase "special proceeding" as used in statute providing that appeal may be taken to supreme court from a final order affecting a substantial right, made in a "special proceeding," is a generic term for any civil remedy in a court of justice, which is not of itself an ordinary action and which, if incidental to an ordinary action, independently of the course of procedure in such action, terminates in an order which, to be appealable, must adjudicate a substantial right with decisive finality separate from any final judgment entered or to be entered in such action on the merits. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

On appeal from order denying motion for amended findings or for a new trial, the appellate court will consider only issues submitted on the motion and those in light most favorable to the findings. Williams v Cass-Crow Wing Co-operative Assn., 224 M 275, 28 NW(2d) 646.

A verdict will not be disturbed on appeal, if the evidence fairly tends to sustain it, even if different persons might reasonably draw different conclusions from the evidence or if the evidence might justify a verdict for either party. Delyea v Goossen, 226 M 91, 32 NW(2d) 180.

A writ of prohibition is a preventative not available to correct errors or reverse illegal proceedings; and on appeal from orders of the railroad and warehouse commission the court may exercise judicial, but not legislative or administrative powers. It may not direct the commission as to what orders it must make. Arrowhead Bus v Black & White Cab, 226 M 327, 32 NW(2d) 590.

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.

Review on appeal must be limited to the record. To justify reversal of a judgment the record must show affirmatively that there was material error. In an action for accounting the finding of a balance due necessarily negatives all items litigated and not allowed in arriving at the balance. The burden is upon the defendant to show that there is no substantial evidence reasonably pending to sustain the findings of fact. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

On an appeal involving only the sufficiency of the evidence to justify a verdict, it is not necessary for the supreme court to review and discuss the evidence to demonstrate the correctness of the verdict. The fact alone that the testimony of the plaintiff is opposed by that of two other witnesses is not enough to warrant setting aside a verdict based on the testimony of the plaintiff. In an action under the Federal Employers' Liability Act evidence that boards or blocks, such as the plaintiff, a railroad brakeman, claimed to have tripped over while walking in a pathway to the switch, were customarily used in railroad yards by the defendants' employees for blocking car wheels, justified the jury in drawing an inference that the brakeman tripped over such blocks, that the block was placed there through negligence of defendants' employees and the defendant was charged with constructive knowledge of the presence of the block so as to be liable for injuries sustained by the plaintiff. Clark v Chicago & North Western Ry. Co., 226 M 375, 33 NW(2d) 484.

Where inadmissible evidence was received over plaintiff's objection, but evidence to the same effect had previously been offered and received without objection, plaintiff's motion for a new trial was properly denied. Where any discovered evidence is cumulative only the trial court may determine whether the ends of justice require a new trial. Manahan v Jacobson, 226 M 505, 33 NW(2d) 606.

An appellate court is not required to discuss and review in detail the evidence to demonstrate that it supports the court's findings. Its duty is performed when it considers all the evidence and determines that it reasonably supports them. Board of Education v Sand, 227 M 202, 34 NW(2d) 689.

When the supreme court reverses an order of judgment with directions as to the order of judgment to be entered upon remittitur, it is the duty of the trial court to execute the mandate of the supreme court precisely according to its terms without alteration, modification, or change in any respect. The court may not give one party an unfair advantage over another by seizing upon and adopting a narrow and technical admission in pleadings without regard to significance and import of pleadings as a whole. Holden v Farwell, 226 M 243, 34 NW(2d) 920.

Alleged errors in instructions were not reviewable where no exception was taken to the instructions and errors were not assigned in the motion for a new trial. Murray v Wilson, 227 M 365, 35 NW(2d) 521.

The findings of fact of the trial court are entitled to the same weight as a verdict of a jury and will not be reversed on appeal unless manifestly and palpably contrary to the evidence. On appeal the testimony must be considered in the light most favorable to the appellee. Lipinski v Lipinski, 227 M 511, 35 NW(2d) 708.

On appeal from order denying a motion for a new trial, when no ground for a new trial is stated in the motion, no question is raised and the order must be affirmed. Coughlin v Rosemount, 228 M 494, 35 NW(2d) 744.

In awarding permanent alimony payable in periodic instalments the court in complying with the one-third statutory limitation may take into consideration not only the earnings and income of the husband but also his entire estate, both real and personal; and where the findings of the trial court are silent as to value of property assigned to the wife in a divorce proceeding and the record does not contain the evidence upon which the findings are based, it is presumed that the property is of nominal value. McKey v McKey, 228 M 28, 36 NW(2d) 17.

The duty to pay alimony and support money is a primary obligation that takes precedence over wilfully incurred subsequent obligations which go beyond the husband's reasonable needs. Subsequent marriage of a divorced husband is a voluntary act and not a circumstance which requires a modification of allowances in a divorce decree. McKey v McKey, 228 M 28, 36 NW(2d) 17.

In determining whether the facts and reasonable inferences to be drawn from them sustain the findings of the industrial commission, the evidence must be reviewed in the light most favorable to such findings; and, where a question of cause and effect is involved, the conclusion must be left to the industrial commission where the evidence is conflicting and will sustain a finding either way. The industrial commission is not bound or controlled by findings of fact made by a referee. An assignment of error is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection, where the assignment is based on mere assertion and is not supported by argument or authorities. Schmoll v Craig, 228 M 429, 37 NW(2d) 539.

Amendment of pleadings is largely in the discretion of the trial court and its action will not be reversed on appeal unless it was clearly an abuse of discretion. Aasen v Aasen, 228 M 307, 36 NW(2d) 27.

On appeal from order denying motion for judgment notwithstanding verdict, the evidence must be reviewed in the light most favorable to the prevailing party. The verdict will not be set aside unless it is manifestly and palpably contrary to the evidence. Hagerty v Radle, 228 M 487, 37 NW(2d) 819.

The evidence in the record justified a finding that the entry by defendant Hoskins into the highway without yielding the right-of-way to plaintiff's truck approaching thereon, coupled with her attempt to make a lefthand turn at an intersection without signalling, was the proximate cause of plaintiff's colliding with a telephone pole. On plaintiff's appeal from a judgment for defendant notwithstanding the verdict for the plaintiff, the supreme court takes a view of the evidence most favorable to plaintiff. Peterson v Jewell Tea Co., 228 M 521, 38 NW(2d) 51.

Where the defendant appeals on the ground that the verdict is excessive, or was influenced by passion or prejudice, he must point out in what particulars the verdict was excessive or was so influenced. Perry v Reuter, 229 M 44, 38 NW(2d) 60.

Where the evidence established that an order of convenience and necessity made by the commission would not materially interfere with the respondent's revenue, it was error for the trial court to find that the commission's order resulted in confiscation of respondent's properties; and on appeal from the district court's judgment vacating the order of the commission, the issue in the supreme court is not whether the evidence is sufficient to sustain the district court's findings and conclusions, but rather whether all the evidence presented including evidence before the commission and the district court as well, reasonably sustains the district court's finding that the commission's order was unlawful and unreasonable. Twin City Motor Bus v Rechtziegel, 228 M 14, 38 NW(2d) 825.

Facts and conclusions stated in the trial court's memo and made a part of its decision, which are not in consistency with facts specifically found and conclusions specifically made, become a part of the decision, and if such facts are supported by the evidence, or if the facts and conclusions are unchallenged they are final on appeal. Land O'Lakes Dairy Co. v Wadena County, 229 M 263, 39 NW(2d) 164.

Where the residuary beneficiary under a will approved the federal estate tax settlement including refund of the tax paid by the testator's widow as executrix on the value of bonds purchased by her but held in joint tenancy with the testator, and erroneously included in the inventory for purposes of such tax, and made no reference in his motion for amended findings and conclusions to point that such payment required modification of the probate court's order allowing the final act of the executrix including charge of the amount so paid, there was no issue as to such matter for determination by the supreme court on appeal from the district court's judgment affirming the order. Gelin v Gelin, 229 M 516, 40 NW(2d) 342.

Where the plaintiff was contributorily negligent as a matter of law, errors in admission of evidence relating to defendant's negligence or misconduct of counsel was harmless and furnished no ground for a new trial; and where the verdict is right as a matter of law there will be no reversal on account of errors in the admission of evidence, instructions of the court, or misconduct of counsel which does not affect the correctness of the verdict. McGuiggan v St. Paul City Ry. Co., 229 M 534, 40 NW(2d) 429.

Where the defendant railroad objected to plaintiff's testimony that he attempted to find a unit to replace his truck which had been damaged in a crossing collision, but defendant did not assign as error the overruling of his objection, the alleged error was not before the appellate court; and where the plaintiff testified that his truck was laid up from Nov. 15, 1947 to Jan. 22, 1948, and the defendant railroad made no objection to the testimony and did not cross-examine on the point and did not assign as error the unreasonableness of the period of repair, the question of reasonableness of the period of repair cannot be considered by the appellate court. Kopischke v Chicago, St. P. M. & O. Ry., 230 M 23, 40 NW(2d) 834.

Where an action is tried by the court without a jury its findings of fact are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. Such rule applies whether the appeal is from a judgment or from an order granting or denying a new trial, and whether the evidence is oral or documentary. The function of the supreme court is to determine whether there is any substantial evidence to sustain the conclusion of the trial court. Burman v Burman, 230 M 75, 40 NW(2d) 902.

An award of $500 increased to $1,000 by additur, to a motorist for damages to his automobile and personal injuries, including a sacro-iliac sprain, was inadequate; and although the grant or refusal of a new trial for inadequate damages rests largely with the trial court, whose decision thereon is subject to the general rule applicable to other discretionary orders for purposes of review, a new trial is ordered by the appellate court where upon the record the damages awarded appear inadequate. Olson v Christensen, 230 M 198, 41 NW(2d) 248.

"Judicial discretion" is the sound choosing by the court, subject to the guidance of the law, between doing or not doing a thing, the doing of which cannot be demanded as an absolute right of the party who asks that it be done. On motion to bring in additional parties the trial court, in passing on the motion, necessarily exercises a broad discretion and may consider a variety of factors. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Where a judgment was entered for defendant on an order sustaining a demurrer to a complaint with a notice to plaintiff and no provision was made for a dismissal of the action or for costs and disbursements for defendant, the judgment was final, though irregular, and an order sustaining the demurrer was not appealable after entry of the judgment. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

On appeal from order granting defendant's motion for judgment non obstante pursuant to the motion therefor or in the alternative for a new trial, sharply conflicting evidence must be construed by the supreme court in the light most favorable to verdict for plaintiff. Demmer v Grunke, 230 M 188, 42 NW(2d) 1.

Order denying a motion to vacate a non-appealable order is non-appealable. The rule as stated in United States Roofing Co. v Melin, 160 M 530, 200 NW 807, and followed in Bruce v Cohn, 172 M 386, 215 NW 520, Johnson v Kruse, 205 M 237, 285 NW 15, is expressly overruled. Bennett v Johnson, 230 M 404, 42 NW(2d) 44.

Where no objection to submission of alleged erroneous instruction to the jury was made by the defendant at the close of the charge, and court's attention was not directed to the claimed error, the omission or error was not ground for granting a new trial. Although a formal exception need not be taken to an inadvertent omission or error in a trial court's instruction to the jury, such omission or error is no ground for granting a new trial unless the trial court's attention has been seasonably directed thereto in some manner. Mickelson v Kernkamp, 230 M 448, 42 NW(2d) 18.

Where plaintiff and intervenor moved to dismiss their respective appeals taken from a non-appealable order, without prejudice to their right to enter judgment in trial court and to appeal therefrom, but parties had given defendants less than required eight days notice on hearing on motion, appeals would be dismissed, but in order to avoid multiplicity of applications and since no prejudice will result to defendants, supreme court, of its own motion, would dismiss appeals for lack of jurisdiction and direct that a subsequent appeal would be heard and considered on record and briefs on file. Muirhead v Johnson, 232 M 408, 42 NW(2d) 318.

Where a taxpayer brings an action to enjoin a city official from paying a salary to a city employee, the action is representative suit, and the trial court has inherent discretionary power to substitute a new plaintiff who is within the classification of those on whose behalf the suit was instituted, where original representative has become disqualified subsequent to trial and order for judgment. Where the court fails to exercise such power in the belief that it did not possess it, the case must be remanded for the exercise of such discretion by the court. Where the action relates to the performance of a continuing duty pertaining to a public office, irrespective of the incumbent, it does not abate upon expiration of the term of the original office holder, named as defendant therein, and his successor may be and should be substituted as such defendant so as to be bound by the judgment in his official capacity. Phillips v Brandt, 231 M 423, 43 NW(2d) 284.

Where the testimony of a party to the action consists of a narrative of events in which the party participated or which he observed, such testimony may be contradicted by the testimony of other witnesses. Conflicting testimony of witnesses as to the movement of defendants' truck presented question of fact for the jury as to negligence and proximate cause, even though it would appear as a matter of law from plaintiff's testimony, standing alone, that negligence was not proximate cause of plaintiff's injuries. Where plaintiff in one action sued for $2,500 and jury returned a verdict of $4,500, which was reduced on motion of plaintiff to $2,500, and plaintiff in the other action sued for $1,100 and jury returned verdict of $1,600, which was reduced on motion of plaintiff to $946.04, the amount of the repair bill, and where the verdicts were against the great weight of the evidence, there should be a new trial rather than a remittitur. McHardy v Standard Oil Co. of Indiana, 231 M 493, 44 NW(2d) 91.

On appeal from a judgment entered after denial of defendant's motion for judgment notwithstanding verdict for plaintiff or a new trial, the evidence would be viewed in the light most favorable to the plaintiff. Benston v Berde, 231 M 451, 44 NW(2d) 481.

A motion for a directed verdict, by its very nature, accepts the view of the entire evidence most favorable to the adverse party and admits the credibility, except in extreme cases, of the evidence in his favor and all reasonable inference to be drawn therefrom. Hanrahan v Safway Steel Scaffold Co., 233 M 171, 45 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.

To warrant overturning a verdict for passion or prejudice, the damages must so greatly exceed adequate compensation as to be accounted for on no other basis. Peculiar facts may be applicable in determining the amount of damage and the diminished value or purchasing power of the dollar may be taken into consideration. In the instant case the amount was not excessive. Gilbertson v Gross, 232 M 373, 45 NW(2d) 547.

In an intersectional collision case the refusal of the trial court to give the requested instructions was reversible error. Plaintiff should not be held contributorily negligent as a matter of law where the evidence of whether he committed a negligent act is conflicting, or where there is a lack of evidence which would compel a finding that such negligence was the proximate cause of his injuries; and where there is credible evidence that plaintiff was traveling at an unlawful speed, that issue should be submitted to the jury with instructions as to the applicable speed limit and with instructions that a driver forfeited his right-of-way when traveling at an unlawful speed. Fisher v Clarkson, 233 M 318, 46 NW(2d) 665.

In a divorce action findings of trial court which are supported by the evidence will be disturbed on appeal, and trial court's award to the wife will not be reversed except where, in the light of the findings made, it appears that the court has abused its discretion. Swanson v Swanson, 233 M 354, 46 NW(2d) 878.

Where an action is tried by the court without a jury its findings of fact are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence. An assignment of error not argued in the brief is deemed abandoned. The supreme court does not decide facts or justify the results reached in the trial court. Where the verdict is a succeeding one and is in accordance with a prior one, the reviewing court is less inclined to set it aside than if it were a first verdict. Wilson v Moline, 234 M 174, 47 NW(2d) 865.

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

On an appeal by the defendant in an action for personal injuries the record was insufficient to establish that the verdict for plaintiff was the result of passion and prejudice and did not entitle defendant to a new trial, notwithstanding that the trial court reduced the verdict in favor of one plaintiff on a finding that such verdict had been rendered as the result of passion and prejudice. Cobradson v Vinkemeier, 235 M 537, 51 NW(2d) 651.

An order granting a new trial after a verdict is not appealable unless the order or the memorandum of the trial court states that the new trial is granted exclusively for errors of law occurring at the trial, and the alleged errors of law are expressly stated in the order or memorandum. Voller v Schmitz, 236 M 155, 52 NW(2d) 289.

In an action for conversion where the defense of res judicata was raised at the trial without objection and was not assigned as error upon appeal, any error in this respect in the trial court was waived as an issue on appeal. The validity of any judicial determination, and its res judicata effect, is limited by the court's compliance with procedural resolutions which due process imposes as jurisdictional prerequisites, such as adequate and proper notice of the adverse claim. Schwartz v First Trust Co., 236 M 165, 52 NW(2d) 290.

On an appeal from an order denying plaintiff's motion to vacate a directed verdict and for a new trial, the evidence must be viewed in the light most favorable to the plaintiff. Sylvester v Northwestern Hospital, 236 M 384, 53 NW(2d) 17.

Where the appeal of a special guardian of an incompetent from an order allowing the final account of the general guardian was pending at the time of the death of the special guardian, any interest which the special guardian might have had which would permit an appeal, was not an interest which would pass to his special administrator, and permit an appeal by the special administrator. The sole duty of the administrator was to collect the assets and conserve the estate of the deceased, and not to protect the interests, if any, of a special guardian. Sargent v Willyard, 236 M 550, 53 NW(2d) 136.

In an action for damages sustained in an intersectional collision in the daytime when plaintiff's automobile came to a stop at an intersection and waited for two automobiles to pass, and looked to his left for a distance of 200 feet down the avenue

where there was no obstruction, no distracting circumstances, and the view was clear and the plaintiff's sight good, and yet plaintiff failed to see defendant's automobile as he entered the intersection, instruction that the plaintiff was guilty of negligence in not seeing the defendant's automobile that was within the space where he looked, and that the question for the jury was whether the plaintiff's failure to look was the proximate cause of what occurred, was not reversible error. Shoop v Peterson, 237 M 61, 53 NW(2d) 633.

Where an action for damages sustained in an automobile accident and action subsequently brought by the defendant in the first action, against plaintiff therein for damages sustained in the same accident were consolidated for trial only and otherwise retained their separate identities, appeal by plaintiff in the first action from an order denying his motion for a new trial after a jury's verdict for the defendant did not affect the trial court's jurisdiction of the other action, so that the supreme court's function in proceeding by appellant for a writ of prohibition commanding the trial court to refrain from proceeding to trial in such other action is limited to determining whether the trial court abused its discretion in denying appellant's motion for a continuance thereof pending the outcome of the appeal. State ex rel v District Court, 237 M 33, 54 NW(2d) 5.

A motion for a new trial based on the ground of newly discovered evidence, or on accident and surprise, is addressed to the sound discretion of the trial court, which discretion must be exercised cautiously and sparingly, and order denying such motion will not be disturbed on appeal in the absence of showing of clear abuse of discretion. In an action arising out of a head-on collision, instruction on the emergency rule was not prejudicial to plaintiff motorist in view of the fact that denial of recovery was based on the motorist's contributory negligence. Schiro v Raymond, 237 M 271, 54 NW(2d) 329.

The trial court's ruling as to the qualifications of a particular witness will be sustained on appeal unless it appears that the ruling was based on an erroneous view of the law or that it clearly was not justified by the evidence. Woyak v Konieske, 237 M 213, 54 NW(2d) 649.

Where the burden of proving contributory negligence rests on the party against whom a presumption of due care operates, it is reversible error to instruct the jury that there is such a presumption. Knuth v Murphy, 237 M 225, 54 NW(2d) 771.

Where the trial court in a case tried by the court without a jury errs as to the rule of law to be applied in considering the evidence in making its findings, the appellate court should vacate the findings made and remand the case with directions to reconsider the entire record and make new findings in the light of the applicable rule of law. Cade v Hoff, 237 M 313, 54 NW(2d) 784.

The trial court gave an erroneous instruction as to damages but, since it was not challenged by either party, it became the law of the case and the sufficiency of the evidence of damages to support the verdict is to be determined in the light of the instruction given. Marion v Miller, ... M ....., 55 NW(2d) 52.

Landowners who are not parties to a proceeding for the improvement of a drainage ditch and were not subject to an assessment for benefits or entitled to damages were not "aggrieved parties" as as to entitle them under the statute to appeal to the district court from an order of the county board granting the petition for such improvement, or to appeal to the supreme court from an order of the district court dismissing such appeal. Re Schoenfelder, ... M ....., 55 NW(2d) 305.

Where the county board ordered the improvement sought on a petition for improvement of a county ditch, and on an appeal by a group of individuals, the district court entered an order overruling objection of appellants to the jurisdiction of the county board, the latter order was not a final order or judgment and was not appealable. Re Schoenfelder, ... M ....., 55 NW(2d) 305.

The opening of a default judgment lies almost wholly in the discretion of the trial court, and its action will not be reversed on appeal except for a clear abuse of discretion, particularly where the determination of the trial court is made on conflicting affidavits. Standard Oil Co. v King, ... M ....., 55 NW(2d) 710.

An order granting a summary judgment is an intermediate order which requires a subsequent judgment to give it effect and is not appealable under a statutory provision that an appeal may be taken from an order involving the merits of the action or some part thereof. Shema v Thorpe Bros., ... M ....., 57 NW(2d) 157.

Certain remarks made in plaintiff's closing argument with reference to medical textbooks and otherwise were improper and prejudicial and required a new trial. Briggs v Chicago, G. W. Ry. Co., ... M ....., 57 NW(2d) 572.

Where there was misconduct of plaintiff's counsel during defense counsel's closing argument, which misconduct involved exposure to jury of material evidence not properly received, such error is so fundamental and manifest as to require that trial judge intervene on his own motion on being apprised of the matter, and his failure to do so constituted grounds for a new trial. Maher v Roisner, ... M ....., 57 NW(2d) 810.

Whether a new trial should be granted for misconduct of counsel in his argument to the jury is usually left to the sound discretion of the trial court. Under the facts in this case there was no abuse of discretion in denying a motion for a new trial on such ground. Willmar Gas Co. v Duininck, ... M ....., 58 NW(2d) 197.

Upon appeal from order denying motion for new trial, trial court's charge to jury becomes the law of the case, notwithstanding errors of fundamental law or controlling principles found therein which are not assigned in motion for new trial, and likewise as to unintentional misstatements and verbal errors or omissions to which no objection, stating grounds therefor, is made before jury retires to consider its verdict. Nelson v Twin City Motor Bus Co., ... M ....., 58 NW(2d) 561.

In a personal injury action tried by jury, question of excessive damages cannot be raised on appeal where it was not presented to trial court as ground for new trial. Monson v Arcand, ... M ....., 58 NW(2d) 753.

On plaintiff's appeal from order denying new trial, the evidence must be viewed in the light most favorable to the verdict for defendant. Donovan v Ogston, ... M ....., 59 NW(2d) 672.

The giving of instruction correctly stating the law is not ground for reversal merely because such instruction is inapplicable to facts in case. Donovan v Ogston, ... M ....., 59 NW(2d) 672.

Where all parties in a breach of warranty action arising out of sale and use of hair dye agreed at the trial that proper interpretation of the book of instructions which accompanied the dye involved a question of law, and no request was made for submission of the question to the jury, after an adverse determination, defendant could not raise the question of propriety of the manner in which the issue was determined. Schilling v Roux, ... M ....., 59 NW(2d) 907.

In prosecution for rape, where defendant admitted intercourse but alleged such act was with the consent of complaining witness, certain remarks of the prosecuting attorney in his closing argument, including his opinion on several material matters and several appeals for a finding of guilty on the basis of defendant's general immoral conduct, were improper to such a degree as to deprive defendant of a fair and impartial trial. State v Cole, ... M ....., 59 NW(2d) 919.

The function of the supreme court in reviewing a decision of the board of tax appeals involving questions of fact is to determine whether there is sufficient evidence to support the decision. Miller's Estate v Commissioner of Taxation, ... M ....., 59 NW(2d) 925.

"Domicile" means bodily presence in a place, coupled with an attempt to make such place one's home. Miller's Estate v Commissioner of Taxation, ... M ....., 59 NW(2d) 925.

If the necessary intention to change one's domicile is present, the motive purpose in making the change is unimportant. Miller's Estate v Commissioner of Taxation, ... M ....., 59 NW(2d) 925.

Intention to abandon a former dwelling place as a home is important criterion in determining the change in domicile. Miller's Estate v Commissioner of Taxation, ... M ....., 59 NW(2d) 925.

Even though section 605.06 does not authorize an appeal from an order denying judgment notwithstanding the verdict in granting a new trial, there must be a compliance with the requirements of section 605.09 (4) which provides that an appeal to the supreme court may be taken from the order refusing or granting a new trial if the court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon errors of law occurring at the trial and upon no other ground, and the court shall specify such errors in its order or memorandum. The order appealed from herein is not appealable. Schaumburg v Ludwig, ... M ....., 60 NW(2d) 12.

Where evidence gives ample support for trial court's finding at variance between bid on public contract and specifications was not material, such finding will not be disturbed upon appeal. Duffy v Village of Princeton, ... M ....., 60 NW(2d) 27.

Reduction by trial court of $26,560 from verdict of $86,560 for injuries to 60-year old railroad engineer, alledgedly permanently incapacitating him from thereafter performing his duties, was not, under the entite record, insufficient and is sustained. Woodrow v Chicago, M., St. P. & P. Ry. Co., ... M ....., 60 NW(2d) 49.

Where plaintiff in negligence action prevailed on issue of right of recovery, his assignments of error which pertained only to issue of defendant's liability need not be considered on appeal. Caswell v Minar Motor Co., ... M ....., 60 NW(2d) 263.

Where inadequate damages were awarded by jury as compromise between right of recovery and amount of damages sustained, case should be remanded for new trial on all the issues. Caswell v Minar Motor Co., ... M ....., 60 NW(2d) 263.

The nature and feasibility of safeguards and precautions that could have been taken with respect to a potentially dangerous condition are proper subjects for expert testimony provided that they are not of such common knowledge that the jury is equally capable of judging them. Testimony of this nature given by plaintiff's expert witness over a defendant's objection of insufficient foundation considered and is not grounds for reversal.

Whether a witness qualifies as an expert ordinarily is a question to be decided by the trial court, and its ruling thereon will not be reversed on appeal unless it is based on some erroneous view of the law or is clearly not justified by the evidence.

Rulings of trial court rejecting certain testimony offered by defendant considered and found to present no grounds for reversal. Hartmon v National Heater Co., ... M ....., 60 NW(2d) 804.

In a proceeding to punish certain persons for contempt for violation of an injunction against trespassing upon described land, the court of appeals held that the federal district court had no jurisdiction to enter a decree enjoining the world at large and that defendants who were not parties to the action in which the injunction was issued and who were not officers, agents, servants, employees or attorneys of the defendants named therein and who did not act in concert, or participate with them could not properly be adjudged in contempt for violating the injunction. Kean v Hurley, 179 F(2d) 888.

Where trial court's instructions were not excepted to by either party they became "the law of the case" and the appellate court must determine question of sufficiency of the evidence by the law as so announced; and where jury returned a general verdict in favor of plaintiff, the appellate court must assume that jury resolved all conflicts in the evidence in favor of plaintiff. Carter v Riley, 186 F(2d) 148.

605.10 BOND OR DEPOSIT FOR COSTS

"Shall" is not always mandatory, and where an appeal was without a bond and notice, but was furnished as soon as the defect was discovered, and no prejudice was found to respondent, the circumstances did call for dismissal of the appeal. Gelin's Estate, 228 M 568, 37 NW(2d) 538.

605.16 EXTENT OF STAY

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.

The provisions of section 60.16 do not prescribe the revocation of the license of an insurance company upon the rendition of a judgment if an appeal has been taken and supersedeas bond executed. OAG Dec. 3, 1947 (249-A-19).

605.18 BOND MAY BE IN ONE INSTRUMENT, HOW SERVED

The provision that bonds in case of designated appeals "shall" be served on the adverse party with notice of the appeal is not mandatory so as to require dismissal of the appeal from a judgment of the district court affirming an order of the probate court allowing the final account of the executrix because the notice of appeal served on respondent did not have a notice of appeal, bond, or notice of a deposit attached thereto, where the notice of the bond was served about one month after the notice of appeal and as soon as the defect was discovered. Appellant acted in good faith and no prejudice resulted. Gelin's Estate, 228 M 568, 37 NW(2d) 538.

CHAPTER 606

ADMINISTRATIVE BOARDS, DECISIONS, CERTIORARI

606.01 CERTIORARI, WITHIN WHAT TIME WRIT ISSUED

Administrative law; judicial review; administrative orders under Federal Administrative Procedure Act. 32 MLR 807.

Administrative law; scope of judicial review; substantial evidence rule under the Administrative Procedure Act and Labor Management Relations Act. 32 MLR 812.

Judicial control of administrative action. 33 MLR 569.

History of the Minnesota statutes pertaining to the extraordinary remedies in general. 33 MLR 571.

Certiorari; type of administrative action subject to control of. 33 MLR 685.

Scope of review under certiorari. 33 MLR 704.

Procedural aspects of certiorari. 33 MLR 710.

Requirements of a reviewable order made by an administrative agency. 34 MLR 464.

Res judicata applies to determination of the court reviewing an administrative holding. 35 MLR 576.

The substantial evidence rule as applied to unfair labor practices enforcement under the National Labor Relations Board upon findings in certiorari. 35 MLR 661.

Declaratory relief reviewing the federal employees alleged wrongful discharge in violation of the Veterans Preference Act. 35 MLR 659.

While an employee's civil service rights are not property, they are rights entitled to protection of the law. On certiorari it is not the province of the court to re-