der 274.33 (3), citing Northern Wisconsin Co-op. T. Pool v. Oleson, 191 W 586, 211 NW 923, and other cases.

The orders contemplated by 269.57 (1) are discretionary, but an order denying an inspection of records thereunder, if based purely on a mistaken view of the law, is not considered to be an exercise of discretion, and is not affected by the rule that the trial court is not to be reversed except for an abuse of discretion. Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

The supreme court will not reverse an order granting or denying an inspection of books and documents under 269.57 (1), Stats. 1967, unless convinced that the trial court's action constituted a clear abuse of discretion, and the burden of establishing such abuse is on the appellant. Wisconsin Fertilizer Asso., Inc. v. Karns, 43 W (2d) 30, 168 NW (2d) 206.

269.59 History: 1939 c. 100; Stats. 1939 s. 269.59.

269.60 History: Court Rule I s. 2; Sup. Ct. Order, 212 W xii; Stats. 1933 s. 269.60.

269.65 History: Sup. Ct. Order, 232 W vi; Stats. 1941 s. 269.65; 1959 c. 264, 652; Sup. Ct. Order, 25 W (2d) vi.

A pretrial conference is not a part of the trial, and the court is not to take up and decide issues presented by the pleadings as to which counsel have not agreed. In the conference an effort is made to have the parties agree as to the disposition of some of the issues, and those issues which are not disposed of by agreement must be disposed of on the trial and are the issues which the trial judge is to embody in his order. Klitzke v. Herm, 242 W 456, 8 NW (2d) 400.

See note to 263.03, citing Schneck v. Mutual Service Cas. Ins. Co. 18 W (2d) 566, 119 NW (2d) 342.

Where plaintiff's counsel did not appear for a pretrial conference after receiving notice of it, which notice and the local court rule did not give any warning of sanctions in the event of failure to appear, a dismissal of the complaint on the merits and granting of judgment on a counterclaim without notice and hearing was an abuse of discretion. Latham v. Casey & King Corp. 23 W (2d) 311, 127 NW (2d) 225.

Pretrial exclusionary evidence rulings. Love, 1967 WLR 738.

269.70 History: 1953 c. 610; Stats. 1953 s. 269.70; 1955 c. 420; 1967 c. 275.

269.80 History: Sup. Ct. Order, 239 W v; Stats. 1943 s. 260.23 (4), (5), 260.24 (2), (3); 1949 c. 301; Stats. 1949 s. 260.23 (4), (5), (6); 1955 c. 210; Stats. 1955 s. 269.80; Sup. Ct. Order, 271 W x; 1957 c. 48; 1957 c. 699 s. 17.

The filing of a petition for approval of a settlement agreement under 269.80 (2), Stats. 1961, tolls the statute of limitations on the cause of action involved until a decision is rendered on the petition, and such proceeding is equivalent to commencement of an action. Carey v. Dairyland Mut. Ins. Co. 41 W (2d) 107, 163 NW (2d) 200.

CHAPTER 270.

Issues, Trials and Judgments.

270.01 History: 1856 c. 120 s. 160; R. S. 1858 c. 132 s. 1; R. S. 1878 s. 2837; Stats. 1898 s. 2837; 1925 c. 4; Stats. 1925 s. 270.01.

270.02 History: 1856 c. 120 s. 161; R. S. 1858 c. 132 s. 2; R. S. 1878 s. 2838; Stats. 1898 s. 2838; 1925 c. 4; Stats. 1925 s. 270.02.

270.03 History: 1856 c. 120 s. 162; R. S. 1858 c. 132 s. 3; R. S. 1878 s. 2839; Stats. 1898 s. 2839; 1925 c. 4; Stats. 1925 s. 270.03.

270.04 History: 1856 c. 120 s. 163; R. S. 1858 c. 132 s. 4; R. S. 1878 s. 2840; Stats. 1898 s. 2840; 1925 c. 4; Stats. 1925 s. 270.04; 1935 c. 541 s. 149.

270.05 History: 1856 c. 120 s. 15; R. S. 1858 c. 122 s. 11; R. S. 1878 s. 2841; Stats. 1898 s. 2841; 1925 c. 4; Stats. 1925 s. 270.05; 1935 c. 541 s. 150.

"Feigned issues, to determine questions of fraud and other questions of fact, were, under the former practice, frequently awarded by courts of equity. Issues may still be awarded, to be tried by a jury, the form of submission only having been changed by statute. R. S., 757, sec. 2841. Such submissions were, and still are, usually ordered at the hearing after the testimony is in." Fairbanks v. Holliday, 59 W 77, 81, 17 NW 675, 677.

Upon vacating the report of a referee the court retains the power to order that an issue of fraud be tried by jury. Fairbanks v. Holliday, 59 W 77, 17 NW 675.

Where the court in an action to foreclose a mechanic's lien orders a jury trial upon an issue of fact the verdict is merely advisory. Huse v. Washburn, 59 W 414, 18 NW 341.

A verdict upon the question of the insanity of a grantor in an action to avoid a deed on that ground is advisory only. Wright v. Jackson, 59 W 569, 18 NW 486.

An order setting aside the submission of a question to a jury and stating that the court decides all the questions involved in the case, together with a finding covering all the issues, is conclusive of the fact that all the issues were tried by the court. Bunn v. Valley L. Co. 63 W 630, 24 NW 403.

Where a jury trial in an equity case has been had and the trial court is of opinion that an objection made to such trial should have been sustained a new trial need not be ordered, but the verdict may be taken as advisory, provided the trial was conducted as it would have been had the cause been regarded throughout as in equity. But where the trial was not so conducted, as where the jury viewed the premises in question and the judge did not, a new trial should be ordered. Fraedrich v. Flieth, 64 W 184, 25 NW 28.

The court is not bound to award a jury trial of any issue in an equitable action, though it may do so. Mason v. Pierron, 69 W 585, 34 NW 921.

270.06 History: 1856 c. 120 s. 164; R. S. 1858 c. 132 s. 5; R. S. 1878 s. 2842; Stats. 1898 s. 2842; 1925 c. 4; Stats. 1925 s. 270.06.

270.07 History: 1856 c. 120 s. 165; R. S. 1858 c. 132 s. 6; R. S. 1878 s. 2843; Stats. 1898 s. 2843;

1925 c. 4; Stats. 1925 s. 270.07; Court Rule XIII s. 2, 3; Court Rule XIV; Sup. Ct. Order, 212 W xii; 1961 c. 336.

Revisers' Note, 1878: Section 6, chapter 132, R. S. 1858, abbreviated and amended so as to declare that all equitable issues are triable by the court, in accordance with Gunn v. Madigan, 28 W 158. Harrison v. Juneau Bank, 17 W 340. As to some such at least it must be a constitutional right under the exposition of the constitution in Callaman v. Judd, 23 W 343.

The trial of an equity case in the same manner as an action at law is a novel proceeding, and if there be no finding by the court of the necessary facts and no order for judgment it is error. Issues of facc submitted to a jury in an equitable action should be particular issues, determined before calling the jury. Stahl v. Gotzenberger, 45 W 121.

An appeal from the county court upon the probate of a will is for the court. A verdict is merely advisory. In re Carroll, 50 W 437, 7 NW 434.

Where the complaint prays for relief, part of which is purely equitable, the action is equitable and triable by the court. The question whether the action is at law or in equity may be raised by an objection to a jury trial. Fraedrich v. Flieth, 64 W 184, 25 NW 28.

Where an equitable and a legal cause of action are joined the former should be tried by the court, and the latter by the court and jury. The equitable issue should be first tried. But it is not error for the court to submit all the issues to the jury in the first instance, if, upon the equitable issue, it makes and files findings of fact and conclusions of law which sustain the judgment. Cameron v. White, 74 W 425, 43 NW 155.

A proceeding in garnishment to reach nonleviable assets, things in action, evidences of debt, is not "an issue of fact in an action for the recovery of money only, or of specific real or personal property," and need not be tried by a jury. Delaney v. Hartwig, 91 W 412, 64 NW 1035.

Where defendant intervenes in an action of replevin and sets up title and the plaintiff amends the complaint alleging fraud and asking to have the bill of sale set aside, the issue is one for trial by the court. Hurley v. Walter, 129 W 508, 109 NW 558.

A question of interpleader whereby the cancellation of the assignment of an insurance policy is sought is properly tried by the court. Hintz v. Wald, 138 W 41, 119 NW 821.

In an action involving the liability of a county treasurer and 2 of his sureties, one for his first term and the other for his second term, the complaint alleged that the treasurer's accounts had been so kept that it was impossible for the plaintiff to determine the amount of defalcation during either term. The action was in equity, although there was no prayer for equitable relief. Oconto County v. Carey, 183 W 420, 198 NW 590.

An action to recover money damages for fraud, inducing plaintiff to exchange a note and mortgage for corporate stock, presents a jury issue, although plaintiff rescinds the alleged agreement and tenders into court what she received. Fritsch v. Kornely, 193 W 54, 213 NW 644.

A claim against a corporation based on an allegation of the corporation's fraud, filed in proceedings for winding up of the corporation's affairs, is treated as in equity and is triable to court. In re Acme Brass & Metal Works, 225 W 74, 272 NW 356.

In an action to set aside a special tax upon the plaintiff's property for sewer construction and to recover assessments paid, an answer alleging nonpayment of the third instalment was a plea in abatement although not denominated as such a plea. Boden v. Lake, 244 W 215, 12 NW (2d) 140.

It is the duty of the court to determine whether, on the facts admitted, found by special verdict, or reasonably inferable from the evidence, the actor's conduct is a substantial factor in bringing about harm to another, unless the question is open to a reasonable difference of opinion, in which case it is to be left to the jury. Hatch v. Small, 249 W 183, 28 NW (2d) 460.

An action for the reformation of a contract is a matter cognizable by a court of equity, triable by the court without a jury. Touchett v. E. Z. Paintr Corp. 263 W 626, 58 NW (2d) 448.

Where the trial court observed the rule that the jury's verdict in an equity action is merely advisory, by making its own finding, the supreme court is nevertheless not satisfied that justice has been done, in view of the trial court's statement that it would have made the opposite finding but for the advisory verdict, and in view of the persuasiveness of the evidence tending to the contrary, and the dissent of 2 members of the jury, and therefore remands the cause for a new trial. Sager v. Hannemann, 6 W (2d) 285, 94 NW (2d) 612.

The issue of whether a false statement or testimony was consciously or deliberately made or given is a question of fact ordinarily to be determined by a jury; but whether the same is material is a question of law to be resolved by the court, and sometimes the facts are so clear that the false statement or testimony was consciously or deliberately made that there is no issue to submit to a jury. Kurz v. Collins, 6 W (2d) 538, 95 NW (2d) 365.

270.08 History: 1856 c. 120 s. 168; R. S. 1858 c. 132 s. 9; R. S. 1878 s. 2844; Stats. 1898 s. 2844; 1925 c. 4; Stats. 1925 s. 270.08; Sup. Ct. Order, 245 W vii.

Comment of Advisory Committee: See Comment of Advisory Committee under 260.01.

Where the equitable issue is such that its determination may decide the legal issue it seems imperative to try the former first. Carroll v. Bohan, 43 W 218.

The trial of an equitable counterclaim having resulted in a finding that the plaintiff's legal title could not prevail against defendant's equitable title, it was not error to refuse plaintiff's demand for a trial by jury of the issue raised by the denial of his legal title. Cornelius v. Kessel, 58 W 237, 16 NW 550.

Where only a part of those who are liable on a joint contract are served with process a separate trial upon the merits under sec. 2844, R. S. 1878, cannot be had. Nichols v. Crittenden, 74 W 459, 43 NW 105.

Where one action is brought against a city for damages for change of grade and the other against the city and certain officers to annul an assessment certificate and for an injunction, the order of trial is in the discretion of the trial court, and there was no error in refusing to consolidate the 2 actions or in trying the action at law first. Haubner v. Milwaukee, 124 W 153, 101 NW 930, 102 NW 578.

It appearing that an issue, as to defendant's claim of a settlement pursuant to which the larceny prosecution was dismissed, which was not presented by the pleadings but arose during the trial and was raised by defendant's motion for direction of verdict, was not fully tried, discretionary reversal for a new trial upon such question is warranted. Mawhinney v. Morrissey, 208 W 333, 242 NW 326.

The court properly submitted to the jury the issue of fact as to the amount of monthly disability income provided in the policy, and itself properly determined the equitable issue raised by the defendant insured's counterclaim for reformation of the policy; and the procedure followed by the court of first having the jury determine the legal issue, then itself determining the equitable issue, was proper. Schmidt v. Prudential Ins. Co. 235 W 503, 292 NW 447.

In an action for injuries sustained in an automobile collision, where the liability insurer of the car driven by the defendant set up that it was not liable under the policy, whether the coverage issue should be tried first or whether all issues should be tried together was within the discretion of the court. Reynolds v. Wargus, 240 W 94, 2 NW (2d) 842.

270.11 History: 1899 c. 217 s. 1; Supl. 1906 s. 2845b; 1911 c. 118 s. 1; 1925 c. 4; Stats. 1925 s. 270.11; 1935 c. 541 s. 151; Sup. Ct. Order, 25 W (2d) vii.

Revisor's Note, 1935: The trial should be limited to the court. That would be consistent with 270.02, 270.04, 270.07, and is the practice. [Bill 50-S, s. 151]

270.115 History: Sup. Ct. Order, 265 W viii; Stats. 1955 s. 270.115; Sup. Ct. Order, 25 W (2d) vii; Sup. Ct. Order, 29 W (2d) vii.

A mistake in naming the county seat where the action was triable will not avoid a notice when it is entitled in the proper county and the opposite party is not misled. Hills v. Miles, 13 W 625.

An action on appeal from a justice cannot be noticed for trial until the return is made. If noticed before it may be stricken from the calendar. Demming v. Weston, 15 W 236.

Noticing a case for trial prematurely is a mere irregularity, not affecting the jurisdiction, and is waived by going to trial on the merits. Mills v. National Fire Ins. Co. 92 W 90, 65 NW 730.

270.12 History: 1856 c. 120 s. 166, 167; R. S. 1858 c. 132 s. 7, 8; R. S. 1878 s. 2846; Stats. 1898 s. 2846; 1911 c. 212; 1925 c. 4; Stats. 1925 s. 270.12; Court Rule III; Sup. Ct. Order, 212 W xiii; 1953 c. 511; Sup. Ct. Order, 265 W v, vi, viii; 1955 c. 577; 1955 c. 652 s. 56, 57; 1961 c. 495; Sup. Ct. Order, 25 W (2d) vii, viii; Sup. Ct. Order, 29 W (2d) viii; 1967 c. 276 s. 40.

The provision regarding the continuance of a motion to a subsequent term applies to proceedings in which the parties or their attorneys participate and not to the mere taking under advisement by the judge of a matter already concluded. Kurath v. Gove A. Co. 144 W 480, 129 NW 619.

See note to sec. 3, art. VII, on general superintending control over inferior courts (prohibition), citing State ex rel. Central Surety & Ins. Corp. v. Belden, 222 W 631, 269 NW 315.

270.125 History: Court Rule IV; Sup. Ct. Order, 212 W xiii; Stats. 1933 s. 270.125; 1955 c. 577; 1961 c. 495; Sup. Ct. Order, 25 W (2d) viii; 1967 c. 276 s. 40.

The purpose of 270.125 is to require publicity, and the statute does not purport to make signed written orders valid as of their date regardless of the date of filing. Yanggen v. Wisconsin Michigan P. Co. 241 W 27, 4 NW (2d) 130.

The failure of the district attorney to give a prisoner the information required by 270.125 (4) is harmless where the prisoner is represented by counsel. Gaertner v. State, 35 W (2d) 159, 150 NW (2d) 370.

270.13 History: 1856 c. 120 s. 168; R. S. 1858 c. 132 s. 9; 1861 c. 211 s. 1; R. S. 1878 s. 2847; Stats. 1898 s. 2847; 1925 c. 4; Stats. 1925 s. 270.13.

270.14 History: 1861 c. 119 s. 1; R. S. 1878 s. 2848; Stats. 1898 s. 2848; 1925 c. 4; Stats. 1925 s. 270.14.

If leave to amend is not requested the court may, on sustaining a demurrer, dismiss the complaint. Wentworth v. Summit, 60 W 281, 19 NW 97.

270.145 History: Court Rule XIX; Sup. Ct. Order, 212 W xiv; Stats. 1933 s. 270.145.

An application for a continuance is always addressed to the discretion of the trial court, and prejudice must be made to appear in order to set aside its ruling thereon. On the basis of the claimant's affidavits, the estate's counter-affidavits, and the record as a whole, the county court did not abuse its discretion in denying the claimant's motion for a postponement of the trial based on his inability to be present at the trial because of alleged illness. Estate of Hatten, 233 W 256, 289 NW 630.

Where a continuance is granted at the instance of one party without the consent of the other, the immediate payment to the other party of the fees of witnesses in actual attendance and reasonable attorney fees is mandatory under 270.145 (6), and a denial of a motion for such fees is error. Zutter v. Kral, 268 W 606, 68 NW (2d) 590.

Where an amended complaint was served which introduced no change to the detriment of the defendant, the trial court was warranted in denying defendant's motion for a continuance for the purpose of filing an amended answer before proceeding to trial. Gunnison v. Kaufman, 271 W 113, 72 NW (2d) 706.

A continuance delaying a trial is not a matter of course and an application therefor is always addressed to the sound discretion of the trial court. Gunnison v. Kaufman, 271 W 113, 72 NW (2d) 706.

270.145, Stats. 1967, the statute applicable to continuances, requires that a motion there-

for be supported by affidavits which state in detail that the movant has used due diligence in preparing for trial and the nature and kind of diligence used. A party to a lawsuit who wishes to continue an action is obliged to follow the requirements of 270.145, and a trial court may refuse to entertain the motion in absence of supporting affidavits. Page v. American Family Mut. Ins. Co. 42 W (2d) 671, 168 NW (2d) 65.

270.15 History: R. S. 1878 s. 2540 to 2544; Stats. 1898 s. 2540 to 2544; 1913 c. 441 s. 6; Stats. 1923 s. 2848m; 1925 c. 4; Stats. 1925 s. 270.15; 1949 c. 488; 1955 c. 167.

270.16 History: R. S. 1849 c. 49 s. 27; R. S. 1858 c. 118 s. 28; R. S. 1878 s. 2849; 1881 c. 9; Ann. Stats. 1889 s. 2849; Stats. 1898 s. 2849; 1913 c. 153; 1925 c. 4; Stats. 1925 s. 270.16.

It is not cause for challenge to the array that jurors served at a previous term of the court. Conkey v. Northern Bank, 6 W 447.

After trial an objection that a juror had removed to another county before trial, which fact was unknown to the parties at the time of the trial, should not be sustained. Rockwell v. Elderkin, 19 W 367.

An objection to a juror because an alien is waived unless taken before trial, if known. Such objection cannot be sustained by an affidavit on information and belief. Brown v. La Crosse C. G. L. & C. Co. 21 W 51.

Other reasons besides those mentioned here may justify the exclusion of a juror, as for inability to understand English sufficiently to intelligently comprehend the proceedings. Sutton v. Fox, 55 W 531, 13 NW 477.

A very large discretion is vested in trial courts in determining whether jurors are indifferent between the parties, and its exercise will not be disturbed except in case of its abuse or the violation of some rule of law. Grace v. Dempsey, 75 W 313, 43 NW 1127.

If a juror has no actual bias and is able to hear the evidence and decide upon it impartially under the guidance of the court as to the law, whatever may be his views as to the enormity of crime in the abstract, he is legally qualified. A prejudice entertained by a juror against a particular crime does not constitute ground for excluding him when he is called to try a person for such offense. Higgins v. Minaghan, 78 W 602, 47 NW 941.

Independently of sec. 2849 the circuit court may upon its own motion excuse a juror whose relations to either party to the action are such as would be liable to operate prejudicially to either. A failure to object to the collected jury before they are sworn operates as a waiver of any precedent error in their selection. Milwaukee S. T. & D. Co. v. American C. Ins. Co. 164 W 298, 159 NW 938.

In an action to recover damages resulting from an automobile accident, it is proper to examine the jurors, in good faith and in a proper manner, as to whether they are in any wise interested, or have business relations with any company carrying automobile accident insurance. And the extent of such examination is largely in the discretion of the trial court. Lozon v. Leamon B. Co. 186 W 84, 202 NW 296.

Denial of a motion to withdraw a juror and declare a mistrial, or to continue trial of an automobile collision case with 11 jurors, on it appearing that a juror had a case pending in the same court and triable at the same term was not error, where, under a system of selecting juries, a juror sat for but a single case, since the statutory requirement that a juror be discharged under such circumstances was aimed at the situation where a juror sat for a term and became intimately acquainted with other jurors. Roellig v. Gear, 217 W 651, 260 NW 232.

Where counsel allowed a juror to serve who had stated on voir dire that he would not be prejudiced against a teen-age driver if such driver had a driver's license, and counsel made no objection to a question asked on the trial as to whether such driver was licensed at the time of the collision, and did not move for a mistrial when surprised by his negative answer but waited for the jury's verdict, which was unfavorable, the protest in motions after verdict came too late and the complaining parties were not entitled to a new trial on the ground of surprise. Briggs Transfer Co. v. Farmers Mut. Auto. Ins. Co. 265 W 369, 34 NW (2d) 116.

The trial court's acceptance of a juror whose husband was insured by the defendant liability insurer, and of 5 jurors who were policyholders in the same company, was not prejudicial or an abuse of discretion. Good v. Farmers Mut. Ins. Co. 265 W 596, 62 NW (2d) 425.

Two prospective jurors who held nonassessable liability policies with the plaintiff's liability insurer, one who informed the trial court that it would be embarrassing for him to sit in the case because of his long acquaintance with the plaintiff, and another who had sold the plaintiff his current home policy and hoped to handle the renewal, were not disqualified as a matter of law, and the court, informed by all 4 that they believed that they could and would decide the case fairly on the evidence, did not abuse its discretion in refusing to excuse them for cause. Kanzenbach v. S. C. Johnson & Son, Inc. 273 W 621, 79 NW (2d) 249.

The conduct of counsel for a certain defendant on the voir dire examination of prospective jurors, in relation to liability insurance, together with the manner in which the matter of whether jurors were interested in named insurance companies, and of liability insurance, as handled by the respective counsel and the trial court, although involving error, was not prejudicial to the plaintiffs, in that no question as to negligence or liability of the defendant in question was submitted to the jury, and the jury was asked to determine a question of fact wholly unrelated to the matter of insurance. Hennepin Trans. Co. v. Schirmers, 2 W (2d) 165, 85 NW (2d) 757.

Appellants having examined the jurors or having had opportunity to do so on the voir dire and having made no objections to their serving in a condemnation case, the contention that they were not impartial jurors is without merit in an appeal to the supreme court. Buch v. State Highway Comm. 15 W (2d) 140, 112 NW (2d) 129.

Questioning of jurors as to stock ownership or office in an insurance company is discussed

in Filipiak v. Plombon, 15 W (2d) 484, 113 NW (2d) 365.

270.17 History: R. S. 1849 c. 10 s. 21; R. S. 1849 c. 97 s. 28; R. S. 1858 c. 13 s. 21; R. S. 1858 c. 118 s. 29; 1872 c. 73; R. S. 1878 s. 2850; Stats. 1898 s. 2850; 1925 c. 4; Stats. 1925 s. 270.17.

270.18 History: R. S. 1849 c. 97 s. 29, 36; R. S. 1858 c. 118 s. 37; 1874 c. 252; R. S. 1878 s. 2851; Stats. 1898 s. 2851; 1909 c. 330; 1917 c. 84 s. 2; 1925 c. 4; Stats. 1925 s. 270.18.

Where it does not clearly appear whether either party strikes off a juror out of his turn, the mere fact that the record shows that the defendant, who had the right to strike last, had exhausted his challenges before the plaintiff had exhausted his, will not be considered error. Gilchrist v. Brande, 58 W 184, 15 NW 817.

An objection to proceeding with the trial on the ground that, 2 juries being out and one juror being excused, only 11 of the regular panel are left, cannot be sustained. The lack may be supplied under sec. 2538, R. S. 1878; the peremptory challenges given by sec. 2851 apply to a full panel of jurors thus called as well as to the regular panel. Olson v. Solverson, 71 W 663, 38 NW 329.

Unless it is shown that, because a challenge for cause was overruled, an objectionable juror was forced upon the challenging party and sat as a juror after the exhaustion of peremptory challenges, no prejudicial error is committed. Pool v. Milwaukee M. Ins. Co. 94 W 447, 69 NW 65.

Where cases are consolidated for trial and there is no adverse interest between the plaintiffs, they may be restricted to a total of 3 peremptory challenges. Keplin v. Hardware Mut. Cas. Ins. Co. 24 W (2d) 319, 129 NW (2d) 321, 130 NW (2d) 3.

270.19 History: Sup. Ct. Order, 25 W (2d) viii; Stats. 1965 s. 270.19.

270.20 History: R. S. 1849 c. 97 s. 31; R. S. 1858 c. 118 s. 32; R. S. 1878 s. 2852; Stats. 1898 s. 2852; 1925 c. 4; Stats. 1925 s. 270.20.

What is said by counsel in order to induce the court to order the view is immaterial. Boardman v. Westchester Fire Ins. Co. 54 W 364, 11 NW 417.

It is not error to exclude evidence of facts which the jury know from an authorized view. Nielson v. Chicago, M. & N. W. R. Co. 58 W 516, 17 NW 310.

The jury may take into consideration whatever information they may have obtained from a view. Johnson v. Boorman, 63 W 268, 22 NW 514.

Certain erroneous estimates of damages to land by the construction of a railroad across it could not be sustained by the fact that the jury viewed the premises. Munkwitz v. Chicago, M. & St. P. R. Co. 64 W 403, 25 NW 438.

If certain jurors, without being authorized and without the knowledge of the defendant, examine the place of an accident, it will be assumed that such view was prejudicial to the defendant against whom a verdict is returned. Jurors' affidavits are competent to show such misconduct. Peppercorn v. Black River Falls, 89 W 38, 61 NW 79.

Whether the jury shall view the premises is a matter in the discretion of the court. Serdan v. Falk Co. 153 W 169, 140 NW 1035.

A view of the scene of an accident is permitted to a jury in order to enable them to understand the evidence; and an instruction that the verdict must be based upon the evidence and the view is erroneous. Haswell v. Reuter, 171 W 228, 177 NW 8.

Although the facts out of which plaintiff's alleged cause of action arose occurred long before the trial it is still within the discretion of the court to order a view. Polebitzke v. John Week L. Co. 173 W 509, 181 NW 730.

270.202 History: Sup. Ct. Order, 17 W (2d) xx; Stats. 1963 s. 270.202.

270.205 History: Court Rule XXII; Sup. Ct. Order, 212 W xiv; Stats. 1933 s. 270.205.

1. Examination of witnesses.
2. Arguments of counsel.

1. Examination of Witnesses.

Refusing to permit cross-examination of witnesses by counsel of defendant liability insurer, after cross-examination by the attorney for insured codefendants, was not error, where defendants' interests were identical. Kiviniemi v. Hildenbrand, 201 W 619, 231 NW 252.

Where the trial court reserved its ruling on a motion for nonsuit at the close of the plaintiff's case, and the defendant thereupon examined 2 witnesses and then renewed the motion and the court thereupon directed judgment for the defendant, taking into consideration the evidence introduced by him (without permitting the plaintiff the opportunity to rebut the evidence and thereby close the case) was reversible error. United States F. & G. Co. v. Waukesha L. & S. Co. 226 W 502, 277 NW 121.

It was within the discretion of the trial court to sustain an objection to a line of cross-examination which amounted to exploration of side issues of little materiality. Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

Hypothetical questions are discussed in Sharp v. Milwaukee & S. T. Corp. 18 W (2d) 467, 118 NW (2d) 905.

To be used in helping to clarify and explain the testimony of a medical witness, a chart of the muscles of the body and a skeleton of the spinal column made out of plastic were not inadmissible in evidence by reason of the fact that neither was an exact reproduction of the plaintiff's anatomy; and it would have been preferable for the trial court to have permitted the use of the chart and skeleton, but its refusal to do so was not prejudicial. Hernke v. Northern Ins. Co. 20 W (2d) 352, 122 NW (2d) 395.

Where, during the course of a trial, plaintiff's counsel requested the production of statements given to the defendant by certain witnesses, which counsel used for purposes of cross examination but did not read any of such statements into the record, the trial court was not obliged to admit such statements, and its ruling excluding them did not constitute error. Merlino v. Mutual Service Cas. Ins. Co. 23 W (2d) 571, 127 NW (2d) 741.

The immunity of the attorney's work prod-

uct in respect to a written statement ceases to exist when the person making the statement is placed on the stand as a witness at the trial, for by becoming a witness the person subjects himself to the risks of impeachment and the attorney has had the benefit of his work product. Shaw v. Wuttke, 28 W (2d) 448, 137 NW (2d) 649.

Cross-examination of a witness not a party may go beyond the direct examination when its purpose is to bring out facts referred to in the opening statement by opposing counsel. Seitz v. Seitz, 35 W (2d) 282, 151 NW (2d) 86.

2. Arguments of Counsel.

When, in an action to recover unliquidated damages, the defendant admits the cause of action and pleads new matter in avoidance, the affirmative is still with the plaintiff and he is entitled to open and close to the jury. Cunningham v. Gallagher, 61 W 170, 20 NW 925.

A judgment will not be reversed because appellant was erroneously deprived of his right to open and close unless it appears that he was prejudiced thereby. Parker v. Kelly, 61 W 552, 21 NW 539.

The rule that a judgment may be reversed for improper remarks of counsel does not apply to statements made by an attorney while testifying as a witness or to the statement of impertinent facts which have been proved or may fairly be inferred from the evidence. The consequences of an improper statement made by counsel, tending to influence the jury, cannot be averted by his saying that he takes it back. Baker v. Madison, 62 W 137, 22 NW 141 and 583.

Where counsel has made an improper statement, but when interrupted by opposing counsel declared that there was no evidence to sustain his statement, and that he put it as a conjecture, it will not be presumed that the jury were prejudiced. Hinton v. Cream City R. Co. 65 W 323, 27 NW 147.

An exception to language used by counsel on the argument cannot be considered in the absence of a ruling thereon by the court below. Mulcairns v. Janesville, 67 W 24, 29 NW 565.

Counsel should be allowed considerable latitude in commenting upon matters in evidence, the character and conduct of the witnesses, etc., though they should not be permitted to assume facts not in proof. Gallinger v. Lake Shore T. Co. 67 W 529, 30 NW 790.

Unless the attention of the trial judge is called to the improper remarks in the opening address to the jury and the court makes some ruling upon them such remarks cannot be assigned for error. Heucke v. Milwaukee City R. Co. 69 W 401, 34 NW 243.

A statement of facts not in evidence, made for the purpose of influencing the jury, is improper; and so is an imputation upon the honesty of a person who was comptetent to be called as a witness and who might have been called, such statement being made as a reason for not calling him. Schillinger v. Verona, 88 W 317, 323, 60 NW 272.

If an improper remark is withdrawn after objection the judgment will not be reversed unless there is reason to believe the appellant was injured. Roche v. Pennington, 90 W 107, 62 NW 946.

It is not material error to refer to a defendant in a mechanic's lien suit as a nonresident banker who did not mean to pay his obligations. Bartlett v. Clough, 94 W 196, 68 NW 875.

Improper argument will not be cured by merely sustaining an objection; the court must at once plainly direct the jury to disregard the objectionable remarks. Andrews v. Chicago, M. & St. P. R. Co. 96 W 348, 71 NW 372.

Prejudicial remarks were cured by an admonition of the court that it was the province of the jury to determine the weight of the evidence. Gletter v. Sheboygan L. P. & R. Co. 130 W 137, 109 NW 973.

The fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing an argument on facts not appearing and appealing to prejudices irrelevant to the case and outside of the proof. It is the duty of the courts, in jury trials, to interfere in all proper cases of their own motion, and if counsel perseveres in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence it is good ground for a new trial or for a reversal in the supreme court. Horgen v. Chaseburg State Bank, 227 W 510, 279 NW 33.

Improper argument justified granting a new trial. Larson v. Hanson, 207 W 485, 242 NW 184; Blank v. National Cas. Co. 262 W 150, 54 NW (2d) 185. See also Pedek v. Wegemann, 275 W 57, 81 NW (2d) 49.

The absence of the trial judge beyond hearing of the proceedings during argument to the jury is error warranting a new trial, except when the evidence is such that there is actually no question for the jury. While it is not the duty of the reporter to take down the arguments to the jury unless he is directed to do so, he should be available; and if objections are made or controversy arises during the course of the argument, the court, whose duty it is to be present at all stages of the trial, should direct a record to be made. Caesar v. Wegner, 262 W 429, 55 NW (2d) 371.

Where counsel during argument stated a fact not in evidence the trial court's instruction to the jury that the record did not disclose such fact and that the jury should disregard any reference to it was sufficient to prevent prejudice resulting from the improper statement, and warranted the denial of a mistrial. Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

The adverse effect, if any, of an attempted remark of the plaintiffs' counsel in argument, to the effect that defense counsel would not have placed his leg under a colliding truck wheel for any amount of money, was adequately disposed of by the trial court's prompt sustaining of objection made thereto. Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc. 6 W (2d) 396, 94 NW (2d) 577.

Provocative language used by counsel in argument to the jury is not an adequate excuse for retaliatory observations made by oppos-

ing counsel to the jury. Crye v. Mueller, 7 W (2d) 182, 96 NW (2d) 520.

The supreme court disapproves of the practice of permitting counsel for the plaintiff in argument to the jury, either orally or by the use of a blackboard or a chart, to present to the jury a mathematical formula setting forth on a per diem basis the amount determined by the plaintiff as his or her damages for pain and suffering, the use of such a formula being pure speculation by counsel, not supported by the evidence, and presenting matters which do not appear in the record. There is no difference between using a mathematical formula for illustrative purposes and using it to determine the reasonableness of the amount sought as damages for pain and suffering. Affett v. Milwaukee & S. T. Corp. 11 W (2d) 604, 106 NW (2d) 274.

Counsel for both the plaintiff and the defendant may properly make an argumentative suggestion in summation from the evidence of a lump-sum dollar amount for pain and suffering which they believe the evidence will fairly and reasonably support, but counsel may not properly argue that such amount was arrived at or explained by a mathematical formula or on a per day, per month, or on any other time-segment basis. Affett v. Milwaukee & S. T. Corp. 11 W (2d) 604, 106 NW (2d) 274.

A statement of the plaintiff's counsel to the jury on the subject of damages for personal injuries, "I am asking you to consider $25,000," was not improper argument. Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

It was proper for plaintiff's counsel to urge on the jurors such lump-sum figure for pain and suffering as counsel considered to be fairly supported by the evidence, and it was not proper for the trial judge to rule that counsel was entitled to argue for only such lump-sum as the trial judge deemed to be supported by the evidence. Halsted v. Kosnar, 18 W (2d) 348, 118 NW (2d) 864.

As to an alleged improper argument to a jury which was not recorded, objection must be made at the time the statement is made. The supreme court will not entertain questions based on affidavits as to what was said. State ex rel. Sarnowski v. Fox, 19 W (2d) 68, 119 NW (2d) 451.

Where there are 2 or more distinct items of injuries, it is proper for the trial court to permit argument whereby a separate sum is urged upon the jury for each such injury. Doolittle v. Western States Mut. Ins. Co. 24 W (2d) 135, 128 NW (2d) 403.

An assertion made by counsel in opening statement or in closing argument need not be founded upon direct evidence, provided that the facts so asserted may be inferred from the evidence, and reasonable latitude should be allowed to counsel in the oral argument even after the evidence is in. Kink v. Combs, 28 W (2d) 65, 135 NW (2d) 789.

If improper argument is made, a motion for a mistrial must be made before the jury returns its verdict or the objection is waived. Every party requesting the reporter to take down arguments should make this request part of the trial record so that opposing counsel will know of it and may make a similar request. Zweifel v. Milwaukee Auto. Mut. Ins. Co. 28 W (2d) 249, 137 NW (2d) 6.

A trial judge should not prevent an attorney from suggesting a sum as damages even if he feels the amount is unreasonable and could not be sustained. Fischer v. Fischer, 31 W (2d) 293, 142 NW (2d) 857.

The rule provided by 270.205, that normally a party having the affirmative of an issue is entitled to open and close the arguments, applies only to the main or basic issue of the case as of right and not to issues of defendants. Wells v. National Ind. Co. 41 W (2d) 1, 162 NW (2d) 562.

Argument as to damages for each separate injury. 48 MLR 423.

270.21 History: R. S. 1858 c. 132 s. 12; 1868 c. 101 s. 1; 1871 c. 89; R. S. 1878 s. 2853; Stats. 1898 s. 2853; 1925 c. 4; Stats. 1925 s. 270.21; Court Rule XIII s. 2; Sup. Ct. Order, 212 W xv; Sup. Ct. Order, 245 W viii.

Comment of Advisory Committee: See Comment of Advisory Committee under 260.01.

1. General.
2. Instructions in writing or taken down.
3. Specific instructions.
4. Requested instructions.
5. Modification of erroneous instructions.

1. General.

All questions of fact are for the decision of the jury, and it is error for the judge to instruct them absolutely on a question of fact. It is his duty to point out and decide what legal principles are applicable to the case, and it is the jury's duty to pass upon the facts. Zonne v. Wiersom, 3 Pin. 217.

An error in stating a legal proposition to the jury or the assertion of a false principle of law, if it be wholly irrelevant to the case, is not cause for the reversal, unless it is clear that the jury may have been misled thereby. Bowren v. Campbell, 5 W 187.

Errors in instructions are not ground for reversal when it is clear that the verdict and judgment could not have been different on the evidence. Andrea v. Thatcher, 24 W 471.

A direction after verdict to insert nominal damages therein is no part of the charge. High v. Johnson, 28 W 72.

An instruction as to what the law would be in case certain property could be identified may be added to by stating what the law would be in case of its nonidentification. Eldred v. Oconto Co. 33 W 133.

It is error for the court to charge the jury that a material fact is proved when there is any evidence to the contrary proper to be considered by them. An expression of opinion by the court as to facts, evidence or character of witnesses, if made in such a manner that the jury may naturally regard it as a direction to them and as excluding them from finding the fact for themselves, there being evidence proper for them to consider, both for and against such direction, constitutes ground for reversal. Ketchum v. Ebert, 33 W 611.

A party who fails to ask more definite instructions cannot urge error on account of in-

definiteness or inaptness of expression in the instructions given. Murphy v. Martin, 58 W 276, 16 NW 603.

It is not error to instruct that, unless something in the case casts discredit, the jury must accept the testimony of an uncontradicted witness as true. Engmann v. Immel, 59 W 249, 18 NW 182.

A judgment will not be reversed because general terms were used in an instruction, where the appellant did not call the judge's attention to it at the time or ask for more specific instructions, where the terms used, in view of the whole charge, could not have misled the jury. Kelly v. Houghton, 59 W 400, 18 NW 326.

It is not error to refuse to instruct that a denial of having made a promise was not negative testimony. Kelley v. Schupp, 60 W 76, 18 NW 725.

It is the duty of the jury to reconcile the discrepancies or contradictions in the testimony of witnesses, if possible; and it is error to instruct the jury that they ought not to attempt it. Taylor v. Young, 61 W 311, 21 NW 488.

Where the successful party is entitled to judgment upon the undisputed evidence errors in the charge are immaterial. Swager v. Lehman, 63 W 399, 23 NW 579.

In reviewing the charge it should be considered as a whole and not in detached parts or sentences. Adams v. McKay, 63 W 404, 23 NW 575.

Preliminary remarks of the judge to jurors to the effect that as jurors they had nothing whatever to do with the policy of the law, but were bound to administer it faithfully while it was in force, were proper and did not furnish ground for a new trial. When a charge correctly states the law as to the points in issue, leaves all questions of fact to the jury and does not assume facts about which there is a conflict of testimony, and when, taken together, there is nothing in it to mislead the jury on any material point, a new trial will not be ordered. Sickler v. La Valle, 65 W 572, 27 NW 163.

An error in admitting evidence as to matters not proper to be considered in assessing damages is not cured by instructing the jury that they cannot award damages on account of such matters, without withdrawing the evidence from the jury. Bradley v. Cramer, 66 W 297, 28 NW 372.

Where it is claimed that the evidence establishes a certain fact the failure of the court to so charge cannot be alleged for error where there was no request to so instruct or exception to the failure to so instruct. Collins v. Shannon, 67 W 441, 30 NW 730.

In an action for negligence charged to have been gross the defendant cannot complain that an instruction to the effect that he is liable if guilty "as charged" did not sufficiently describe the degree of negligence which would make him liable. Schaefer v. Osterbrink, 67 W 495, 30 NW 922.

An error as to the measure of damages becomes immaterial if the jury entirely disallow the claim for damages. Morawetz v. McGovern, 68 W 312, 32 NW 290.

Where the court has correctly charged the jury upon all the main questions involved the failure to give additional or more specific instructions, which were not requested, is not error. Austin v. Moe, 68 W 458, 32 NW 760.

The mere refusal to state certain facts to the jury, although they were undisputed, is not ground for reversal. Brickley v. Milwaukee, 68 W 563, 32 NW 773.

It is error for the court in charging the jury to cast suspicion and doubt upon the testimony of a party in respect to a memorandum of a contract made by him, there being no evidence tending to impeach his credibility in respect thereto. Valley L. Co. v. Smith, 71 W 304, 37 NW 412.

An instruction that if in addressing the jury counsel have inadvertently misstated the evidence the jury must arrive at their conclusions from the evidence itself and not from the statements of counsel furnishes no ground for criticism. Where such instruction was called for by some statement made by counsel, an exception will not be sustained if such statement is not in the record. Mullen v. Reinig, 72 W 388, 39 NW 861.

An instruction that the jury should feel "reasonably certain" as to what they should find to be the cause of an accident, was not error. Beery v. Chicago & Northwestern R. Co. 73 W 197, 40 NW 687.

The discussion of evidence in a railroad case merely impeaching as part of the evidence in the case, and not confining it to its purpose of impeaching, accompanied by language calculated to excite a prejudice on the part of the jury against railroads, ruled by the court below to be proper, was error. Heddles v. Chicago & Northwestern R. Co. 74 W 239, 42 NW 237.

Not every statement or direction made by the judge in the presence of the jury constitutes an instruction or charge within the meaning of the statute. Stiles v. Neillsville M. Co. 87 W 266, 58 NW 411.

It is the duty of the court to decide whether a proposed instruction is applicable to the evidence, and it is error upon giving an instruction, to say that the jury may use it as far as they find it applicable. Duthie v. Washburn, 87 W 231, 58 NW 380; Guinard v. The Knapp-Stout & Co. and Company, 90 W 123, 62 NW 625.

On the effect of a charge of a general nature given in connection with a special verdict see Banderob v. Wisconsin C. R. Co. 133 W 249, 113 NW 738.

The trial court should give specific instructions applicable to any particular question of a special verdict, so that there can be no doubt as to which question the instructions apply. Becker v. West Side D. Works, 172 W 1, 177 NW 907.

An argumentative instruction, reciting plaintiff's grounds for an affirmative answer and negativing their effect one by one was erroneous because it impressed the jury that the court favored the defendant and that plaintiff's proofs were of little value. Also, it was error to detail the testimony of one of defendant's witnesses and make no reference to opposing evidence except to tell the jury they had heard all of the evidence and had it be-

fore them. Roys v. First Nat. Bank, 183 W 10, 197 NW 237.

Instructions should be short, concise, and directly to the point. Hoffman v. Regling, 217 W 66, 258 NW 347.

It is reversible error for either the court or counsel to inform the jury of the effect of their answer or answers on the ultimate result of their verdict. Pecor v. Home Ind. Co. 234 W 407, 291 NW 313. See also De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

Where the trial court's instructions are not returned with the record on appeal, the supreme court must assume that the trial court instructed according to law. Post v. Thomas, 240 W 519, 3 NW (2d) 344.

Instructions given before the jury commenced its deliberations, that the same 10 jurors "must" agree on all the questions in the special verdict, and repeated with special emphasis when the jury after 6 hours' deliberation returned a verdict showing that the same 10 jurors did not agree on 2 of the questions, constituted prejudicial error as being coercive, where the jury after only 5 minutes' further deliberation returned a verdict showing that certain jurors had changed their original answers so that now the same 10 agreed on all the questions. Perkie v. Carolina Ins. Co. 241 W 378, 6 NW (2d) 195.

Failure of the court to instruct the jury not to take into account expert or other testimony which was merely speculative and conjectural cannot be assigned as error or reviewed on appeal, where there was no ruling or error assigned in relation to any ruling by the trial court on the admission or exclusion of such testimony, or any request for such an instruction on that subject. Jorgenson v. Hillestad, 250 W 592, 27 NW (2d) 709.

Where the trial court had instructed correctly, and there was no request by a party for instructions on the subject, the failure of the court to respond to the jury's request, after it had retired, for further instructions concerning the question of lookout, was within the discretion of the court. Bengston v. Estes, 260 W 595, 51 NW (2d) 539.

Erroneous instructions imposing an excessive burden of proof on one party are not rendered harmless by similar instructions given as to the opponent party, since one party may have sufficient evidence to meet a legitimate burden of proof and thereby become entitled to a favorable answer which the jury would necessarily withhold if it believed that he must satisfy an excessive requirement, while his opponent would not be at all prejudiced by a like extra burden if he was fortunate enough in the quantity and quality of his evidence to carry it. A party on whom an instruction has cast a greater burden than the law requires can justly complain thereof when the answer is unfavorable to him, and an erroneous instruction as to burden of proof on a material issue must be deemed to affect substantial rights of the party. Bengston v. Estes, 260 W 595, 51 NW (2d) 539.

The failure to object to prejudicially erroneous instructions, given in connection with a defective form of special verdict, did not constitute a waiver that would prevent such error from being raised on appeal. Deaton v. Unit C. & S. Corp. 265 W 349, 61 NW (2d) 552.

Instructions should be given so that the jury will understand to what questions they refer, but it is not necessary that an instruction be stated in immediate connection with every question on which it bears, although it is the better practice to do so. Olson v. Milwaukee Auto. Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

Where defendant made no objection in the trial court as to an allegedly improper instruction, he cannot raise the matter for the first time on appeal. Zombkowski v. Wisconsin River P. Co. 267 W 77, 64 NW (2d) 236.

An instruction, claimed to have been comment on evidence from which the jury would infer that a child unexpectedly and suddenly ran in front of defendant driver's auto, did not violate the rule that the trial court must not incorporate in its charge assumptions or positive statements as to facts which are in dispute so as to impress its interpretation of the evidence on the jury, but the instruction in question is not approved. Instructions should not give prominence to a contention of one party without giving equal prominence to a contention of other. Kuklinski v. Dibelius, 267 W 378, 66 NW (2d) 169.

Where the jury verdict was merely advisory, and the court itself decided the issues, error, if any, in the submission of questions to the jury and in the instructions was immaterial. Hartung v. Milwaukee County, 2 W (2d) 269, 86 NW (2d) 475, 87 NW (2d) 799.

Any possible prejudicial effect of plaintiffs' motion, made while the jury was present, to amend a complaint by increasing the amount in the prayer for relief, was sufficiently removed by the court's instruction that the request was not evidence. Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc. 6 W (2d) 396, 94 NW (2d) 396 and 577.

Although the problem of whether the jury, in comparing the negligence of the parties, will give great weight to a finding by the trial court, is inherent in a situation where the court is compelled to make a finding, the problem can and should be met by instructions making it clear that no greater weight should be given to such a finding than should be given to a finding made by the jury. Field v. Vinograd, 10 W (2d) 500, 103 NW (2d) 671.

The rule, that failure to give a proper requested instruction in an automobile collision case is not error where it affects both drivers in the same way and to the same degree, would apply to a failure to give a proper instruction on the emergency rule which was not requested but which should have been included in the charge. Pagel v. Holewinski, 11 W (2d) 634, 106 NW (2d) 425.

Where instructions are incomplete, and do not cover a point that ought to be covered, the supreme court will not reverse unless a timely request for appropriate instructions has been made to the trial court. Grinley v. Eau Galle, 274 W 177, 79 NW (2d) 297; Carson v. Pape, 15 W (2d) 300, 112 NW (2d) 693. See also: Taylor v. Seil, 120 W 32, 97 NW 498; Rost v. Roberts, 180 W 207, 192 NW 38; and Savina v. Wisconsin Gas Co. 36 W (2d) 694, 154 NW (2d) 237.

Instructions given on the question of damages, listing several items for possible consideration, are deemed not objectionable as allowing a double recovery for a single item of damage, in view of the fact that a general verdict on damages was used. Spleas v. Milwaukee & S. T. Corp. 21 W (2d) 635, 124 NW (2d) 592.

It is not error to refuse to give preliminary instructions to the jury prior to the admission of evidence. Keplin v. Hardware Mut. Cas. Co. 24 W (2d) 319, 129 NW (2d) 321, 130 NW (2d) 3.

The trial court is under no duty where it finds one party negligent as a matter of law, sua sponte to caution the jury, in connection with instructions relating to the comparative-negligence question, not to give greater or lesser importance or weight to its finding than to similar finding made by the jury. Moritz v. Allied Am. Mut. Fire Ins. Co. 27 W (2d) 13, 133 NW (2d) 235.

Denial of a request to instruct the jury with respect to plaintiff's failure to produce the testimony of his dentist who performed dental surgery upon him following the accident that they could infer that the witness' testimony would be unfavorable could not constitute a basis for error, where the parties had stipulated that the dentist's bills could be received in evidence without further proof, that they were reasonable, and the services performed necessary, for by stipulating to the reasonableness of the bills and their admission, defendants conceded that the dental services listed thereon were made necessary by the accident. Lundquist v. Western Casualty & Surety Co. 30 W (2d) 159, 140 NW (2d) 241.

A general guide for the instruction of juries. Fritz, 5 MLR 19.

2. Instructions in Writing or Taken Down.

The answer to a juror's question as to the rights of the parties is no part of the charge. Seymour v. Colburn, 43 W 67.

Where the record did not show that the charge was written or taken down but it was stated in a bill that the reporter had said that he took down the charge but had lost his notes of it, the rule of ch. 101, Laws 1868, as amended, was not complied with and the judgment must be reversed. Penberthy v. Lee, 51 W 261, 8 NW 116.

It is not error for the trial judge to repeat from memory, at the request of the jury, a portion of his written charge. Gibbons v. Wisconsin V. R. Co. 66 W 161, 28 NW 170.

Counsel who are aware that the reporter is absent from the courtroom at the time the judge gives additional oral instructions to the jury, by failing to call the court's attention to the fact (of which it had no knowledge), waives the right to object that such instructions were not taken down. Stringham v. Cook, 75 W 589, 44 NW 777.

Remarks made to the jury upon matters not relating particularly to the case on trial, but of a general character, as to their duties as jurors, are not a part of the instructions required to be in writing, and such remarks, when made orally, will not be cause for a reversal of the judgment, unless they are such as must necessarily have prejudiced the rights of the defeated party. Moore v. Platteville, 78 W 644, 47 NW 1055.

Where instructions were given orally in the absence of the stenographer and defendant's leading counsel, one of his attorneys being present and not objecting, the error in so instructing was waived. McMahon v. Eau Claire W. Co. 95 W 640, 70 NW 829.

Where the trial judge commented to the jury on the law or facts without his comments being taken down or reduced to writing and there was no waiver of a written charge at the beginning of the trial, the judgment is reversed even though the violation may not have resulted in prejudice. Stollfuss v. Reeck, 258 W 278, 45 NW (2d) 619.

3. Specific Instructions.

It was not error to instruct the jury that to publish in a newspaper that a man is a skunk, "if it is intended, as it ordinarily would be, * * * to render him ridiculous or odious," is libel; or that to publish in a newspaper that a man is guilty of low business practices, "meaning to have it understood that in his business he is unfair and disreputable or dishonest, is libelous"—the question of intention being left to the jury. Massuere v. Dickens, 70 W 83, 35 NW 349.

One of the defenses to an action on a policy of fire insurance being that plaintiff had destroyed or injured insured goods after the fire, it was error to charge that whatever damage was done to the property was in consequence of the fire. F. Dohmen Co. v. Niagara Fire Ins. Co. 96 W 38, 71 NW 69.

Although the court told the jury that it was the duty of the defendant to exercise ordinary care, without mention of the rule imposing a high degree of care on those operating automobiles on streets in the presence of children, requested instructions that the defendant was required to keep a proper lookout after observing the children should have been given. Ruka v. Zierer, 195 W 285, 218 NW 358.

An instruction that the burden was upon the defendant to show that the negligence of the plaintiff was as great as that of the defendant was not erroneous. McGuiggan v. Hiller Bros. 214 W 388, 253 NW 403.

An instruction that the testimony of witnesses who had measured the distances and made memoranda thereof was entitled to greater weight than evidence of witnesses who testified from recollection based on estimates of such distances, with the qualification that this instruction did not apply to any conflict in the testimony as to whether marks on the pavement were produced by any particular machine, correctly stated the law, and the refusal of the trial court to give the requested instruction without qualification was not error. Balzer v. Caldwell, 220 W 270, 263 NW 705.

A statement by the trial court, in its charge to the jury, of the statutory limitation of the amount of damages recoverable for pecuniary loss and for loss of society in a death case, is improper as suggesting permissible allowance of the maximum, but does not necessarily constitute reversible error. Schulz v. General Cas. Co. 233 W 118, 288 NW 803.

An instruction was erroneous which stated

the duty of a driver is to have his car under such control as to enable him to avoid accident since his duty is to use ordinary care to that end. Schulz v. General Cas. Co. 233 W 118, 288 NW 803.

An instruction stating the amounts demanded in the complaint in a death case, including a demand for the statutory limit for loss of society and companionship, a statement that the jury's total allowance was limited to the total of the amounts demanded was erroneous as suggesting to the jury that they might at all events assess the limit of the demand of the complaint, and was prejudicial to the defendants especially in view of the jury's assessment of the statutory limit for loss of society and companionship. Hoffman v. Labutzke, 233 W 365, 289 NW 652.

An instruction on right of way at intersections, quoting literally the provisions of 85.18 (1), and then adding that "any person who has the right of way is not absolved for that reason from using ordinary care to avoid a collision," was not erroneous by reason of such addition. (Roellig v. Gear, 217 W 651, and Beer v. Strauf, 236 W 597, distinguished.) Schmallenberg v. Smith, 237 W 285, 296 NW 597.

An erroneous instruction, to the effect that the driver of a motor vehicle must have his vehicle under such reasonable control as to enable him to avoid accidents which might be foreseen by the exercise of ordinary care, was not prejudicial where there were findings of negligence on his part as to speed, lookout and failure to yield the right of way, and no finding of negligence as to the plaintiff. Schmallenberg v. Smith, 237 W 285, 296 NW 597.

An instruction as to the presumption that a deceased motorist at the time of a collision acted for her safety should have been qualified by informing the jury as to the limited application and effect of the presumption. Guderyon v. Wisconsin Tel. Co. 240 W 215, 2 NW (2d) 242.

Negligence of a pedestrian or of a driver having the statutory right of way on a highway, in failing to use ordinary care to avoid injury by going ahead regardless of consequences, is not the same thing as negligence in respect to yielding the right of way in the statutory sense, and the term "yielding the right of way" should be used only in the statutory sense in questions relating thereto in a special verdict, and in instructions relating thereto. Smith v. Superior & Duluth Transfer Co. 243 W 292, 10 NW (2d) 153.

In relation to a question in the special verdict, worded so as to be answered by stating the total amount received by the plaintiff from the defendants, instead of calling for a "Yes" or "No" answer, an instruction, that the jury should insert such an amount as it was convinced by the preponderance of the evidence to a reasonable certainty that the defendants had paid to or expended in behalf of the plaintiff with her consent or approval, was correct and sufficient as to instructing on the burden of proof. Thoma v. Class Mineral Fume Health Bath Co. 244 W 347, 12 NW (2d) 29.

An instruction that the jury, in answering the question on comparative negligence in a special verdict, should apportion between the plaintiff pedestrian and the defendant's truck driver all of the negligence "which you find" attributable to each, was not defective as withdrawing from the consideration of the jury the driver's negligence in failing to yield the right of way. Derge v. Carter, 248 W 500, 22 NW (2d) 505.

The complaint alleged that the defendant had agreed with the plaintiff to support her for life in consideration of her agreeing to do housework for him as long as she was able. He denied making any agreement. The court instructed the jury that the burden of proof was on the plaintiff but omitted to tell the jury that she "was bound to establish the contract by direct and positive evidence or by circumstantial evidence equivalent to direct and positive." Such omission was reversible error. Roszina v. Nemeth, 251 W 62, 67a, 27 NW (2d) 886, 28 NW (2d) 885.

Since assumption of risk is not necessarily contributory negligence, it was misleading to speak of adding it to contributory negligence to determine that the negligence of the plaintiff guests was at least equal to the negligence of the driver of the automobile in which they were riding when it left the highway. Storlie v. Hartford Acc. & Ind. Co. 251 W 340, 28 NW (2d) 920.

An instruction that in determining the money value of damages the jury was entitled to consider the present "depleted" value of a dollar and its "lessened" purchasing power might have omitted the quoted words in order that the instruction have more universal application, but the inclusion of those terms was not prejudicial error since there is a clearly lessened purchasing power in the dollar at the present time. Dabareiner v. Weisflog, 253 W 23, 32 NW (2d) 220.

In an action to recover damages sustained in auto collision, the quantum of evidence required to support an affirmative on a given negligence issue was that which satisfies to a reasonable certainty by a "fair" preponderance of the evidence; and an instruction that plaintiff had the burden of proving defendant's negligence and proximate cause by a "clear" preponderance of the evidence was reversible error, particularly since the instruction given as to damages stated that they should be proved by "fair" preponderance. Bengston v. Estes, 260 W 595, 51 NW (2d) 539.

An actor is liable for the natural consequences of his negligent act and not merely for the natural "and probable" consequences thereof. An instruction that negligence is a cause when it produces injury or damage "as a natural and probable result" was technically incorrect, but not prejudicial here, since no liability was sought to be imposed for any consequences which were not probable as well as natural. Bengston v. Estes, 260 W 595, 51 NW (2d) 539.

An instruction on proximate cause is erroneous so far as including the element of foreseeability therein. (Such instruction was substantially verbatim the one recommended in Deisenrieter v. Kraus-Merkel Malting Co. 97 W 279, but was impliedly repudiated by the decision in Osborne v. Montgomery, 203 W 223.) It was also error to charge that proxi-

mate cause is one which "produces the injury as a natural and probable result" of defendant's negligence, since the use of the term "probable result" carries with it a connotation of forseeability, which is disapproved. An instruction on proximate cause would be proper which informs the jury that by proximate cause, legal cause, or cause (whichever of such 3 terms as may have been used in framing the causation question in the special verdict) is meant such efficient cause of the accident as to lead the jurors, as reasonable men and women, to conclude that the negligence of A (A having been found negligent by the jury's answers to prior question in the verdict) was a substantial factor in causing the injury. Pfeifer v. Standard Gateway Theater, Inc. 262 W 229, 55 NW (2d) 29.

An instruction was not erroneous for applying presumption of the exercise of due care for one's own safety to a defendant driver who had suffered a complete loss of memory as a consequence of injuries sustained in the accident and was unable to testify in relation thereto. Davis v. Fay, 265 W 426, 61 NW (2d) 885.

Instructions as to the care required of parent-driver were considered and approved in Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

An instruction was erroneous and prejudicial, requiring a new trial, in that it incorrectly stated that when a vehicle is in a position on the highway where it has no legal right to be it is presumed that its position is due to some act of negligence on the part of the operator, and in that it thereby placed the burden on the operator to prove otherwise. Olson v. Milwaukee Auto. Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

An instruction on lookout was approved in Weber v. Mayer, 266 W 241, 63 NW (2d) 318.

It is error to instruct that a driver is required to drive at such speed and under such control as to avoid accident, since his duty is to use ordinary care to that end. This error is not prejudicial where the jury found no negligence as to speed. Swanson v. Maryland Cas. Co. 266 W 357, 63 NW (2d) 743.

Where injury to land is in question the jury should be asked to find the values before and after the injury, and should not be told that the difference constitutes the damages. Zombkowski v. Wisconsin River P. Co. 267 W 77, 64 NW (2d) 236.

Under testimony from which the jury had the right to conclude that a driver exercised due care in approaching an intersection on an arterial highway, and saw the other car approaching on intersecting nonarterial highway as soon as it was possible for him to see it, and that he was confronted with an emergency when it became apparent that such other car was going to invade his path, the element of emergency was a proper subject for instructions and argument. Lawrence v. E. W. Wylie Co. 267 W 239, 64 NW (2d) 820.

In an action for personal injuries, the trial court erred in instructing that the burden of proof was on defendant to establish an affirmative answer to a question asking whether the injuries resulted from an unavoidable accident. Defendant was not prejudiced by such error, where the jury found defendant guilty of causal negligence and the court had rightly instructed that burden of proof as to questions relating thereto was on plaintiff and where the jury's negative answer to question asking whether plaintiff's injuries resulted from an unavoidable accident was not needed to support the judgment and hence was superfluous. Van Matre v. Milwaukee E. R. & T. Co. 268 W 399, 67 NW (2d) 831.

Where, in a head-on collision case, the questions submitted inquired as to the negligence of plaintiff driver in respect to position of her car on the highway, and in other respects, and there was evidence contrary to the presumption that plaintiff driver, an amnesia victim, had exercised due care for her own safety in respect to position on the highway, an instruction on such presumption was error so far as addressed to position on the highway; but where the jury was required by the instruction to consider the presumption only in connection with particular respects concerning which there was no actual evidence as to what plaintiff driver's acts or omissions were, it will be assumed that the jury eliminated the presumption from its consideration of inquiry as to position on the highway, and the instruction was not prejudicial. Atkinson v. Huber, 268 W 615, 68 NW (2d) 447.

An instruction, that the question of cause in this case was not affected by the fact that vehicles did not collide, correctly and sufficiently apprised the jury that actual collision was not necessary to give rise to causal negligence, and refusal to give a requested separate instruction couched in somewhat different language was not error. Simon v. Van de Hey, 269 W 50, 68 NW (2d) 529.

An instruction on management and control of motor vehicles, which, when considered in entirety, correctly stated the applicable rule that the duty of a driver is not to have his car under such control as to enable him to avoid an accident but is to use ordinary care to that end, was not rendered erroneous by reason of a phrase contained therein, "so that when danger appears he may stop his vehicle, reduce his speed, change his course, or take such other means to avoid injury or damage as may reasonably appear proper and feasible." Simon v. Van de Hey, 269 W 50, 68 NW (2d) 529.

Where the jury was properly instructed that damages recoverable by plaintiff were limited to those reasonably certain to have resulted from the injury complained of, it must be assumed that when damages were assessed the testimony as to plaintiff's nasal condition and its cause was considered by the jury in light of such instructions; and a question asking whether plaintiff's nasal condition was a natural result of injuries received by her when struck by an auto will be treated as surplusage, and the jury's affirmative answer thereto as immaterial, particularly where the award of damages was not excessive. Merkle v. Behl, 269 W 432, 69 NW (2d) 459.

For instructions in re violation of the safe-place statute, see note to 101.06, on safe public buildings, citing Bobrowski v. Henne, 270 W 173, 70 NW (2d) 666.

The refusal to give requested instructions, relating to mere skidding not being in itself proof of negligence and to skidding occurring

without fault, was not prejudicial where it appeared that the driver of the truck, bringing sand to help extricate stalled vehicle, was aware that the shoulder of the road declined to the ditch and was covered with ice, and that he stopped his truck on slippery shoulder at a place where he should have anticipated that it would skid toward the deceased. Williams v. Monroe County, 271 W 243, 73 NW (2d) 501.

Where the trial court, in instructing on questions inquiring whether northbound driver was negligent as to management and control, covered issue of her invasion of west lane of highway and read to jury the applicable portions of 85.15 (1), Stats. 1953, the court's failure to include a separate question as to her invasion of west lane was not prejudicial error. Heagney v. Sellen, 272 W 107, 74 NW (2d) 745, 75 NW (2d) 801.

Although instructions in the instant case correctly defined "under the influence of intoxicating liquor" as applied to the driver of a motor vehicle, the jury should also have been instructed that they must first determine that host-driver's consumption of liquor appreciably interfered with his care and management of the vehicle before they could properly consider the evidence as to the driver's drinking in answering questions dealing with his negligence and the guest's assumption of risk. Frey v. Dick, 273 W 1, 76 NW (2d) 716, 77 NW (2d) 609.

To avoid an inconsistent verdict, the question asking whether the host-driver was operating his car while under the influence of intoxicating liquor should preferably be omitted, and the matter of intoxication should be covered in instructions given in respect to questions dealing with host's negligence and guest's assumption of risk, since intoxication in itself does not give rise to liability but does so only when combined with some act of causal negligence. Frey v. Dick, 273 W 1, 76 NW (2d) 716, 77 NW (2d) 609.

Where the jury, under a proper instruction given, could not find in favor of the boy unless it was persuaded by the evidence to answer "Yes" to the question in special verdict, it cannot be said the trial court erred to prejudice of defendants in not informing the jury that the burden of proof was on the plaintiffs to show that the boy failed to realize the risk. Nechodomu v. Lindstrom, 273 W 313, 77 NW (2d) 707, 78 NW (2d) 417.

An instruction related to causation rather than to negligence and should not have been given with respect to the question inquiring as to whether the driver of the colliding vehicle was negligent as to speed. Vidakovic v. Campbell, 274 W 168, 79 NW (2d) 806.

Where the trial court had properly found pedestrian negligent as a matter of law in failing to yield the right of way to defendant's oncoming auto, the jury should not have been instructed that the emergency doctrine might be considered in determining the pedestrian's causal negligence, since one cannot deliberately proceed to a point of danger, as the pedestrian did, and then act within protection that a sudden emergency might otherwise give him. Metz v. Rath, 275 W 12, 81 NW (2d) 34.

Where the trial court instructed as to the duty of an auto driver to keep a proper lookout but, with reference to the question submitted as to the plaintiff pedestrian's lookout, the court merely stated, "I have already instructed you in regard to that," defendants' rights are deemed to have been so seriously prejudiced by lack of adequate instructions as to require the supreme court to invoke its discretionary powers under 251.09 and to order a new trial. Vanderhei v. Carlson, 275 W 300, 81 NW (2d) 742.

Where evidence warrants it, the jury should be instructed as to both liability and comparison, that a motorcyclist who by threats and pursuit causes another driver to speed may be found guilty of causal negligence. Veverka v. Metropolitan Cas. Ins. Co. 2 W (2d) 8, 85 NW (2d) 782.

In an instruction to the effect that the law presumes a person will not knowingly and consciously place himself in imminent danger, use of the language "knowingly and consciously" was erroneous and prejudicial, since negligence in placing oneself in a position of danger involves only inadvertence. Instructions on skidding and unavoidable accident were prejudicial as to plaintiff guest, where evidence was that the highway was clear of ice and snow, and there was nothing to show that it was a "slippery highway," and furthermore, no evidence that the car skidded but only that it suddenly made a turn into the lane of the oncoming car. On introduction of credible evidence permitting a contrary inference, the presumption of due care on the part of decedent driver disappeared, and it was error to instruct on such presumption; such error was prejudicial to plaintiff guest in view of jury's finding that the host-driver was not negligent as to driving on left side of highway. Mittelstadt v. Hartford Accident & Indemnity Co. 2 W (2d) 78, 85 NW (2d) 793.

In referring to ordinary care as that which "the great mass or majority of mankind" would exercise, etc., or which "the man of ordinary care and prudence" would exercise, etc., the 2 quoted expressions mean the same thing, and they may properly be used interchangeably, so that the use of either in instructions given to the jury is proper. Hasselman v. Zimmerman, 2 W (2d) 345, 86 NW (2d) 418.

An instruction given to the jury on burden of proof, that, in order to warrant an affirmative answer to any of certain submitted questions, "your minds must be satisfied or convinced by a preponderance of the evidence and to a reasonable certainty," if incorrect, is deemed not to have resulted in prejudice to the plaintiffs as placing an unwarranted burden on them and influencing the jury's answers. Powers v. Joint School Dist. 2 W (2d) 556, 87 NW (2d) 275.

An instruction that a driver changing a tire on a car parked partly on the highway must give warning to drivers approaching from the rear, but not informing the jury that the only warning required is adequate taillights, was prejudicial error. The court should instruct both as to the restriction against parking and the emergency parking exception, where there was some evidence that the car could not be completely driven off the roadway. Andraski v. Gormley, 3 W (2d) 149, 87 NW (2d) 818.

Instructions concerning the duty of drunken pedestrians on the highway and the duty of officers who have arrested them to protect them are discussed in Henrikson v. Maryland Cas. Co. 3 W (2d) 379, 88 NW (2d) 729.

An instruction on the doctrine of res ipsa loquitur, though inapplicable, although given immediately following an instruction given on a question asking whether the defendant was negligent in using a trailer hitch without a safety lock, is deemed not to have been prejudicial as affecting the jury's determination on the issue of ordinary care in finding the defendant negligent in using the hitch without a safety lock. Brunner v. Van Hoof, 4 W (2d) 459, 90 NW (2d) 551.

An instruction given to the jury, that in determining the money value of the plaintiff's damages "the present depleted value of a dollar and its lessened purchasing power" might be considered, although serving no good purpose, is deemed not prejudicial, since it made only a bare reference to a condition that must have been well known to every member of the jury. Kincannon v. National Ind. Co. 5 W (2d) 231, 92 NW (2d) 884.

In instructions relating to assumption of risk just prior to and at the time and place of the accident, it was proper to include the language "a guest who knows, or in the exercise of ordinary care should have known, that the conduct of the host-driver is in any respect dangerous is required under the law to make known his objection to such conduct by protesting." Ven Rooy v. Farmers Mut. Auto. Ins. Co. 5 W (2d) 374, 92 NW (2d) 771.

In an action for death of a pedestrian, struck by defendant's auto while crossing a highway at or near a rural intersection, an instruction that no person shall operate a vehicle at a speed greater than is "reasonable and prudent" under conditions and having regard for the actual and potential hazards then existing, etc., and that any rate of speed is unreasonable if it is greater than a reasonable and prudent person would use under the same or similar circumstances, was not prejudicial error for failing to refer to that portion of 85.40 (2) (b) providing that the operator of a vehicle shall, consistent with the above requirement, operate at an "appropriate reduced speed" when "passing" a pedestrian. Greene v. Farmers Mut. Auto. Ins. Co. 5 W (2d) 551, 93 NW (2d) 431.

It was not prejudicial error to refuse a requested instruction informing the jury that damages should not include any sum for federal income taxes, and that awards for personal injury are not subject to federal income tax. Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc. 6 W (2d) 396, 94 NW (2d) 577.

An instruction in connection with inquiries into negligence of a host-driver, to the effect that the jury might consider the evidence as to his drinking, but must first be satisfied that his consumption of alcoholic beverages appreciably interfered with his management and control of his automobile, was neither erroneous nor prejudicial. Haag v. General Accident Fire & Life Assur. Corp. 6 W (2d) 432, 95 NW (2d) 249.

If an instruction as to the impact of income taxes on damages awarded for personal injuries is given, it should state that the jury is to add nothing to and deduct nothing from the award because of nonliability for income tax. Behringer v. State Farm Mut. Auto. Ins. Co. 6 W (2d) 595, 95 NW (2d) 249.

An instruction on the elements comprising damages to be considered in answering a question asking merely as to the amount of "damages," which stated one of such elements to be plaintiff's loss of earnings resulting from her injuries was erroneous, in the absence of any evidence of impairment of earning capacity. Behringer v. State Farm Mut. Auto. Ins. Co. 6 W (2d) 595, 95 NW (2d) 249.

In an action for injuries sustained by a pedestrian who was crossing a street when struck by the defendant's automobile proceeding partially to the left of the center line of the street, instructions given to the jury which stated that the question was whether it was practical for the defendant to drive on the wrong side of the street, instead of properly stating that the question was whether it was impractical for the defendant to drive on the right-hand side of the street, and which erroneously placed the burden of proof on the plaintiff in respect to such issue, were prejudicial, and affected the substantial rights of the plaintiff in view of the jury's findings of comparative negligence against the plaintiff, thereby requiring a new trial. Smith v. Cummings, 8 W (2d) 369, 99 NW (2d) 179.

An instruction given on burden of proof, that before the jury would be justified in answering in the affirmative a question submitted as to whether there was ice where the plaintiff fell the jury must be "satisfied or convinced," etc., was not prejudicial to the plaintiff as requiring the jury to reach too high a standard of certainty because of the use of the additional word "convinced," and as thereby influencing the jury's negative answer. Potter v. Schleck, 9 W (2d) 12, 100 NW (2d) 559.

Even though a city ordinance prohibiting the maintenance of any downspout in such position that its contents would be cast onto or made to flow over a public sidewalk may have created a duty on the part of a property owner to a pedestrian using the sidewalk so that violation thereof would be negligence per se, the failure of the trial court so to instruct the jury was not prejudicial, since it would have no direct or logical effect on the jury's negative answer to the question submitted as to whether there was any ice where the plaintiff fell on the sidewalk adjacent to the defendant's building. Potter v. Schleck, 9 W (2d) 12, 100 NW (2d) 559.

When evidence supports a number of contributing causes, the charge and the verdict should recognize that possibility, and it is error to confine the causation question to a single cause. If the actor's negligent conduct is a substantial factor in bringing about the harm, it is a legal cause of that harm. Reserve Supply Co. v. Viner, 9 W (2d) 530, 101 NW (2d) 663.

In a situation where the defect is temporary or transitory, and consists in a failure to repair or maintain a place of employment in a condition as safe as the nature of the premises reasonably permitted, the instructions to the jury should make it clear that the defendant owner is not negligent if he had no knowl-

edge of the defect or notice of facts which should have caused him to know of its existence. Krause v. Veterans of Foreign Wars Post No. 6498, 9 W (2d) 547, 101 NW (2d) 645.

Where the trial court gave a requested instruction that the court, in finding that the plaintiff 12-year-old pedestrian was causally negligent in failing to yield the right of way to the defendant motorist, was not finding that the defendant was or was not negligent, and that the determination of the other questions in the special verdict was for the jury, including the apportionment of the negligence, and the court then gave instructions, among others, that a driver owes a special responsibility of care and safety as to children and a higher degree of care toward children than toward adults, that a child is held to a lesser degree of care than is an adult, and that in comparing the negligence the jury should take into consideration that the defendant was an adult and the plaintiff a child, the first-mentioned instruction was not inadequate because of being placed in the early part of the instructions, and the remaining instructions were not prejudicial to the plaintiff as placing undue emphasis on the court's finding on the plaintiff's failure to yield the right of way because of again referring in certain places to such finding. Field v. Vinograd, 10 W (2d) 500, 103 NW (2d) 671.

Instructions as to burden of proof in undue influence cases are discussed in Kuehn v. Kuehn, 11 W (2d) 15, 104 NW (2d) 138.

There is negligence on the part of the driver of an automobile when he proceeds at a speed at which he cannot stop his vehicle within the distance that he can see ahead of him. Any person whose negligence contributes to or helps to create an emergency is not entitled to the benefit of the emergency rule, and the jury in many cases should be so advised. Lentz v. Northwestern Nat. Cas. Co. 11 W (2d) 462, 105 NW (2d) 759.

The emergency rule is directed to the question of negligence rather than to the question of causation. Kuentzel v. State Farm Mut. Auto. Ins. Co. 12 W (2d) 72, 106 NW (2d) 324.

For criticism of an instruction as to negligence of a child see Rasmussen v. Garthus, 12 W (2d) 203, 107 NW (2d) 264.

Under evidence that on a snowy morning plaintiff entered a store and slipped on a puddle of water near the entrance, plaintiff should have anticipated the likelihood of a slippery floor and maintained a lookout. An instruction on ordinary care is approved. Mondl v. F. W. Woolworth Co. 12 W (2d) 571, 107 NW (2d) 472.

For discussion of instructions concerning negligence of driver and pedestrian run over while lying on road at night see Gilberg v. Tisdale, 13 W (2d) 249, 108 NW (2d) 515.

For decision respecting an instruction as to duty of a driver meeting a car which is signaling for a left turn see Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

Where the trial court instructed the jury as to the life expectancy of the plaintiff, but neglected to instruct also that in making a present award for a period of future years the jury should determine the present value of such award, but the defendant made no request for such instruction it was not prejudicial error on the part of the trial court in failing to include and give such instruction. Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

Failure to reduce speed after a dangerous situation has been sighted is properly a matter of management and control and not speed. Bartz v. Braun, 14 W (2d) 425, 111 NW (2d) 431.

Before an instruction on the duty of a physically handicapped motorist should be given to the jury, there must be a foundation in the evidence for a jury finding that there is some element of negligence to which the handicap relates, and the mere fact that a defendant motorist, here one partially disabled from polio, is physically handicapped does not justify giving such an instruction. In order to attain the required standard of ordinary care, a physically handicapped motorist must do more to exercise ordinary care than would be required if he were not handicapped, but the greater effort to compensate for his handicap should not be characterized either expressly or impliedly in instructions to the jury as requiring an exercise of a greater degree of care. Lisowski v. Milwaukee Auto. Mut. Ins. Co. 17 W (2d) 499, 117 NW (2d) 666.

Where there was no evidence of negligence as to management and control, deviating from a traffic lane or yielding a right of way, it was error to instruct on these points, but where no questions concerning them were submitted, the errors were not prejudicial. United States F. & G. Co. v. Milwaukee & S. T. Corp. 18 W (2d) 1, 117 NW (2d) 708.

For discussion of an instruction that before the jury could find causation it must find that the injury would not have occurred "but for" the accident see Chapnitsky v. McClone, 20 W (2d) 453, 122 NW (2d) 400.

Where a boy was struck as he crossed a highway at a private driveway running from the house to the barn on opposite sides of the road it was error to instruct as to his duties in crossing at a marked or unmarked crosswalk. The jury should have been instructed that there was no crosswalk present. Rossow v. Lathrop, 20 W (2d) 658, 123 NW (2d) 523.

Instructions given to the jury as to negligence in a safe-place case were considered in Petoskey v. Schmidt, 21 W (2d) 323, 124 NW (2d) 1.

The trial court did not commit prejudicial error in refusing to instruct the jury that the driver had the right to rely upon the assumption that pedestrians on the sidewalk would observe the rules of the road, since the driver was obligated to maintain an efficient lookout from a point where his view was unobstructed, and his duty to yield the right-of-way to pedestrians as defined in 346.47 (1) could not be lessened by an assumption that users of the sidewalk would obey the rules of the road, and more specifically, that children playing on a toy bicycle would not violate 346.88, relating to obstructing the operator's view or driving mechanism, or would not drive at unreasonable speeds, the only rules of the road relevant here. Bey v. Transport Ind. Co. 23 W (2d) 182, 127 NW (2d) 251.

Although the trial court, in submitting the case to the jury upon an ultimate fact verdict, included in its instruction as to the negligence

of the drivers, failure to dim headlights, and under the state of the evidence such failure could not be causal in view of the other dominant aspects of causal negligence present, the error was not prejudicial, since the causation question, as well as the negligence question, was submitted to the jury under proper instructions. Wanserski v. State Farm Mut. Auto. Ins. Co. 23 W (2d) 368, 127 NW (2d) 264.

A contention that the trial court erred in extending the benefit to the plaintiff of the emergency doctrine in its instructions, because no emergency is created in a head on collision situation where the time span is such that the confronted driver has time for considered action, must be rejected, where the testimony indicated that until the cars were about one-eighth of a mile apart the southbound driver would return to his own lane, and thus under the circumstances plaintiff would have had less than 5 seconds in which to react. Wanserski v. State Farm Mut. Auto. Ins. Co. 23 W (2d) 368, 127 NW (2d) 264.

A refusal to give specific instructions as to the degree of care a cab driver owed the passenger as a common carrier was not error, where such an instruction would not assist the jury in deciding the sole issue of consequence, i.e., who closed the door on plaintiff's thumb, and the instruction given in effect told the jury that whatever the degree of care, the driver was negligent if the jury found that he closed the door. Fleischman v. Holz, 23 W (2d) 415, 127 NW (2d) 9.

A defendant is not entitled to the benefit of the emergency rule where he has failed as to lookout, but where there is a jury question as to lookout, the application of the emergency rule is for the jury. A party who does not claim to have acted or failed to act in the situation in response to a sudden emergency is not entitled to the instruction. Misiewicz v. Waters, 23 W (2d) 512, 127 NW (2d) 776.

Even though the court instructed the jury that "you may" find defendant negligent if he violated safety statutes, this was not prejudicial where the jury was also told that a violation of the motor vehicle code constitutes negligence. Willenkamp v. Keeshin Transport System, Inc. 23 W (2d) 523, 127 NW (2d) 804.

Where evidence is introduced which would support a jury finding contrary to the presumption that a deceased person or one who has suffered amnesia exercised due care for his own safety, the presumption is eliminated and drops out of the case entirely and no instruction upon that subject should be given to the jury. Brunette v. Dade, 25 W (2d) 617, 131 NW (2d) 340.

When proof of negligence is offered in a case where res ipsa loquitur may be applicable, the trial judge must evaluate the testimony to determine if there has been such substantial proof of negligence as to render superfluous the giving of an instruction on res ipsa loquitur; sometimes the question as to adequacy of the proof of negligence will be a close one; it will be within the sound discretion of the trial court to determine whether the giving of the instruction will be redundant. Fehrman v. Smirl, 25 W (2d) 645, 131 NW (2d) 314.

An instruction that a child's violation of a safety statute is negligence is proper. Shaw v. Wuttke, 28 W (2d) 448, 137 NW (2d) 649.

Before a party is entitled to the benefits of the emergency doctrine he must be free from negligence which contributed to the creation of the emergency. If there is a factual dispute as to such negligence and assuming the time element is so short as to make the doctrine otherwise applicable, a person is entitled to the emergency-doctrine instruction and it is for the jury to determine its application. If, however, it can be held a person was negligent as a matter of law and such negligence contributed to the emergency, then such person is not entitled to the emergency-doctrine instruction. Shaw v. Wuttke, 28 W (2d) 448, 137 NW (2d) 649.

In the absence of testimony of a medical expert qualified to express such an opinion the jury should be instructed that no damages may be allowed for future pain and suffering. It is also error to refuse to instruct the jury regarding the absence of any permanent injuries where the record was devoid of medical proof that plaintiff's injuries would be permanent. Huss v. Vande Hey, 29 W (2d) 34, 138 NW (2d) 192.

The emergency instruction should be given only when a driver's management and control is in question, not when his only negligence is with respect to lookout. Where the court finds negligence as a matter of law, it is not error to refuse to instruct the jury that it should give this finding no more importance than its own findings; such an instruction is proper, however. Schmit v. Sekach, 29 W (2d) 281, 139 NW (2d) 88.

An instruction given the jury that they could consider impairment of claimant's future earning capacity as an element of damages was erroneous, where the evidence disclosed that the only aftereffect of the injury sustained was discomfort following surgery, but no explanation was offered as to how this affected his employment and the record otherwise indicated that plaintiff returned to work 3 months after the accident, and worked steadily from that time until the date of trial. Lundquist v. Western Casualty & Surety Co. 30 W (2d) 159, 140 NW (2d) 241.

Where plaintiff adduced direct expert testimony of negligent conduct of the attending physicians which, if accepted by the jury, would have been sufficient to sustain the verdict, res ipsa loquitur instructions were unnecessary and if given would have been superfluous. Carson v. Beloit, 32 W (2d) 282, 145 NW (2d) 112.

An emergency instruction may not be refused because the trial court feels a party was not free from negligence. The party's negligence may be a jury issue. Even an ultimate finding of negligence does not justify a refusal, since the instruction might have affected the finding. Geis v. Hirth, 32 W (2d) 580, 146 NW (2d) 459.

Wis J I—Civil, 1280, on skidding is a correct statement of the law, and should be used in proper cases. Abbott v. Truck Ins. Ex. Co. 33 W (2d) 671, 148 NW (2d) 116.

It is proper to give the "absent witness" instruction as applied to a party who claims amnesia but does not call his doctor to sup-

port the claim, since his claim prevented his adverse examination and cross-examination. Schemenauer v. Travelers Ind. Co. 34 W (2d) 299, 149 NW (2d) 644.

A driver who slows to 5 miles per hour at night without using his brakes when not required to do so by conditions present, is negligent for failing to keep a lookout to the rear. Under this state of facts the court may also instruct as to 346.59 (1). Bentzler v. Braun, 34 W (2d) 362, 149 NW (2d) 626.

The trial court did not err in omitting to instruct the jury that the plaintiff, who claimed retrograde amnesia, was entitled to the presumption that at the time of the accident he was exercising due care, where there was no medical testimony that the plaintiff had amnesia, that the injury sustained by the plaintiff caused any amnesia, or that, to a reasonable degree of medical probability, such amnesia would be the likely result of the injuries sustained. Ernst v. Greenwald, 35 W (2d) 763, 151 NW (2d) 706.

4. Requested Instructions.

A party cannot take advantage of an erroneous instruction given at his own request. Woodworth v. Mills, 61 W 44, 20 NW 728.

An instruction, prepared by counsel, summarizing the evidence as understood by them and stating that all matters stated in such summary as well as all other facts and circumstances are to be considered by the jury in reaching a conclusion, may be refused. Tuckwood v. Hanthorn, 67 W 326, 30 NW 705.

It is not error to refuse an instruction as to what constitutes neglect which ignores material facts in evidence bearing thereon. Atkinson v. Goodrich T. Co. 69 W 5, 31 NW 164.

A judgment will not be reversed for instructions as to the degree of care required of appellant or as to the weight of testimony of experts, where the verdict shows that the appellant was not prejudiced thereby. Atkinson v. Goodrich T. Co. 69 W 5, 31 NW 164.

The refusal to give correct instructions as asked and without change is error unless they are substantially given in the general charge. Guinard v. The Knapp-Stout & Company, 95 W 482, 70 NW 671.

It is not error, after giving an instruction as requested by a party, to add a more complete instruction on the same point as the law applicable to a particular phase of the case. Doan v. Willow Springs, 101 W 112, 76 NW 1104.

Sec. 2853, Stats. 1898, requires counsel to formulate in writing the exact words of the instruction desired. Lynch v. Waldwick, 123 W 351, 101 NW 925.

Where there was no request for an instruction as to the weakness of admissions, the refusal of the trial court to grant a new trial for want of such an instruction was not error. The refusal of the court to submit to the jury additional questions requested by the defendant was not error, where the questions submitted covered the ultimate issues of fact involved in the plaintiff's cause of action. Levandowski v. Studey, 249 W 421, 25 NW (2d) 59.

A request for instructions should not be an attempt to perform duties of the trial court in preparing total instructions but request that the court incorporate specific matters in which the party has an interest; and the requested instructions should be short, concise and directly to the point. Minton v. Farmers Mut. Auto. Ins. Co. 256 W 556, 41 NW (2d) 801.

It is not error to refuse a requested instruction which assumes a fact not proved. The trial court has some discretion as to what special instructions it will give based on isolated portions of testimony in the case. Gustafson v. Engelman, 259 W 446, 49 NW (2d) 410.

The provision that each instruction requested shall be given without change or refused in full, must be considered together with the provision in 274.37 that no judgment shall be reversed or set aside or new trial granted on the ground of misdirection of the jury or for error as to any matter of procedure unless it shall appear that the error complained of has affected the substantial rights of the complaining party. Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

A sufficiently adequate instruction was not prejudicial for failing to give in full the requested instruction, which, if given in full, would have repeated several times the general proposition that an employer has no duty to warn of dangers which are open and obvious to a person of ordinary comprehension. Venden v. Meisel, 2 W (2d) 253, 85 NW (2d) 766.

Where the plaintiff's requested instruction as to the relationship of speed to management and control bore no relationship to the question of speed being a factor in management and control, the trial court's refusal to give the requested instruction was not error, and its failure to do so was not prejudicial to the plaintiff in view of the jury's finding that the defendant was negligent as to his rate of speed and that such negligence was causal. Bensend v. Harper, 2 W (2d) 474, 87 NW (2d) 258.

Where an emergency, if any, existed because of defendant driver's failure to keep a proper lookout, defendant was not entitled to an instruction as to the emergency doctrine, and the giving of such instruction constituted prejudicial error. Andraski v. Gormley, 3 W (2d) 149, 87 NW (2d) 818.

Where defendant driver drove in the left lane because she saw the pedestrian in her right-hand lane, failure to give plaintiff's requested instruction, that the operator of a vehicle shall operate the same on the right half of the roadway, was not prejudicial error. Failure to give plaintiff's requested instruction that the deceased pedestrian was presumed to have exercised due care was not prejudicial error, in that such presumption disappears when evidence sufficient to support a finding of negligence on the decedent's part is introduced. Greene v. Farmers Mut. Auto. Ins. Co. 5 W (2d) 551, 93 NW (2d) 431.

5. Modification of Erroneous Instructions.

If the appellant is injured by a violation of the statutory requirement it is error; it is otherwise where an erroneous instruction asked is so modified as to state the law correctly. Mason v. H. Whitbeck Co. 35 W 164.

An error in stating too broadly the duty of

a party under a contract is cured if the judge thereafter states that duty in such a way that the jury could not be misled. Asmuth v. Shaw 63 W 223, 23 NW 430.

An inadvertent error in stating the law, which is immediately and fully corrected by the rest of the charge, will not cause a reversal. Annas v. Milwaukee & N. R. Co. 67 W 46, 30 NW 282.

An erroneous instruction is not cured by a correct one on the same subject unless the latter specifically or necessarily withdraws or qualifies the former. (Yerkes v. Northern P. R. Co. 112 W 184, 88 NW 33, followed.) O'Donnell v. Kraut, 242 W 268, 7 NW (2d) 889.

Instructions placing the burden of proof erroneously on the defendants were not cured by subsequent instruction properly putting burden of proof on the plaintiff, since it cannot be known whether the jury was guided by the correct rule or by the erroneous one. (Ackley v. Farmers Mut. Auto. Ins. Co. 273 W 422, 78 NW (2d) 744, followed.) Frankovis v. Klug & Smith Co. 275 W 156, 81 NW (2d) 495.

Where the court misquoted a statute in instructing the jury, but later called them back and pointed out the error and reread the statute correctly, there was no prejudicial error. Smuda v. Milwaukee County, 3 W (2d) 473, 89 NW (2d) 186.

270.22 History: 1857 c. 69 s. 2; R. S. 1858 c. 132 s. 13; R. S. 1878 s. 2854; Stats. 1898 s. 2854; 1925 c. 4; Stats. 1925 s. 270.22; 1935 c. 541 s. 154.

See note to 274.13 citing Klassa v. Milwaukee Gas Light Co. 273 W 176, 77 NW (2d) 297.

270.23 History: R. S. 1849 c. 97 s. 30; R. S. 1858 c. 118 s. 31; R. S. 1878 s. 2855; Stats. 1898 s. 2855; 1925 c. 4; Stats. 1925 s. 270.23.

A judgment will not be reversed for the reason that, on the jury asking further instructions, the court read to them the evidence for the respondent bearing on the question and refused to read that of the appellant. Byrne v. Smith, 24 W 68.

The court, upon being informed by the jury that they cannot agree, may refuse to discharge them and may tell them that it is their duty to use every reasonable effort to come to an agreement. Giese v. Schultz, 69 W 521, 34 NW 913.

The court, in a civil case, is not required to send for counsel when the jury desires further instructions. Meier v. Morgan 82 W 289, 52 NW 174.

How much of the evidence and what part of it may be stated anew or read to the jury when it returns into court is a question within the discretion of the judge, and error can be assigned because of its exercise only in case of a clear abuse of such discretion. Salladay v. Dodgeville, 85 W 318, 55 NW 696.

It is not error for the court to tell the jury, on their being brought in without having agreed, that they should not be obstinate, but should harmonize their differences by meeting the testimony in a spirit of fairness and candor. Odette v. State, 90 W 258, 62 NW 1054; Jackson v. State, 91 W 253, 64 NW 838.

Where there was no dispute as to the amount that plaintiff was entitled to recover, if any recovery could be had, it was proper for the court to decline to receive a verdict for the plaintiff for one-half of this amount and to direct the jury to further consider the case. Chandler v. Hinds, 135 W 43, 115 NW 339.

There was no error in sending the jury back a third time for further deliberation, the statute not applying where the jury returned a sealed verdict into court, and on being polled it was discovered there was lack of unanimity and the jury was thereafter sent out a second time, and a subsequent poll again indicated such lack of unanimity; the statute was not applicable because in both cases the jury did bring in a verdict, and difficulty arose by reason of negative answers to subdivisions of a question while an affirmative answer on the polls was required to support such negative answers in the verdict, resulting in a misunderstanding on the part of one of the jurors as to how to evidence his assent to the verdict, and creating the appearance of a disagreement when in fact there was none. Wilke v. Milwaukee E. R. & L. Co. 209 W 618, 245 NW 660.

Where the jury during its deliberation sent the bailiff to the trial court with a written communication inquiring as to a question in the special verdict, counsel, by participating with the court in formulating a written statement of further instructions and by consenting to such means of communication with the jury, waived possible error in respect to the procedure employed in thus further instructing the jury. Olson v. Williams, 270 W 57, 70 NW (2d) 10.

Where the jury's first return to the courtroom was merely for purposes of obtaining clarification on answering certain submitted questions, and did not in any way indicate an inability to reach a verdict, and the jury later returned with a proposed verdict listing 4 dissenting jurors, and the trial court sent the jury back to the jury room for further deliberation after advising that the proposed verdict was defective, the practice thus employed by the court was entirely appropriate. La Vallie v. General Ins. Co. 17 W (2d) 522, 117 NW (2d) 703.

In furnishing additional instructions the trial court is not obliged to frame the same in the precise words earlier employed. Fehrman v. Smirl, 25 W (2d) 645, 131 NW (2d) 314.

Although it is common and desirable practice to agree after the jury has retired for deliberation to give counsel reasonable notice of the jury's return for reinstructions or to render its verdict, the court is under no legal duty to do so. Behling v. Lohman, 30 W (2d) 519, 141 NW (2d) 203.

270.24 History: R. S. 1878 s. 2856; Stats. 1898 s. 2856; 1925 c. 4; Stats. 1925 s. 270.24; 1927 c. 473 s. 48.

The plaintiff cannot, without consent of the court, submit to a nonsuit after a new trial has been granted. Anderson v. Horlick's M. Co. 137 W 569, 119 NW 342.

A plaintiff has no absolute unqualified right to a nonsuit. Such right is subject to the discretion of the court. In a proper case a nonsuit may be denied. Rohr v. Chicago, N. S. & M. R. Co. 179 W 106, 190 NW 827.

A motion for nonsuit is equivalent to a demurrer to the evidence. In passing on a motion for nonsuit, the trial court should view the evidence in the light most favorable to the plaintiff and must give the plaintiff the benefit of the most favorable inference that can reasonably be deduced therefrom. Lake Mills v. Veldhuizen, 263 W 49, 56 NW (2d) 491.

270.24 does not overcome the well-settled rule that voluntary nonsuit is discretionary and neither by negative inference gives the plaintiff an absolute right to a nonsuit up until the argument to the jury nor reserves to the trial court jurisdiction during appeal to grant one. State ex rel. Freeman Printing Co. v. Luebke, 36 W (2d) 298, 152 NW (2d) 861.

The purpose of 270.24 is that both sides ought to stand on even terms, and it is unnecessary to preserve the plaintiff from inequitable surprises that he should have a privilege of attempting another trial which the defendant does not have, if the charge of the court shall prove unfavorable. Krueger v. Winters, 37 W (2d) 204, 155 NW (2d) 1.

Refusal to grant a voluntary dismissal of an action at the request of the plaintiff whose sole object was to try the case in Minnesota was not an abuse of discretion where the request was made after defendant had prepared the case for trial shortly before the term in which the case was to be tried, and where defendants and the majority of the witnesses resided in Wisconsin. Nelson v. Devney, 102 F (2d) 487.

270.25 History: 1856 c. 120 s. 170; R. S. 1858 c. 132 s. 10; R. S. 1878 s. 2857; Stats. 1898 s. 2857; 1923 c. 65; 1925 c. 4; Stats. 1925 s. 270.25; Court Rule XXXIII s. 1; Sup. Ct. Order, 212 W xv; Stats. 1933 s. 270.25, 270.251; 1935 c. 541 s. 155, 156; Stats. 1935 s. 270.25; 1951 c. 36.

1. Five-sixths verdict.
2. Directed verdict.

1. Five-Sixths Verdict.

On verdicts in civil cases (five-sixths rule) see notes to sec. 5, art. I.

An instruction that, if 10 or more jurors are convinced that the answer to a question should be "Yes," the answer should be "Yes," but if 10 or more are not so convinced the answer should be "No," was erroneous because it left no opportunity to disagree. Stevens v. Montfort S. Bank, 183 W 621, 198 NW 600.

On appeal the supreme court will assume that a verdict was unanimous in the absence of a showing to the contrary. Ireland v. Tomahawk L., T. & I. Co. 185 W 148, 200 NW 642.

A party who fails to poll the jury cannot claim error on the ground that the replies of the jury do not show that the same 10 jurors agreed to each answer. Kosak v. Boyce, 185 W 513, 201 NW 757; Bentson v. Brown, 186 W 629, 203 NW 380.

If the burden of proof is upon one party to establish an affirmative answer and 10 or more jurors are not convinced that the burden has been met, then they must return a negative answer, because 10 or more, i. e. the jury, agree that the question should not be answered in the affirmative. (The rule as stated in prior cases, insofar as it conflicts with the foregoing, is overruled.) Stokdyk v. Schmidt, 190 W 108, 208 NW 941, 210 NW 719.

Where 10 jurors were agreed that the defendant railroad company did not have knowledge that there was danger to its employes from a condition existing in its refrigerator cars, and that it ought not, in the exercise of ordinary care, to have known of such danger, and these 2 answers cover the entire range of possible liability of the defendant, judgment should be entered for the defendant notwithstanding the same 10 jurors did not agree upon other questions of the special verdict. (The rule announced in former cases and language contained in them, and in particular in Hobbs v. Nelson, 188 W 108, 205 NW 918, is withdrawn.) Will v. Chicago, M. & St. P. R. Co. 191 W 247, 210 NW 717.

An erroneous instruction, in an action for personal injuries, requiring at least 10 jurors to be satisfied by the evidence in order to negatively answer a question as to defendant's negligence, is prejudicial error, notwithstanding the jury gave an affirmative answer to such question. Kichefsky v. Wiatrzykowski, 191 W 319, 210 NW 679.

An instruction that the agreement of five-sixths of the jury upon answers to the questions submitted would constitute the verdict was erroneous, though probably not prejudicial where all questions were answered affirmatively. Waters v. Markham, 204 W 332, 235 NW 797.

Error in instructing that at least the same 10 jurors "must" agree to all of the answers made in the verdict was not prejudicial, where the jurors unanimously found adversely to the defendant's contentions in respect to all facts which had to be established in order to hold the defendant liable for the amount assessed as damages by 10 of the jurors. Fraundorf v. Schmidt, 216 W 158, 256 NW 699.

Where the jury answered the question of causal connection between a motorist's negligence and the collision in the negative but also found that the motorist's negligence contributed 10% to produce the collision, and gave the motorist a verdict for full damages, the verdict was corrected by changing the answer to the affirmative and reducing the judgment 10%. Bodden v. John H. Detter Coffee Co. 218 W 451, 261 NW 209.

An erroneous instruction relating to a five-sixths verdict is not reversible error where the jury's verdict is unanimous. In re Hogan, 232 W 521, 287 NW 725.

Where the jurors were unanimous on answers finding the defendant causally negligent but 2 jurors dissented from the answer exonerating the plaintiff from contributory negligence as to lookout, and another juror dissented on the award of damages, the verdict is fatally defective. (Biersach v. Wechselberg, 206 W 113, 238 NW 905, followed.) Stylow v. Milwaukee E. R. & T. Co. 241 W 211, 5 NW (2d) 750.

To constitute a five-sixths verdict under 270.25 (1), every question in a special verdict that is essential to support a judgment must be answered by at least 10 and the same 10

jurors. Scipior v. Shea, 252 W 185, 31 NW (2d) 199.

In a tort case involving the comparative-negligence statute, the same 10 jurors must agree on every question that is necessary for them to consider in answering the question of comparative negligence; and the same 10 jurors must agree as to the items of causal negligence found and the comparative effect of the causal negligence of the parties in producing the resulting damage. Scipior v. Shea, 252 W 185, 31 NW (2d) 199.

A guest occupant of an automobile brought an action against her host and a street railway company for injuries sustained in a collision between the automobile and a streetcar. There was no issue of assumption of risk or contributory negligence on the part of the plaintiff. The jury by special verdict found that the streetcar motorman was not negligent as to speed or lookout or control, with 2 jurors dissenting from the answer on control; found that the motorist was not negligent as to speed or lookout or control but was causally negligent as to yielding the right of way to the streetcar, with 2 other jurors dissenting from the answer on control; and assessed the plaintiff's damages at a stated sum, with 2 other jurors dissenting therefrom. The verdict was complete as to nonliability of the streetcar company by the agreement of the same 10 jurors on all questions in regard thereto. The verdict was complete as to liability of the motorist by the unanimous answers to the questions of his causal negligence as to yielding the right of way, so as to render immaterial the 2 dissents to the answer on control. The verdict was complete as to assessment of the plaintiff's damages by the agreement of 10 jurors thereto. In such circumstances, the verdict was not defective as failing to comply with the requirements of a five-sixths verdict. Augustin v. Milwaukee E. R. & T. Co. 259 W 625, 49 NW (2d) 730.

An instruction to the jury relating to a five-sixths verdict, stating that the same five-sixths of the jurors "must" agree to each answer, is disapproved as being peremptory, and should be avoided on retrial. Johnston v. Eschrich, 263 W 254, 57 NW (2d) 396.

Where the jury unanimously found the defendant guilty of causal negligence and the plaintiff not guilty of contributory negligence, but on the damage question the jury found the plaintiff's loss of earnings to be $1,000, with one juror dissenting, and damages for permanent injuries to be $4,500, with 2 other jurors dissenting, the same 10 jurors not agreeing answering all the questions necessary to support a judgment, the verdict was defective, requiring a new trial. The trial court's estimate of damages could not be substituted for the several appraisals by different jurors, when the question was one of fact for the jury. McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

Where 2 jurors dissented from a finding that the defendant motorist was causally negligent and 2 others dissented from the findings that the plaintiff pedestrian was causally negligent, the effect was that 4 jurors were disqualified from answering the comparative-negligence question, thereby leaving only 8 to participate in that essential answer, and hence it was not the required verdict of five-sixths of the jurors and the trial court properly granted a new trial. Fleischhacker v. State Farm Mut. Auto. Ins. Co. 274 W 215, 79 NW (2d) 817.

Read as a whole, instructions given to the jury on the subject of five-sixths verdicts, after a verdict returned in which 4 separate jurors had noted dissents, were not erroneous as insisting that 10 jurors must agree on all questions to support a valid verdict, and, taken as a whole, the instructions were not prejudicial to the plaintiff, although the jury then returned the verdict with all dissents eliminated. Bensend v. Harper, 2 W (2d) 474, 87 NW (2d) 258.

An instruction given with reference to the five-sixths-verdict rule, to the effect that the court would of course like to have the jury be unanimous in all of their answers, but that "the jury may return a verdict when 10 or more jurors are in agreement upon the answers made" and that "as to any jurors who dissent or disagree" they should sign their names and the number of the question in the spaces provided "at the foot of the verdict," was not erroneous as coercive, or as restricting the right of individual jurors to express disagreement. Kowalke v. Farmers Mut. Auto. Ins. Co. 3 W (2d) 389, 88 NW (2d) 747.

Where, in actions arising out of a collision between 2 automobiles, 10 jurors agreed that both drivers were causally negligent, but only 9 of those 10 agreed on the comparison, the verdict was defective under 270.25 (1), since it is necessary for at least the same 10 jurors to agree on every question that it is necessary for them to consider in answering the question of comparative negligence, and the same 10 jurors must agree as to the items of causal negligence found and the comparative effect of the causal negligence of the parties in producing the resulting damages. Strupp v. Farmers Mut. Auto. Ins. Co. 14 W (2d) 158, 109 NW (2d) 660.

A special verdict which is defective under 270.25 (1), because the same five-sixths of the jurors do not agree on all of the questions submitted, requires a new trial. Wendel v. Little, 15 W (2d) 52, 112 NW (2d) 172.

Where 10 jurors agreed that the driver of the turning automobile involved in the instant collision was not guilty of any negligence, this made a complete verdict as to her, and the dissents of the remaining 2 jurors were immaterial on an issue of whether a new trial should be granted because the special verdict was not agreed to by five-sixths of the jurors as required by 270.25 (1). United States F. & G. Co. v. Milwaukee & S. T. Corp. 18 W (2d) 1, 117 NW (2d) 708.

A verdict could not be impugned as invalid on the theory that the same 10 jurors were not in agreement upon all issues because one juror dissented both as to the finding of causal negligence on the part of decedent and also to the 95% assessment to the host driver, while 2 different jurors dissented to the amount determined as pecuniary loss, since the verdict as a whole was for the plaintiff, and dissent as to the negligence of the deceased could only be interpreted as evincing

a belief that the verdict should have been for the plaintiff only more so, i. e., that the 95% negligence assessed against the driver should have been increased to 100%; hence the dissent was not essential to support the verdict for the plaintiff and the verdict was complete and defendant in no way prejudiced thereby. Vogt v. Chicago, M. St. P. & P. R. Co. 35 W (2d) 716, 151 NW (2d) 713.

While under 270.25 the same five-sixths of the jurors must agree upon all questions essential to support the judgment entered upon it, a verdict containing 3 dissents (each on separate questions) may be cured where the trial court determines that one of the questions to which a juror dissented should be answered as a matter of law, thereby rendering that question and the dissent thereto superfluous. Krueger v. Winters, 37 W (2d) 204, 135 NW (2d) 1.

Requirements for five-sixths verdicts in civil jury trials. Ihrig, 11 MLR 84.

Requirements to be met for a valid five-sixths verdict. 27 MLR 103.

2. Directed Verdict.

On a motion to direct a verdict the court is required to determine the question whether conflicting inferences may fairly be drawn from the evidence, and it is the province of the court to determine such question. Where the court determines that such inferences may be drawn, it is the province of the jury to determine the weight of the probabilities. The decision of the court in this matter will not be disturbed unless it appears to be clearly wrong. McCune v. Badger, 126 W 186, 105 NW 667.

It is not proper to direct a verdict until both parties rest. Kaley v. Van Ostrand, 134 W 443, 114 NW 817.

A fact established by undisputed evidence must be taken as a verity, notwithstanding a contrary finding by the jury. Richland E. S. Asso. v. Chicago, M. & St. P. R. Co. 177 W 530, 188 NW 625.

It is the duty of the court to declare the law on undisputed facts, not to submit such facts to a jury. Twist v. Minneapolis, St. P. & S. S. M. R. Co. 178 W 513, 190 NW 449.

When a verdict is directed, the question on appeal is whether the trial court was clearly wrong. Wendt v. Fintch, 235 W 220, 292 NW 890.

In determining whether the trial court should have submitted a controversy to the jury instead of directing a verdict for the defendant, the supreme court assumes the validity of the plaintiff's evidence if it is not found to be inherently defective or untrue. Huerth v. Prairie du Sac, 246 W 25, 16 NW (2d) 422.

On review of a judgment of dismissal based on a directed verdict for the defendant, the question is whether the testimony, construed most favorably to the plaintiff, required submission of the issue to the jury. Scheit v. Duffy, 248 W 174, 21 NW (2d) 257.

If the evidence is conflicting, or if the inferences to be drawn from the credible evidence are doubtful, and there is any credible evidence which under any reasonable view will support an inference either for or against the claim or contention of any party, then the proper inference to be drawn therefrom is a question for the jury and the court should not assume to answer such question. Trautmann v. Charles Schefft & Sons Co. 201 W 113, 228 NW 741; Elder v. Sage, 257 W 214, 42 NW (2d) 919; Webster v. Heyroth, 257 W 238, 43 NW (2d) 23.

A verdict may be directed only when the evidence gives rise to or admits of no dispute as to the material issues, or when the evidence is so clear and convincing as reasonably to permit an unbiased and impartial mind to come to but one conclusion. In an action to recover on an alleged oral royalty contract relating to an invention of the plaintiff, the evidence was sufficient to submit to the jury the question whether such a contract had been entered into between the parties, so that the trial court erred in directing a verdict in favor of the defendant on this issue. Johann v. Milwaukee Elec. Tool Corp. 264 W 447, 59 NW (2d) 637.

Positive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court or jury in the absence of something in the case which discredits the same or renders it against the reasonable probabilities. Thiel v. Damrau, 268 W 76, 66 NW (2d) 747.

Conflict in the testimony must be resolved in the plaintiff's favor in considering whether it was error for the trial court to have failed to direct a verdict against the plaintiff, since a verdict can be directed against a plaintiff only if the plaintiff's evidence, giving it the most favorable construction it will reasonably bear, is insufficient to justify a verdict in the plaintiff's favor. Pelitsie v. National Surety Corp. 272 W 423, 76 NW (2d) 327.

In determining whether or not the trial court was in error in directing the verdict, the evidence is to be construed in the light most favorable to the party against whom the verdict was directed. Olson v. Sentry Ins. Co. 38 W (2d) 175, 156 NW (2d) 429. See also Hollie v. Gilbertson, 38 W (2d) 245, 156 NW (2d) 462.

The trial court was warranted in directing a verdict in favor of defendant (a railroad company) under undisputed evidence which clearly established that negligence of the plaintiff (a motorist) exceeded that of defendant. Verrette v. Chicago & N. W. Ry. 40 W (2d) 20, 161 NW (2d) 264.

270.26 History: 1915 c. 219 s. 3; Stats. 1915 s. 2857a; 1923 c. 31; 1925 c. 4; Stats. 1925 s. 270.26; 1927 c. 473 s. 48a; Sup. Ct. Order, 245 W viii.

Comment of Advisory Committee: See Comment of Advisory Committee under 260.01.

Where, in an action before a jury, a motion by plaintiff to dismiss a counterclaim was in effect a motion for a directed verdict in his favor, there was a waiver of jury trial and submission of the whole case to the court for decision. Ott v. Cream City S. Co. 166 W 228, 164 NW 1005.

Upon motion for a directed verdict by all parties, the court has the option to either direct a verdict or submit the issue to a jury. Hutching v. Rahn, 179 W 50, 190 NW 847.

Where the court, after dismissing the jury on motions by both parties for a directed verdict, decided that it had erroneously excluded testimony for defendant and reopened the case, defendant's waiver of a jury trial extended only to the case as it then stood and did not deprive it of the right to a jury trial on the issue raised by such newly admitted evidence. Borosich v. Metropolitan Life Ins. Co. 191 W 239, 210 NW 829.

Where the trial court elects not to treat the motions of both parties for a directed verdict as amounting to a stipulation waiving a jury trial, the motions do not have the effect of such a stipulation within 270.26. Rodaks v. Herr, 213 W 310, 251 NW 453.

The trial court, after directing a retrial because of inability of the jury to agree, could grant a renewed motion for a directed verdict and entry of judgment dismissing the complaint. Shumway v. Milwaukee Athletic Club, 247 W 393, 20 NW (2d) 123.

The fact that the parties remaining in a lawsuit move for a directed verdict, and the court accepted the motions as a waiver of a jury, would not prevent one of the parties from assigning as error the fact that the court had earlier granted a third party's motion for a directed verdict and dismissed the action as to him. Peterson v. Wingertsman, 14 W (2d) 455, 111 NW (2d) 436.

270.27 History: 1856 c. 120 s. 171; R. S. 1858 c. 132 s. 11; 1874 c. 194 s. 1; 1875 c. 21; R. S. 1878 s. 2858; Stats. 1898 s. 2858; 1903 c. 390 s. 1; Supl. 1906 s. 2858; 1925 c. 4; Stats. 1925 s. 270.27; Sup. Ct. Order, 217 W ix; Sup. Ct. Order, 11 W (2d) v.

Revisers' Note, 1878: Last part of section 11, chapter 132, R. S. 1858, with the new provision of section 1, chapter 194, Laws 1874, as amended by chapter 21, Laws 1875, amended to designate more clearly the mode of taking a special verdict, and put it under the direction of the court. Since the adoption of chapter 194, Laws 1874, it has been apparently often supposed that a special verdict, instead of being separate findings on material issues raised by the pleadings, was a form of having the jury express their opinion on various fragments of the evidence, and accompany them with a general verdict. The general and special verdicts ought not to be used together, strictly; but with the general verdict, the jury may be required to return special findings, which more nearly agree with the common practice under chapter 194, Laws 1874. Yet the right to this in the discretion of the court, has existed since the adoption of the code, at least, and is so retained.

1. Generally; form; controverted issues.
2. Instructions.
3. Complete; consistent; speculative; duplicitous.
4. Requests; objections; waiver.

1. Generally; Form; Controverted Issues.

Answers to special questions must be direct and positive. Carroll v. Bohan, 43 W 218.

Ch. 21, Laws 1875, was not intended to take away the common-law power of the judge to direct a nonsuit or to direct a verdict either for the plaintiff or defendant. The true meaning of the statute is that, when the case is submitted to the jury, either party may demand that the jury shall find a special instead of a general verdict. Furlong v. Garrett, 44 W 111.

The verdict should be so full, clear and consistent that judgment may be rendered from the facts found. Cotzhausen v. Simon, 47 W 103, 1 NW 473.

Where there were but 2 questions in the case it was a perversion of the right to a special verdict to submit 19 questions. Blesch v. Chicago & N. W. R. Co. 48 W 168, 2 NW 113. See also Eberhardt v. Sanger, 51 W 72, 8 NW 111.

It is in the discretion of the court to direct findings upon particular questions when a general verdict is required. Schatz v. Pfeil, 56 W 429, 14 NW 628.

Failure to submit questions to the jury in a special verdict which upon the evidence could receive but one answer, and when such answer sustains the judgment rendered in the case, is not error. Wright v. Ft. Howard, 60 W 119, 18 NW 750.

The questions submitted should be limited to a single, direct and controverted issue, and so stated as to admit of a direct and intelligible answer. Jewell v. Chicago, St. P. & M. R. Co. 54 W 610, 12 NW 83; Murray v. Abbot, 61 W 198, 20 NW 910.

A general verdict is unnecessary where a special verdict is found; but its rendition is not error. Hoppe v. Chicago, M. & St. P. R. Co. 61 W 357, 21 NW 227.

Where the evidence conclusively shows that plaintiff is not entitled to recover, and a special verdict contains no finding which interferes with the rendition of judgment for defendant, judgment may be rendered accordingly. Munkwitz v. Uhlig, 64 W 380, 25 NW 424.

If the questions submitted cover all the controverted issues of fact and are reasonably specific, nothing more is required. Pratt v. Peck, 65 W 463, 27 NW 180.

It is not error to refuse to submit for a special verdict questions as to matters not controverted on the trial. Schrubbe v. Connell, 69 W 476, 34 NW 503.

An answer that there was no proof upon which a reply could be made to a question is, in effect, a negative one, and it is improper to send the jury back after causing to be read to them portions of the testimony of one witness, omitting other material portions and other testimony on the same subject. Sherman v. Menominee R. L. Co. 77 W 14, 45 NW 1079.

The form of the verdict is very much in the discretion of the trial court. Bartlett v. Beardmore, 77 W 356, 361, 46 NW 494.

A question in the nature of a general verdict may be united with the special verdict. It obviates the necessity for another trial, where the special verdict does not cover all the issues or controverted points. Barnes v. Stacy, 79 W 55, 48 NW 53.

In ejectment against a tax-title claimant not in actual occupancy of the land the court did not submit a question on that point; but in submitting questions said that they involved "all the controverted facts of the case upon which plaintiff founds his claim." To this the

defendant then made no objection or suggestion. His silence was equivalent to admission that nonoccupancy had been proved. Geisinger v. Beyl, 80 W 443, 50 NW 501.

The statute seems to limit the questions to the controverted facts or at most to such as might properly have been put in issue by the pleadings. It was never designed to elicit from the jury a mere abstract of the evidence, nor to submit undisputed facts to it. Montreal River L. Co. v. Mihills, 80 W 540, 551, 50 NW 507 (42 questions); Ohlweiler v. Lohmann, 88 W 75, 59 NW 678 (10 questions); Farley v. Chicago, M. & St. P. R. Co. 89 W 206, 61 NW 769 (32 questions); Haley v. Jump River L. Co. 81 W 412, 427, 51 NW 321, 956 (28 questions).

If the special verdict covers the disputed questions the trial court may formally find the undisputed facts. Mayhew v. Mather, 82 W 355, 52 NW 436.

If there are separate findings as to compensatory and punitory damages there is no presumption that the former were increased because of an error allowing the latter. Stone v. Chicago, St. P. M. & O. R. Co. 88 W 98, 59 NW 457.

Facts established by the undisputed evidence go to support or defeat the verdict, whether they are formally made a part of it or not. For purposes of review they are equivalent to a special finding. Murphey v. Weil, 89 W 146, 61 NW 315.

In the absence of a bill of exceptions and a general verdict the presumption is that every allegation of the complaint not negatived by the special verdict was proven. McDermott v. Chicago, M. & St. P. R. Co. 91 W 38, 64 NW 430.

A statement of the facts made by the judge, covering the undisputed testimony, is considered a part of the verdict. McDermott v. Chicago, M. & St. P. R. Co. 91 W 38, 64 NW 430.

A question which is compound, and, while calling for an affirmative answer, is in the alternative, is objectionable. Klochinski v. Shores L. Co. 93 W 417, 67 NW 934.

Where the court answered a question by saying that plaintiff was injured as alleged in his complaint, and its attention was not called to the fact that the language might be understood to mean that the allegations of the complaint were true, the answer was not ground for reversal. Stanwick v. Butler-Ryan Co. 93 W 430, 67 NW 723.

A general verdict may be taken in connection with a special one where the latter covers all the issues; the former is merely a conclusion of law from the special findings and neither benefits nor harms either party. Cooper v. Insurance Co. of Penn. 96 W 362, 71 NW 606.

Any fact which is established by the undisputed evidence may be considered as part of the special verdict for the purpose of rendering judgment thereon. Farwell v. Warren, 76 W 527, 45 NW 217; Cooper v. Insurance Co. of Penn. 96 W 362, 71 NW 606.

The duty of framing the questions in a special verdict is solely for the court. If the verdict covers the issues, error cannot be assigned because questions suggested by counsel are not adopted. Schumaker v. Heinemann, 99 W 251, 74 NW 785.

The final facts which are put in issue should be submitted to the jury when request is made, and a verdict covering simply the negligence is not sufficient. Lee v. Chicago, St. P. M. & O. R. Co. 101 W 352, 77 NW 714.

It is error to submit a special verdict covering the entire case, and also a general verdict accompanied by full instructions. Schaidler v. Chicago & Northwestern R. Co. 102 W 564, 78 NW 732; Ward v. Chicago, M. & St. P. R. Co. 102 W 215, 78 NW 442.

A special verdict should cover the facts in issue and not conclusions derived from the facts. Bigelow v. Danielson, 102 W 470, 78 NW 599.

Every material fact in issue by the pleadings, controverted on the evidence and affecting the rights of the parties, should be covered by a special verdict and those facts from which any such issuable fact may be taken as inferable may properly be omitted, although questions covering such evidentiary facts may be added in the discretion of the court. Baxter v. Chicago & Northwestern R. Co. 104 W 307, 80 NW 644.

The special verdict is not designed to obtain from the jury a mere abstract of the evidence. Zimmer v. Fox Valley E. R. Co. 118 W 614, 95 NW 957.

Sec. 2858, Stats. 1898, limits the questions of a special verdict to such facts as are put in issue by the pleadings or to such as might properly have been put in issue by the pleadings. Sladky v. Marinette L. Co. 107 W 250, 83 NW 514; Wisconsin F. L. Co. v. Bullard, 119 W 320, 96 NW 833.

A single general verdict on more than one cause of action may under certain circumstances suffice if the instructions were such that the jury could only have reached such verdict by resolution of all the material issues in favor of that party. Sletten v. Madison, 122 W 251, 99 NW 1020.

Where the complaint alleged that injury was caused by failure to carry on certain work in the usual, safe and workmanlike manner, it was error to omit to submit to the jury a question covering the issue raised as to whether or not the work was done in a safe and workmanlike manner. Olwell v. Skobis, 126 W 308, 105 NW 777.

Where the court submitted certain even-numbered questions together and then submitted the odd-numbered questions, each of which was dependent upon the answer of one of the even-numbered questions, this method was contrary to the statute. Clark County v. Rice, 127 W 451, 106 NW 231.

It is improper to submit any question in a special verdict on a subject concerning which there is no conflict in the evidence. Bereiter v. Abbottsford, 131 W 28, 110 NW 821.

For a discussion of the rules applicable to the submission of questions on a special verdict, and the citations of a large number of Wisconsin cases bearing upon this question see the dissenting opinion of Justice Timlin in Paulus v. O'Neill, 131 W 69, 111 NW 333.

Where certain of the jurors filed affidavits that they did not intend to find contributory negligence but that they intended to return a verdict which would entitle the plaintiff to judgment, this was not a correction of a ver-

dict but an impeachment, and could not be allowed. Butteris v. Mifflin M. Co. 133 W 343, 113 NW 642.

A question covering 2 issuable propositions disjunctively connected is erroneous, where after the question is answered in the affirmative it cannot be said that the whole jury affirmed either of the disjunctive propositions. (Mueller v. Northwestern I. Co. 125 W 326, 104 NW 67, overruled.) Du Cate v. Brighton, 133 W 628, 114 NW 103.

A special verdict should not be combined with a general verdict. Where no special verdict is requested, the court has the power to submit any particular questions of fact in addition to the general verdict. Rowley v. Chicago, M. & St. P. R. Co. 135 W 208, 115 NW 865.

Where there was an issue as to the eviction from leased premises, this could be submitted as a question in the special verdict, and a submission of specific facts concerning the condition of the premises would have been error. Johnson v. Tucker, 136 W 505, 117 NW 1002.

A special verdict should fairly cover the issuable facts raised in an action. Ryan v. Oshkosh G. L. Co. 138 W 466, 120 NW 264; Gay v. Milwaukee E. R. & L. Co. 138 W 348, 120 NW 283.

Unless the discretion of the court in framing a special verdict is so abused as to infringe upon the statutory right of a party to a special finding on a material issue, the judgment will not be reversed. Sufferling v. Heyl, 139 W 510, 121 NW 251.

The proper practice is to omit from the special verdict grounds of negligence not supported by the evidence or relevant under the evidence. Lemke v. Milwaukee E. R. & L. Co. 149 W 535, 136 NW 286.

A form of special verdict in an action by a traveler on a highway for damages because of collision between his vehicle and electric car is discussed in Lemke v. Milwaukee E. R. & L. Co. 149 W 535, 136 NW 286.

A special verdict should contain only one question relating to contributory negligence; but 2 questions partly covering the field and one covering it wholly will not constitute prejudicial error if the answers are consistent. Fandek v. Barnett & Record Co. 161 W 55, 150 NW 537.

The court may properly answer a question in the special verdict as to which there is practically no conflict in the evidence. Murphy v. Interlake P. & P. Co. 162 W 139, 155 NW 925.

The submission of an erroneous question and a negative answer thereto were nonprejudicial, because the case was barren of any evidence warranting an affirmative answer. Meidenbauer v. Pewaukee, 162 W 326, 156 NW 144.

A clerical error in the questions submitted, which did not mislead the jury, may be corrected by the court after verdict. Estate of Margaret Flanagan v. Estate of John Flanagan, 169 W 537, 173 NW 297.

The practice of deciding issues in sections by questions covering a part of each issue cannot be approved, as it tends to subject a trial to the peril of confusing the jury and misleading them into a failure to clearly comprehend the issues and thus to produce mistrials. Kellner v. Christiansen, 169 W 390, 172 NW 796; Baraboo v. Excelsior C. Co. 171 W 242, 177 NW 36.

The questions of a special verdict should be so framed as to put the burden of proof on the party having the affirmative of the issue; and the placing of the burden upon the wrong party is prejudicial error when the issue is material. Kausch v. Chicago & M. E. R. Co. 173 W 220, 180 NW 808.

A question not submitted to the jury will not be presumed to have been decided by the court when it is supported by no evidence. Smeesters v. New Denmark M. H. F. Ins. Co. 177 W 41, 187 NW 986.

In an action to recover damages for injuries sustained in an automobile collision, the better practice is to submit the issues raised by the complaint and those by a counterclaim in separate questions. Zeitlow v. Sweger, 179 W 462, 192 NW 47.

Questions in a special verdict eliciting facts showing as a matter of law the assumption of risk by a coemploye, rather than the direct question of such assumption, accord with the purpose of the special verdict statute. Molovasilis v. Chicago, M. & St. P. R. Co. 179 W 653, 191 NW 582.

A question in a special verdict as to whether a bank or "its agents acting therein" had reasonable cause to believe that it was receiving a payment that would constitute a preference of creditors was too narrow, because it did not include the president and a director and attorney of the bank who had sufficient knowledge. Roys v. First Nat. Bank, 183 W 10, 197 NW 237.

Where the answer to a question in the verdict was written "no" instead of "yes," and the jury was reassembled after having left the jury box, but not the courtroom, and was permitted to correct the answer, the procedure was proper. Junion v. Snavely M. Co. 186 W 298, 202 NW 674.

In the absence of a request by either party that the case be submitted upon a special verdict as to the specific grounds of negligence, the trial court may properly submit the separate grounds to the jury by means of a general question. Halamka v. Schneider, 197 W 538, 222 NW 821.

Submission of a question in condemnation proceedings as to what sum would compensate a landowner for damage was sufficient submission of the case on special verdict. Muscoda Bridge Co. v. Grant County, 200 W 185, 227 NW 863.

The question as to a host's negligence in the management of a car should be framed to permit determination of whether the host was negligent in increasing the danger which the guest assumed or of adding new danger. The question of negligence having been submitted in 3 divisions there should have been like subdivisions as to proximate cause. Waters v. Markham, 204 W 332, 235 NW 797.

It was error to submit an omnibus question inquiring whether the negligence of the defendant caused the plaintiff's injuries, following questions as to the negligence of the defendant in 3 specific respects. The jury should have been called upon to answer whether each

element of negligence constituted the cause of the injuries. Fontaine v. Fontaine, 205 W 570, 238 NW 410.

In the preparation of a special verdict the question of speed might well be merged with that of control or management, the jury being told that in deciding whether the car was under proper control or properly managed the speed at which it was being driven should be taken into consideration. Haines v. Duffy, 206 W 193, 240 NW 152.

The jury's answers to the court's questions, limited to material fact issues, constitute a sufficient verdict. Honore v. Ludwig, 211 W 354, 247 NW 335.

Questions in the special verdict, as to whether defendant was negligent in respect to lookout and control, and as to whether plaintiff was negligent in respect to lookout and control, were not improper as suggesting to the jury the opinion of the court as to who was negligent. (Loizzo v. Conforti, 207 W 129, distinguished.) Submitting the issue of lookout and issue of control in one question was not prejudicial. Guth v. Fisher, 213 W 323, 251 NW 223.

Submission of defendant's negligence by series of questions headed by a preface containing an omnibus statement of the law of the case and evidentiary facts applicable to each question was prejudicial error. Hoffman v. Regling, 217 W 66, 258 NW 347.

In an action against an employer by an operator of a vegetable topping machine for injuries sustained when his fingers became caught in the rollers of the machine, where the evidence was sufficient to raise a jury question as to whether the employer because of a failure to block and steady the machine had failed to make it as free from danger as the nature and place of employment permitted and whether this was a cause of the injury, but where it appeared that a failure to supply switches or other devices in no way contributed to the injury, submitting a question merely whether the machine was as free from danger as the nature and place of employment permitted, with instructions setting forth the safety statute (101.06) was misleading and constituted prejudicial error. Fries v. Lallier, 219 W 388, 263 NW 178.

The preferred practice is to submit only controverted questions of fact to the jury, which are to be answered without reference to the court's ruling on other facts. Balzer v. Caldwell, 220 W 270, 263 NW 705.

Under a stipulation of facts on which a case was presented to the trial court, the rights of the parties were subject to determination on the facts stipulated as if they had been found by special verdict. Riley v. State Bank of De Pere, 223 W 16, 269 NW 722.

For a discussion of jury questions in an action for malicious prosecution, see Lechner v. Ebenreiter, 235 W 244, 292 NW 913.

A special verdict should consist of a sufficient number of plain, single questions, calling for direct answers, to cover the facts in issue, and the questions must be so framed that the jury can find the ultimate facts and so that those findings will reveal all essential facts necessary to enable the court to enter the correct judgment. Carlson v. Strasser, 239 W 531, 2 NW (2d) 233.

A question in the special verdict, asking whether the rainfall and accumulation of water preceding the break in the embankment was greater than an ordinary prudent and intelligent owner of a dam on the river in question ought reasonably to anticipate might occur, should not have been included. But an instruction assigning to the plaintiff town the burden of proving to the contrary was not error. Wausaukee v. Lauerman, 240 W 320, 3 NW (2d) 362.

Under the evidence, grounded entirely on the presumption of death from prolonged absence, there should have been submitted a question asking whether the insured had been seen or heard from within 7 years prior to the commencement of the actions, and (to be answered in case of a negative answer to the first question) a second question asking whether the insured had disappeared under circumstances such that he would be unlikely to communicate with his family, relatives and friends. Swenson v. Kansas City Life Ins. Co. 246 W 432, 17 NW (2d) 584.

The intention of a party presents a question of fact. A finding of the court on the question of the intention of a grantor to create a restrictive covenant running with the land should be given the same weight as are findings of fact of the court in other cases. Clark v. Guy Drews Post, 247 W 48, 18 NW (2d) 322.

In negligence cases each ground of negligence constitutes a distinct litigated question, and proper practice requires that the jury be given an opportunity to find specially with reference to each ground of alleged negligence; and this cannot be accomplished by the submission of an omnibus question. Schumacher v. Wolf, 247 W 607, 20 NW (2d) 579.

The general rule is that jurors will not be permitted to impeach a verdict by affidavit, and ordinarily their power over the verdict ceases when they are discharged, and only within narrow limits can they impeach the verdict by what they say after having been discharged. Brophy v. Milwaukee E. R. & T. Co. 251 W 558, 30 NW (2d) 76.

A question asking whether the place where plaintiff was injured was a portion of depot grounds of defendant, together with an instruction that the burden of proof was on the plaintiff to satisfy the jury that such question should be answered "No," properly presented the issue to be decided, and was not error for putting the burden of proof on the negative rather than on the affirmative. The form of a special verdict rests in the sound discretion of the trial court, and that discretion will not be interfered with so long as the issues of fact in the case are covered by appropriate questions. Garcia v. Chicago & N. W. R. Co. 256 W 633, 42 NW (2d) 288.

Where specific acts of negligence are charged in the complaint and litigated on the trial, a special verdict should contain specific questions covering those alleged acts. Cook v. Wisconsin Tel. Co. 263 W 56, 56 NW (2d) 494.

Questions in a special verdict should be framed, so far as practicable, to secure the most direct consideration of the evidence as

it applies to the issues made by the pleadings and supported by the evidence. Thoresen v. Grything, 264 W 487, 59 NW (2d) 682.

Where the driver of a truck, who turned left as another truck was approaching from the rear, testified that he did not see the approaching truck at any time before the collision, and this was not controverted by any other evidence, the special verdict properly included a question on his negligence as to lookout but should not have included a question on his negligence as to management and control, since, where a driver did not see what was plainly in sight, his negligence is one of lookout only and his management and control do not enter the case. Briggs Transfer Co. v. Farmers Mut. Auto. Ins. Co. 265 W 369, 61 NW (2d) 305.

Assumption of risk was not an issue where it was not specially pleaded as a defense, and hence questions thereon should not have been in the special verdict where timely objection had been made to the introduction of evidence thereon and to the inclusion of such questions in the verdict; further, the questions on assumption of risk were not in proper form and erroneously referred to certain other questions submitted; rendering the verdict defective and requiring a new trial. Catura v. Romanofsky, 268 W 11, 66 NW (2d) 693.

Under the circumstances presented in evidence, a question asking whether, as 2 vehicles approached each other, and before either of them turned to the west immediately prior to the collision, the southbound driver was negligent, (a) as to lookout, and (b) as to yielding one half of the traveled portion of the highway, would have tended to avoid confusion and made it easier for the jury to resolve the question as to whether the southbound driver was negligent in being on the wrong side of the road immediately before he swerved his car to the west and applied his brakes. Stevens v. Farmers Mut. Auto. Ins. Co. 268 W 25, 66 NW (2d) 668.

Where it was not clear just what the left-turning driver was attempting to do prior to collision with a northbound station wagon south of the intersection, but it was clear that his maneuvers with his truck were violative of one of the statutes regulating the turning movements of motor vehicles, a question asking whether he was negligent in respect to the manner in which he turned to the left was proper as covering any of such violations. Donahue v. Western Casualty & Surety Co. 268 W 193, 67 NW (2d) 265.

Since a child 5½ years old cannot be guilty of contributory negligence, questions on such point are surplusage, and since defendant was found negligent, can be stricken without affecting the verdict. Since no new trial is necessary on the issue of negligence, there is no need to invoke the rule of waiver based on the failure of the guardian ad litem to object to the questions. Thomas v. Tesch, 268 W 338, 67 NW (2d) 367, 68 NW (2d) 457.

In intersectional collision cases inconsistent verdicts will be reduced if the verdict states that the jury is not to answer the question as to the failure of the driver approaching from the left to yield, if it answers "Yes" to the question of either speed or failure to stop for the arterial on the part of the driver coming from the right. Burkhalter v. Hartford Accident & Indemnity Ins. Co. 268 W 385, 68 NW (2d) 2.

Where a driver testified that he did not see the other car at any time before the collision, there was an issue as to negligence in respect to lookout but none as to management and control on his part, and hence a question on his management and control should not have been submitted. Burkhalter v. Hartford Accident & Indemnity Ins. Co. 268 W 385, 68 NW (2d) 2.

In a question directing the jury to assess the plaintiff's damages for pain and suffering and disability, "if any," the qualifying phrase "if any" was confusing and misleading, and made it uncertain whether any part of the jury's allowance therefor was in compensation of disability which the jury might have included in answering another question inquiring as to damages for loss of wages. Kalish v. Milwaukee & Suburban Trans. Corp. 268 W 492, 67 NW (2d) 868.

The failure of the driver of a motor vehicle to reduce speed after a dangerous situation has been sighted by him is properly a matter of management and control, and not speed. Jennings v. Mueller Trans. Co. 268 W 622, 68 NW (2d) 565.

Where the testimony is not sufficient to raise an issue of fact in some particular, the trial court should refuse to submit a question thereon to the jury. Thompson v. Eau Claire, 269 W 76, 69 NW (2d) 239.

Assumption of risk by a guest occupant of an automobile is an affirmative defense, so that where it is not pleaded, a question of assumption of risk should not be submitted to the jury. Sandley v. Pilsner, 269 W 90, 68 NW (2d) 808.

In an action for injuries sustained by a guest, a question inquiring as to the negligence of the host-driver in respect to speed should have been submitted in the same manner as though the host-guest relationship did not exist. Ameche v. Ameche, 271 W 170, 72 NW (2d) 744.

It is unnecessary to submit a question of fact to the jury when the fact itself is established by undisputed evidence; the fact, when so established, is as much a verity in the case as if it were admitted by the pleadings. Leiterman v. Burnette, 271 W 359, 73 NW (2d) 490.

The refusal to include questions concerning possible negligence of the operator of a truck in tow in stopping on the highway, in not leaving a clear and unobstructed width of 15 feet of roadway opposite his vehicle, and in failing to put out fusees or other lights was prejudicial error, which was not cured by questions as to whether such operator was negligent in having his vehicle towed on the highway and as to lights, especially in view of inadequate and erroneous instructions given to the jury in connection with such submitted questions. Robinson v. Briggs Trans. Co. 272 W 448, 76 NW (2d) 294.

Where there is no consensual relationship, no question of assumption of risk should be submitted. Schiro v. Oriental Realty Co. 272 W 537, 76 NW (2d) 355.

Where the jury could have found that 2 drivers entered the intersection at approximately the same time, so that the southbound driver on the arterial and coming from the right would have the right of way, and the evidence would permit the inference that the deceased westbound driver failed to yield, the trial court, instead of exonerating the westbound driver as to failure to yield by answering the question thereon in the special verdict, should have submitted such question to the jury, but in such form as not to require an answer if the jury had already found that the southbound driver was negligent as to speed so as thereby to forfeit the right of way. Neumann v. Evans, 272 W 579, 76 NW (2d) 322.

Where the trial court, concluding that certain questions should be answered as a matter of law, answers them in the negative, as distinguished from the affirmative, such questions and the negative answers thereto should not be included in the special verdict as submitted to the jury, since the jury may be influenced by such inclusion when it makes its comparison of the negligence of the respective parties. Neumann v. Evans, 272 W 579, 76 NW (2d) 322.

Assumption of risk is an affirmative defense which must be specifically pleaded, and hence, where it was not pleaded, the trial court's refusal to include a question relative to the plaintiff's assumption of risk was not error. Stanley v. Milwaukee Auto. Ins. Co., 274 W 226, 79 NW (2d) 662.

In pedestrian cases, confusion will be avoided if inquiries as to failure to yield the right of way are limited to those cases in which a pedestrian is crossing a street or highway. In other cases, such as where the pedestrian is merely walking on or along the highway, the proper inquiry is as to position on the highway. Wojciechowski v. Baron, 274 W 364, 80 NW (2d) 434.

Where, after return of a verdict, plaintiff's counsel obtained and filed affidavits from 3 jurors which stated that a certain other juror during the deliberations took a stand indicating prejudice against the plaintiff, and the inference which counsel sought to draw from such affidavits was that these jurors were influenced in their deliberations by arguments advanced by such other juror, thus impeaching their own verdict, the proposed use of such affidavits was objectionable as violating the general rule that jurors will not be permitted to impeach their own verdict by affidavits. Frion v. Craig, 274 W 550, 80 NW (2d) 808.

In drafting a special verdict the trial court must first consider the issues raised by the pleadings, and should then eliminate those that are determined by the evidence on the trial by admissions, by uncontradicted proof, or by failure of proof; and only those issues remaining should go to the jury. Bell v. Duesing, 275 W 47, 80 NW (2d) 821.

Where there are no special circumstances to excuse lookout by a passenger in the front seat of a car, it is error not to submit a question as to causal contributory negligence in respect to lookout by the guest. Vandenack v. Crosby, 275 W 421, 82 NW (2d) 307.

Where specific acts of negligence are charged in the complaint and litigated on the trial, and there is evidence in the record to support affirmative answers, specific questions covering such alleged acts should be included. Omer v. Risch, 275 W 578, 83 NW (2d) 153.

The mere fact that issues are raised by pleadings does not require that they be included, since the trial court must first consider the issues raised by the pleadings, then eliminate from the issues so raised those that are determined by the evidence on the trial by admissions, by uncontradicted proof, or by failure of proof, and only those remaining should go to the jury. Behr v. Larson, 275 W 620, 83 NW (2d) 157.

Instead of submitting a form of question asking the jury to assess damages for "personal injury" to a person who died about 7 hours after being injured in an accident, it would have been better to have used the term "conscious pain and suffering," but the terms used were not erroneous when considered in the light of the instructions given in connection therewith. Blaisdell v. Allstate Ins. Co. 1 W (2d) 19, 82 NW (2d) 886.

In a case involving an intersectional collision between a northbound auto approaching on a nonarterial street and a westbound truck approaching on an arterial street, it was not a proper submission to have conditioned the jury's answering of the question as to the north-bound driver's negligence with respect to calculation on a negative finding as to his failure to make proper observation and, instead, lookout should have been submitted in but one question under proper instructions both as to matters of observation and of calculation. Plog v. Zolper, 1 W (2d) 517, 85 NW (2d) 492.

A question asking whether a host-driver failed to exercise the skill and judgment which she possessed should not have been submitted, since the question involved assumption of risk, which defense was not raised in any of the pleadings, and since, further, there were no grounds for submission of the question, in that plaintiff guest testified that she often rode with the host and that the host was a good and careful driver, and driver of the other car involved testified that from the time he first saw the host's car it traveled in its proper lane and that its invasion of his lane was a sudden turn. Mittelstadt v. Hartford Accident & Indemnity Co. 2 W (2d) 78, 85 NW (2d) 793.

In regard to compensatory damages, separate questions should be asked as to pain and suffering and loss of earnings. Meyer v. Fronimades, 2 W (2d) 89, 86 NW (2d) 25.

Where the only question is whether one or the other driver was on the wrong side of the road, no questions as to speed or management and control need be submitted. Hennepin Trans. Co. v. Schirmers, 2 W (2d) 165, 85 NW (2d) 757.

Considering the instructions given to the jury with respect to a question submitted as to the plaintiff's personal injury, including his pain and suffering and future disability, and a separate question as to his future wage loss if any, no duplication of damages resulted in submitting both questions. It is optional with a trial court whether to embrace the element of future wage loss in the same damage ques-

tion covering future disability, or to submit it separately. Sawdey v. Schwenk, 2 W (2d) 532, 87 NW (2d) 500.

The submission of a single question as to the negligence of the arresting officer in his care of the intoxicated decedent, rather than submitting certain requested separate questions, was within the proper discretion of the trial court; and in any event, the submission as a single question could not have been prejudicial, since the jury, adequately instructed as to the officer's duty to protect the decedent, answered the submitted question in the negative and thereby found that the officer was not negligent in any of the respects asserted. Henrikson v. Maryland Cas. Co. 3 W (2d) 379, 88 NW (2d) 729.

In an action for injuries sustained by a police officer when a motorist, whose car was blocked in front by a squad car, suddenly backed his car in an effort to escape arrest for speeding and the open right-hand door of his car swept the officer along until he was thrown to the pavement, a question in the special verdict asking whether the motorist did "intentionally injure" the plaintiff correctly stated the issue, rather than a question requested by defendant liability insurer asking whether the motorist did "intentionally move his car backwards at a time when he knew the plaintiff was in such position, in or near the car, that contact with the plaintiff would result." Peterson v. Western Casualty & Surety Co. 5 W (2d) 535, 93 NW (2d) 433.

In an action against a surgeon for malpractice a question asking whether defendant failed to use that degree of care and skill which surgeons of the same school or system have practiced in good standing in the vicinity usually exercise with respect to the treatment employed, was a proper form of question to be used. Ahola v. Sincock, 6 W (2d) 332, 94 NW (2d) 566.

Foreseeability of harm to others through the use of a product is an element of negligence and not of causation. Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

In effect, the emergency rule defines a standard of due care which is to be applied to conduct of an actor confronted by an emergency not brought about by his own negligence; but the jury's determination that such emergency occurred is only an intermediate step in determining whether the actor was negligent; and defendants were not entitled to submission of a separate question on the intermediate step, where they had made no claim of any inadequacy in the instruction given or question submitted. Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc. 6 W (2d) 396, 94 NW (2d) 577.

Where defendant host drove in a prudent manner and at lawful speed until he swerved sharply and struck a parked car, negligence, if any, on the part of a guest as to lookout could not have been causal, and a question thereon was unnecessary. Haag v. General Accident Fire & Life Assur. Corp. 6 W (2d) 432, 95 NW (2d) 245.

An instruction that questions inquiring whether injury was a "natural result" of failure or negligence presented a question whether relation of efficient cause and "natural effect" existed between such failure or negligence, if any found, was not erroneous as misleading the jury to think the trial court meant the common or usual effect of the negligence so as thereby to confuse foreseeability with causation. Ruplinger v. Theiler, 6 W (2d) 493, 95 NW (2d) 254.

The plaintiff's testimony that the partial loss of a finger impaired her work as a waitress was credible testimony so that the loss of the member was properly included in the verdict's question concerning allowance for "personal injuries." Sennott v. Seeber, 6 W (2d) 590, 95 NW (2d) 269.

The fact that a question of assumption of risk is submitted does not mean that a question of contributory negligence by the guest is not to be asked, where the facts warrant it. Romberg v. Nelson, 8 W (2d) 174, 98 NW (2d) 379.

A question in the special verdict inquiring whether the eastbound driver was negligent in respect to "failure to stop at the stop sign," rather than whether he was negligent "with respect to stopping before entering the intersection," was not misleading or error or abuse of discretion, in view of instructions given to the jury with reference thereto. Rensink v. Wallenfang, 8 W (2d) 206, 99 NW (2d) 196.

Under the evidence in the case, it was not sufficient to submit to the jury, on the issue of the plaintiff driver's negligence, only the question whether he was "negligent in respect to his own safety," in that the jury would have been in a better position to compare the negligence of the parties if the negligence of the driver had been separated as to the various elements of lookout, speed, and management and control. Kornetzke v. Calumet County, 8 W (2d) 363, 99 NW (2d) 125.

The submission of a question as to the southbound driver's lookout, together with stating to the jury the substance of the statute requiring the windshield and windows to be kept reasonably clean at all times, and instructing that the jury might consider the statute with respect to the question of lookout, was a proper submission of the issue as to the cleanliness of the windshield and windows in question, so as not to require the submission of a separate question thereon. Baier v. Farmers Mut. Auto. Ins. Co. 8 W (2d) 506, 99 NW (2d) 709.

With reference to actions for personal injuries, grounded on the safe-place statute, the supreme court recommends that trial courts, in framing the question of the special verdict which inquires as to whether a defendant violated such statute, employ the word "negligent," so as better to correlate this question in the minds of the jury with the comparative-negligence question of the verdict. Krause v. Veterans of Foreign Wars Post No. 6498, 9 W (2d) 547, 101 NW (2d) 645.

It is not necessary for a question on fraud to be separated into the 4 elements constituting actionable fraud. Rud v. McNamara, 10 W (2d) 41, 102 NW (2d) 248.

In an action for injuries where plaintiff was forcibly removed from a council meeting by a police officer, it was error to submit the case

on a comparative negligence basis. The only question is whether excessive force was used and whether this caused the injury. Schulze v. Kleeber, 10 W (2d) 540, 103 NW (2d) 560.

Where the issue of racing on the highway was pleaded in only one of 3 cases consolidated for trial, but evidence was presented on the question, the pleadings should have been amended under 269.44 and the issue submitted in the special verdict. Giemza v. Allied Am. Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

The duty created by 346.34 (1), prohibiting a left turn into a private driveway unless and until such turn can be made with reasonable safety, should not be broken down into lookout and management and control as separate acts of negligence, the rule applicable thereto being that, when an inquiry is made in the form of the special verdict of a statutory duty which includes several elements of conduct, one of those elements should not also be made the subject of a separate inquiry. Grana v. Summerford, 12 W (2d) 517, 107 NW (2d) 463.

Where the trial court answered a question as to negligence of one party as a matter of law and failed to do so as to the other party, but left the question of causation to the jury under proper instructions, the supreme court will refuse to believe that the jury gave disproportionate weight to the court's answer in the absence of clear indication that it did so. Niedbalski v. Cuchna, 13 W (2d) 308, 108 NW (2d) 576.

A question of the special verdict in a safe-place case involving a temporary condition inquiring as to the negligence of the defendants "at the time and place" of the injury was not objectionable for not stating at "and prior to" the time of the injury, it being deemed that the language selected by the trial court was reasonably calculated to obtain a meaningful response from the jury. Petoskey v. Schmidt, 21 W (2d) 323, 124 NW (2d) 1.

The use of the omnibus form of verdict is not precluded by the fact that one party is found negligent as a matter of law while the other is not. Moritz v. Allied Am. Mut. Fire Ins. Co. 27 W (2d) 13, 133 NW (2d) 235.

Juries will not be allowed to impeach their verdicts by asserting improper recording of the answer. (Prior cases overruled.) Ford Motor Credit Co. v. Amodt, 29 W (2d) 441, 139 NW (2d) 6.

A verdict which combines negligence, causation and comparison in a single question is improper, but parties can stipulate to such a form. Baierl v. Hinshaw, 32 W (2d) 593, 146 NW (2d) 433.

It was improper for the trial court to include the passive negligence of the 2 guest-passengers in the same comparative-negligence question with the active negligence of the host and thus require the jury to assume the total of the negligence, active and passive, of all the parties constituted 100%. Vroman v. Kempke, 34 W (2d) 680, 150 NW (2d) 423.

A party cannot claim error for refusal of the court to submit a special verdict where prior to the retirement of the jury to the jury room, the court announced the form of verdict which would be submitted and no objection was made to the proposed form. In condemnation proceedings the defendants were not prejudiced by refusal to submit a special verdict as to the present market value of the land considered as a whole, and what would be the market value of the remainder after taking the land sought to be condemned, where the court did not restrict the evidence relating to present market value of the entire tract and of the remainder after taking the land condemned. United States v. Hayman, 115 F (2d) 599.

In federal court the submission of a special verdict is governed by Rule 49, Federal Rules of Civil Procedure, 28 U. S. C., and not by the law of the state. Tillman v. Great American Ind. Co. of New York, 207 F (2d) 588; De Eugenio v. Allis-Chalmers Mfg. Co. 210 F (2d) 409.

2. Instructions.

Where a fact has been specifically found by the jury a refusal to instruct them as to their verdict if they found otherwise becomes immaterial. Knowlton v. Milwaukee City R. Co. 59 W 278, 18 NW 17.

It is error for the trial court to explain to the jury how the special questions submitted should be answered in order to be consistent with a general verdict in favor of either party. Such a course is calculated to defeat the object of the statute, which is to secure direct answers to the special questions, free from bias or prejudice. Ryan v. Rockford Ins. Co. 77 W 611, 46 NW 885.

The rule of Ryan v. Rockford Ins. Co. 77 W 611, does not govern where the jury is instructed that if certain questions are answered in a given way they need not answer others, although it is indicated in the instructions what the effect of their answers will be if they are told they are not to consider such effect. Chopin v. Badger P. Co. 83 W 192, 52 NW 452.

If the issues are to be found by a special verdict only it is not good practice to instruct the jury on the law of the case; but to do so will not necessarily be cause for reversing the judgment. Reed v. Madison, 85 W 667, 56 NW 182.

Where a question proposed by defendant's counsel was submitted to the jury as having been "propounded by counsel for defendants," and the others were submitted as "propounded by the court," this was error. Conway v. Mitchell, 97 W 290, 72 NW 752.

Where a special verdict is given, a general instruction that the burden of proof is where the weight is was erroneous. The court should have instructed the jury as to which side the burden of proof lay as to each of the issues covered by the special questions. Siebrecht v. Hogan, 99 W 437, 75 NW 71.

For rules as to a charge of a general nature given in connection with a special verdict, see Banderob v. Wisconsin C. R. Co. 133 W 249, 113 NW 738.

A defense pleaded and supported by evidence in an action for an injury by a defective street should be submitted to the jury by a distinct question; but failure to so submit will not work a reversal, where the jury was instructed that if they found the fact so pleaded they could not find the defect in the street to

be the cause. Schroeder v. Watertown, 161 W 13, 152 NW 470.

Where a proposed question does not relate to facts specifically pleaded, proper instruction respecting the matter is a sufficient substitute therefor. John E. De Wolf Co. v. Harvey, 161 W 535, 154 NW 988.

A requested instruction not directed to any question in the special verdict may be refused. Guillaume v. Wisconsin-Minnesota L. & P. Co. 161 W 636, 155 NW 143.

Though it is error to inform the jury of the effect of their answers to questions in a special verdict, an instruction that affirmative answers to certain questions would constitute a finding of contributory negligence, but not indicating the effect of such finding, does not warrant reversal. Edwards v. Kohn, 207 W 381, 241 NW 331.

The inclusion of the uncontested issues in the question submitting the stipulated issue did not make instructions on the necessity for a meeting of the minds of the parties to a contract applicable to the uncontested issues. That the jury gave a negative answer to the question as submitted did not negative the entire contract, in view of the instruction that the sole question presented was the stipulated issue. Catlin v. Schroeder, 214 W 419, 253 NW 187.

Where the jury answered 3 questions which they were directed to answer only in case of an affirmative answer to another question, which other question the jury answered in the negative, sending the jury back after calling attention to the answers and to the form of verdict and instructing the jury to read the verdict and see whether any correction was desired, followed by the jury's returning with an answer to a so-called foundation question unchanged and with their first answers to the 3 other questions stricken, did not constitute error. Jackson v. Robert L. Reisinger & Co. 219 W 535, 263 NW 641.

In an action against a garage owner arising out of a collision with an auto driven by a garage employe, where special issue was submitted as to whether the employe was using an automobile in the garage owner's business, an instruction informing the jury that the employe's act must be within the scope of his employment for the garage owner to be liable was prejudicial error, since it informed the jury of the legal effect of a special verdict. Anderson v. Seelow, 224 W 230, 271 NW 844.

In an action for breach of a contract which leased the plaintiffs' limestone quarry to the defendant county and authorized it to grind limestone quarried by it, a proper trial of the issues raised by the pleadings and evidence required the court to instruct the jury that a contract was concededly entered into, that certain provisions thereof were not in dispute, and that certain provisions were in dispute, and the essential question in the case was not merely as to which party broke the contract. O'Brien v. Dane County, 235 W 59, 292 NW 440.

The better practice for the trial court when charging the jury is to direct its instructions to specific questions of the special verdict, but its failure to do so will be considered error only when it appears that the jury was misled thereby. London & Lancashire Ind. Co. v. Phoenix Ind. Co. 263 W 171, 56 NW (2d) 777.

Whether the 2 vehicles approached or entered an intersection at approximately the same time, and the matter of the duty of the driver approaching on the left, should be covered in the instructions given to the jury in connection with the question to be submitted asking whether such driver was negligent in respect to failure to yield the right of way, which is the ultimate question to be determined by the jury in such a case. Vogel v. Vetting, 265 W 19, 60 NW (2d) 399.

When the jury is called on to determine an issue of gross negligence predicated on intoxication, the trial court should preferably refrain from submitting a question in the special verdict with reference to intoxication, but should treat the matter by instructions, employing the method suggested in Wedel v. Klein, 229 W 419. A question of the verdict should inquire whether the defendant was guilty of gross negligence in respect to any items such as speed, management and control, etc., accompanied by instructions as outlined in the opinion herein. Ayala v. Farmers Mut. Auto. Ins. Co. 272 W 629, 76 NW (2d) 563.

Where there is evidence of drinking by defendant host-driver, it is not error for the trial court not to include a question on intoxication in the special verdict if the court covers such issue by proper instructions, since operation of a motor vehicle while under the influence of intoxicating liquor does not in itself provide support for a cause of action to one injured in an accident in which such vehicle participated, but driving under the influence of intoxicating liquor must be combined with some phase of negligent operation such as speed, lookout, or management and control, in order to be actionable. Bronk v. Mijal, 275 W 194, 81 NW (2d) 481.

In a tort action for negligence against the manufacturer or supplier of a product, whether or not privity of contract exists between plaintiff and defendant is wholly immaterial, and the question of liability should be approached from the standpoint of the standard of care to be exercised by the reasonably prudent person in the shoes of defendant, which approach will eliminate any necessity of determining whether particular product is "inherently dangerous." Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

The evidence warranted an instruction given to the jury, referring to testimony relating to a "stinging" sensation on the side of the plaintiff's head, and stating that some of the testimony on this subject consisted of medical opinion based on statements of the plaintiff, and that the jury should consider this opinion evidence with caution and scrutiny, and should make no award of damages based on guess, speculation, or conjecture. Field v. Vinograd, 10 W (2d) 500, 103 NW (2d) 671.

Even though a trial court instructs on overlapping elements of negligence, this in itself does not constitute error. Merlino v. Mutual Service Cas. Ins. Co. 23 W (2d) 571, 127 NW (2d) 741.

The proper manner of submitting a case for contribution between 2 tort-feasors is discussed in Milwaukee Auto. Mut. Ins. Co. v. Nat.

F. U. P. & C. Co. 23 W (2d) 662, 128 NW (2d) 12.

The failure to request inclusion of a question in a special verdict precludes a party from raising for the first time on appeal any error in respect thereto. Williams v. Milwaukee & S. T. Corp. 37 W (2d) 402, 155 NW (2d) 100.

While, generally speaking, the enlargement of the scope of a question in a special verdict by an instruction is permissible, it is not permissible when the question is narrow and restricted and the instruction seeks to import into it something apparently excluded by its terms. Kiggins v. Mac Kyol, 40 W (2d) 128, 161 NW (2d) 261.

3. Complete; Consistent; Speculative; Duplicitous.

Where there is a general as well as a special verdict, and they are inconsistent, the latter prevails; if the latter is not full and explicit the former will not cure the defect. Davis v. Farmington, 42 W 425; Kelly v. Chicago, M. & St. P. R. Co. 53 W 74, 9 NW 816.

A special verdict in an action of libel, finding facts which would justify the giving of exemplary damages but awarding nominal damages only, may be set aside as inconsistent. Cottrill v. Cramer, 59 W 231, 18 NW 12.

Evasiveness or surplusage in the answer to questions submitted for a special verdict, if they could not possibly prejudice the appellant, will not work a reversal of the judgment. Nelson v. Chicago, M. & St. P. R. Co. 60 W 320, 19 NW 52.

The evidence of the defendant's negligence being weak and the special findings bearing upon the question of plaintiff's negligence inconsistent, the refusal to grant a new trial was erroneous. Burns v. Roller M. Co. 60 W 541, 19 NW 380.

If there is any evidence to support them, material findings cannot be stricken from a special verdict and judgment rendered in opposition to them, merely because they are inconsistent with other findings. Dahl v. Milwaukee City R. Co. 65 W 371, 27 NW 185.

A special verdict assessing damages for the flowage of land by a milldam is not inconsistent merely because the prospective damages are much greater for a similar period than the past damages. Murray v. Scribner, 70 W 228, 35 NW 311.

A special verdict must be returned as a whole, and as a unit. Ryan v. Rockford Ins. Co. 77 W 611, 46 NW 885; Shenners v. West S. S. R. Co. 78 W 382, 47 NW 622.

In an action for slander, findings that the words complained of were not spoken in the proper place and manner and that the defendant did not speak them maliciously or with intent to injure the plaintiff are inconsistent. Karger v. Rich, 81 W 177, 51 NW 424.

If the answers made by the jury determine the merits of the action the verdict should not be rejected by reason of the failure to answer other questions, or any inconsistency in the answers given which cannot qualify or limit the answers upon which the right of either of the parties to a judgment is made clear. In such cases the verdict should be received so that any action of the court based on it may be reviewed. The court may not determine the questions arising upon such findings finally and in a summary way by refusing to receive and make them a matter of record. Robinson v. Washburn, 81 W 404, 51 NW 578.

In an action against a city and a lot owner to recover for injuries resulting from a pile of earth which the latter had placed on a street, the verdict found that no signal was placed on the earth and that the lot owner did not use ordinary care and prudence to prevent injury to travelers, and also that the injury was caused by the sole negligence of the city. There was no general verdict. Judgment against the lot owner could not be rendered on the verdict; and as against the city the verdict was inconsistent and contradictory. Raymond v. Keseberg, 84 W 302, 34 NW 612.

If there is any evidence to support a material finding it cannot be stricken from the special verdict or a directly opposite finding substituted for it. If a finding is against a decided preponderance of the evidence the remedy is by motion for a new trial. Ohlweiler v. Lohmann, 82 W 198, 52 NW 172; Sheehy v. Duffy, 89 W 6, 61 NW 295.

Findings that a highway was reasonably safe, that the town did not have notice of the defect a sufficient time to have remedied it, and that plaintiff was guilty of contributory negligence, are not materially inconsistent. King v. Farmington, 90 W 62, 62 NW 928.

A general verdict for plaintiff was accompanied by answers to 2 questions involving the sufficiency of the highway and whether plaintiff was guilty of any want of ordinary care which contributed to the injury; the finding was that the highway was not reasonably safe, and that "there was some want of care." It was proper for the court to require the last answer to be made clear. Coats v. Stanton, 90 W 130, 62 NW 619.

A verdict which finds that defendant was negligent, that his negligence was the cause of plaintiff's injury, that plaintiff was guilty of contributory negligence or assumed the risk of the consequences of defendant's negligence, and that the injury sustained by plaintiff was the result of an accident occurring without the want of ordinary care of either party, is uncertain and insufficient. Darcey v. Farmers' L. Co. 91 W 654, 65 NW 491.

On plaintiff's appeal an inconsistency in the findings as to his contributory negligence is immaterial where, if the findings were in his favor, the remainder of the verdict would not sustain a judgment for him. Deisenrieter v. Kraus-Merkel M. Co. 92 W 164, 66 NW 112.

A verdict which finds as to the defendant's negligence at the precise time and place when and where his servant was injured, and which fails to determine the danger of the agency which caused the injury and defendant's knowledge of that danger and his care to prevent accidents because of it, is insufficient. Deisenrieter v. Kraus-Merkel M. Co. 92 W 164, 66 NW 112.

If a sealed verdict is returned with some questions unanswered, because the jury supposed it unnecessary to answer them, the court may, after their separation, send them out to perfect it, nothing appearing to show improper conduct on the part of any juror during

the separation or to raise a well founded suspicion of such conduct. Olwell v. Milwaukee S. R. Co. 92 W 330, 66 NW 362.

If certain answers dispose of all the material issues in favor of the defendant and the answers to other questions are unsustained, the latter may be stricken out. Rahr v. Manchester F. Asso. Co. 93 W 355, 67 NW 725.

A finding that an employer ought to have known that there was danger to a minor employe of being hurt while using ordinary care in discharging his duties is not a sufficient finding of negligence. Kucera v. Merrill L. Co. 91 W 637, 65 NW 374; Kutchera v. Goodwille, 93 W 448, 67 NW 729.

On the issue as to the negligence of defendant it is not proper to put a question as to what the negligence consisted of, and if the question as to negligence embodies the question as to its being the cause of defendant's injury a question as to whether he could have avoided the injury by the exercise of reasonable care is properly refused. McCoy v. Milwaukee S. R. Co. 88 W 56, 59 NW 453 (28 questions); Louis F. Fromer & Co. v. Stanley, 95 W 56, 69 NW 820 (38 questions).

Negligence is not established by a verdict expressing that the machine of which the plaintiff complained as the case of his injury was not safe to be used in the mill. Rysdrop v. George Pankratz L. Co. 95 W 622, 70 NW 677.

Findings contrary to the undisputed evidence may be set aside and judgment rendered upon such evidence and the undisturbed findings; but if any evidence supported a material finding set aside a new trial should be granted. Menominee River S. & D. Co. v. Milwaukee & N. R. Co. 91 W 447, 65 NW 176; Conroy v. Chicago, St. P. M. & O. R. Co. 96 W 243, 70 NW 486.

A verdict which is silent on the question of cause in a negligence case is defective. Klochinski v. Shores L. Co. 93 W 417, 67 NW 934; Sheridan v. Bigelow, 93 W 426, 67 NW 732; Bagnowski v. Linderman & Hoverson Co. 93 W 592, 67 NW 1131; Andrews v. Chicago, M. & St. P. R. Co. 96 W 348, 71 NW 372.

Where the jury failed to assess the value of the property when seized in replevin, and failed to find that defendant was entitled to a lien thereon or to assess his damages for such wrongful seizure, the verdict did not conform to the requirements of the statute. Aultman v. McDonough, 110 W 263, 85 NW 980.

For example of a special verdict criticized as covering questions not in dispute, as repeating various questions so as to confuse the jury and to render answers inconclusive, see Patnode v. Westenhaver, 114 W 460, 90 NW 467.

The fact that a juror answered a question to a special verdict because he believed that the answer in that form was immaterial and that it would not prevent recovery by the plaintiff is no reason for setting aside the special verdict. Owen v. Portage T. Co. 126 W 412, 105 NW 924.

Where various grounds of negligence are alleged in the complaint a special verdict which does not show in what way defendant was negligent is fatally defective. Reffke v. Patten P. Co. 136 W 535, 117 NW 1004.

Where specific acts of negligence are alleged and denied and litigated, a special verdict should contain specific questions covering these acts and the submission of a general question as to the owner's negligence is insufficient. Wawrzyniakowski v. Hoffman & Billings Co. 146 W 153, 131 NW 429.

Perverseness of the jury in assessing damages does not necessitate the setting aside of their finding as to negligence. Vogel v. Ott, 182 W 1, 195 NW 859.

A verdict should not be set aside as contradictory because it finds that plaintiff's failure to exercise ordinary care contributed to his injury, and also that the defendant's failure to exercise ordinary care contributed to such injury. Zeidler v. Goelzer, 182 W 57, 195 NW 849.

Failure to answer questions in a special verdict as to defendant's negligence amounts to negative answers. Hayden v. Carey, 182 W 530, 196 NW 218.

The answers by a jury of any number of questions less than all submitted do not constitute their verdict; that consists of their determination of all the ultimate controverted facts. Dick v. Heisler, 184 W 77, 198 NW 734.

In an action to recover for the damages to plaintiff's auto struck by a street car, an answer in the verdict that no want of ordinary care on the part of the auto driver contributed to cause the collision, being a general conclusion inconsistent with another answer that the driver was able to see the approaching street car at such a distance that by the exercise of ordinary care she might have avoided a collision, was properly changed by the court so as to accord with such other answer, which was a finding of a specific fact making the driver contributorily negligent. Stephenson v. Wisconsin G. & E. Co. 186 W 403, 202 NW 798.

Submission to the jury of separate questions as to negligence in stopping a truck on the roadway for several hours and in failing to remove the truck was not error, although the questions overlapped in substance, where the jury in answer to both questions found the defendants guilty of negligence causing the collision. The jury's findings of the percentages of causal negligence as between the various plaintiffs and the defendants are erroneous because the jury was permitted to consider the defendants' negligent failure to have a clearance signal on the truck a cause of the plaintiff's injuries, necessitating a new trial in order to have a jury pass upon the issues of comparative negligence under proper instructions. Walker v. Kroger G. & B. Co. 214 W 519, 252 NW 721.

Specific findings, to overcome the more comprehensive findings, must exclude every theory which will sustain the broader and more complete findings. The specific finding is inconsistent only when, as a matter of law, it will authorize a judgment different from that which the more comprehensive will permit. Trastek v. Dahlem, 219 W 249, 262 NW 609.

Verdicts must rest on probabilities and not on mere possibilities and on reasonable inferences rather than on speculation and conjecture. Schiefelbein v. Chicago, M., St. P. & P. R. Co. 221 W 35, 265 NW 386.

A jury cannot be allowed to determine disputed questions of fact from mere conjecture.

There must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, otherwise the question should not go to the jury. Walraven v. Sprague, Warner & Co. 235 W 259, 292 NW 883.

Reasonable inferences from the evidence are all that can be required of juries. The supreme court, in reviewing the jury's findings as to comparative negligence, must accept rough generalizations rather than fine distinctions, and cannot hold juries to the use of calipers to evaluate ratios precisely. Horn v. Snow White Laundry & D. C. Co. 240 W 312, 3 NW (2d) 380.

In a special verdict asking whether the plaintiff negligently turned left toward the defendant's half of the road, and whether the defendant negligently turned left toward the plaintiff's half of the road, a further question asking, if both previous questions are answered in the affirmative, which party turned left first invites contradictory answers and an inconsistent verdict, and should not be included. The point of such further question, which is that the party who first turned left created an emergency justifying the other party in turning left, should be covered by suitable instructions on the emergency rule, thereby enabling the jury properly to answer the first 2 questions and also to determine the comparative negligence of the parties. (Haskins v. Thenell, 232 W 97, overruled so far as directing submission of the questions proposed therein on retrial.) Ernst v. Karlman, 242 W 516, 8 NW (2d) 280.

For an inconsistent verdict requiring a new trial see Smith v. Superior & Duluth Transfer Co. 243 W 292, 10 NW (2d) 153.

A question submitted to the jury and asking as to each defendant whether he participated in, induced, or gave substantial assistance to or encouragement to others in an assault and battery on the plaintiff, was duplicitous, and rendered the verdict for the plaintiff fatally defective. Martin v. Ebert, 245 W 341, 13 NW (2d) 907.

If a question in a special verdict presents more than one question, and it is impossible to determine whether some of the jury did not answer one question and some another, the verdict is fatally defective. The defect is formal, and if no objection is taken to the form of the verdict, and the answer of the jury is such as to raise no ambiguities as to the extent of the finding, the verdict is valid but if the answer is such as to make it impossible to know what they have found, the verdict is fatally defective. Vlasak v. Gifford, 248 W 328, 21 NW (2d) 648.

The jury delivered its verdict without answering a question whether the plaintiff's negligence was a cause of the collision, and with its answers on comparative negligence deleted. The verdict should not have been received, and the court, instead of inserting "Yes" as the answer on cause and thereby invading province of jury, and ordering judgment on the verdict "as so completed and amended," should have instructed the jury to answer the question on cause and to return to the jury room for that purpose and to consider the effect of their answer thereto on the question relating to comparative negligence. Singerhouse v. Minnesota Farmers Mut. Cas. Ins. Co. 256 W 352, 41 NW (2d) 204.

Where the jury's answers were in the affirmative as to negligence of defendant motorist in certain respects, and it was established that the jury's answers to corresponding questions on causation were also in the affirmative but a clerical error resulted in recording negative answers thereto, correction of the verdict as thus presented was required as a matter of law, and the trial court's correction thereof deprived defendant of no right. Kuecker v. Paasch, 260 W 520, 51 NW (2d) 516.

Where, by answers that plaintiff was not causally negligent in any respect and that defendant was causally negligent in certain respects, the special verdict was complete on its face and sufficient to render judgment for plaintiff, it was legal and binding and required only the ministerial acts of the trial court in accepting and filing it with the clerk, so that the court erred in subsequently directing the jury to answer the question on comparative negligence, and the jury's answer thereto did not affect the verdict as originally returned. Topham v. Casey, 262 W 580, 55 NW (2d) 892.

Where a special verdict permits the jury to find the operator of a motor vehicle causally negligent in several specified respects and the jury does so find, when actually the operator was causally negligent in only one of such respects, there is a duplication of findings of negligence which renders the comparison of negligence by the jury inaccurate. Dahl v. Harwood, 263 W 1, 56 NW (2d) 557.

Where there is uncertainty as to the existence of negligence the question is not one of law but one of fact to be settled by a jury, whether the uncertainty arises from a conflict in the testimony or because fair-minded men might draw different conclusions from the facts established. Where there is any credible evidence which under any reasonable view will admit of inferences which may have been drawn by the jury, the jury's findings, in conformity with such inferences, are not based on mere conjecture or speculation and should not be changed by the trial court. Chicago, North Shore & M. R. Co. v. Greeley, 264 W 549, 59 NW (2d) 498.

Failure of the jury to answer the questions as to damages does not show bias and prejudice where other answers, supported by evidence, showed no liability. Frings v. Donovan, 266 W 277, 63 NW (2d) 105.

Where a special verdict inquired as to negligence of a driver in failing to stop before entering an arterial, and as to lookout, failure to yield right of way and speed, a question as to management and control in failing to apply brakes or otherwise reduce speed would be a duplication. Roeske v. Schmitt, 266 W 557, 64 NW (2d) 394.

If the finding of a jury is based on pure conjecture or speculation, and not on credible evidence giving rise to a reasonable inference, such finding cannot be sustained. Frenzel v. First Nat. Ins. Co. 267 W 642, 66 NW (2d) 679.

Where the testimony was that the damage could be result of either of 2 causes, and one

such cause was actionable and the other was not, the jury could not be allowed to guess which was responsible for the damage. Fonferek v. Wisconsin Rapids G. & E. Co. 268 W 278, 67 NW (2d) 268.

Where the evidence would not support a finding that plaintiff driver was guilty of negligence in respect either to speed or to lookout, questions inquiring as to her negligence in these respects should not have been included in the special verdict, but their inclusion was not prejudicial, since the jury absolved her of negligence in all respects and there was thus no occasion for comparison of negligence. Atkinson v. Huber, 268 W 615, 68 NW (2d) 447.

Two separate questions inquiring as to the negligence of the driver of a stalled truck in failing to put out warning flares or to use any other device or method of warning were duplicitous. Szymon v. Johnson, 269 W 153, 69 NW (2d) 232, 70 NW (2d) 2.

A question on the lookout of a man pushing a stalled truck should not have been submitted where there was no evidence whatever of his lookout or lack of it and the jury could only infer negligent lookout from his position on the highway; but, in any event, lookout was immaterial since the negligence which contributed to his fatal injuries would be that of placing himself in a position of danger. Szymon v. Johnson, 269 W 153, 69 NW (2d) 232, 70 NW (2d) 2.

Where, as to the plaintiff pedestrian, only the element of negligence as to lookout was submitted to the jury and the trial court could find as a matter of law that the pedestrian was guilty of causal negligence as to lookout and the jury found that she was negligent but not causally so, and the jury in answer to the question on comparative negligence attributed to the pedestrian 5% of the total causal negligence, the trial court could properly change the answer on causation to the affirmative and permit the jury's comparison to stand with judgment accordingly. Merkle v. Behl, 269 W 432, 69 NW (2d) 459.

A special verdict inquiring as to the negligence of defendant in respect to lookout, management and control, and speed was not overlapping for including therein the question on management and control, in that the jury could conclude that the defendant did or should have seen the plaintiff pedestrian on the concrete portion of the highway when the plaintiff was a substantial distance from the defendant, and in time for the latter to have effectively applied his brakes or swerved his car so as to avoid a collision. Albrecht v. Tradewell, 271 W 303, 73 NW (2d) 408.

The jury's finding of causal negligence as to position on the highway, lookout, and management and control, coupled with a finding that the driver was operating his vehicle while intoxicated when it collided with another car, was, as a matter of law and in effect, a finding of causal gross negligence, and the jury could not properly find that his intoxication was not causal. Ayala v. Farmers Mut. Auto. Ins. Co. 272 W 629, 76 NW (2d) 563.

Where, especially in view of instructions given, the jury's affirmative answers to questions of the special verdict as to whether a guest in an auto which left the highway at a curve assumed the risk of the driver's negligence as to speed and lookout, could be sustained only on the premise that the jury considered the driver's negligent speed and lookout to have been the result of his excessive drinking, such answers were inconsistent with the jury's finding that the driver was not operating his car while under the influence of liquor at the time of the accident. Frey v. Dick, 273 W 1, 76 NW (2d) 716, 77 NW (2d) 609.

A verdict is not necessarily inconsistent which finds that a 9-year-old boy failed to appreciate the risk of playing near a machine, but did find him guilty of contributory negligence. Nechodomu v. Lindstrom, 273 W 313, 77 NW (2d) 707, 78 NW (2d) 417.

Where the jury finds that the host-driver was intoxicated and that the guest knew it when he entered the car, the guest assumed the risk as a matter of law, and a further finding that the guest did not do so should be treated as mere surplusage. Sanderson v. Frawley, 273 W 459, 78 NW (2d) 740.

A question asking whether the driver was negligent as to lookout, and a question asking whether such driver was negligent as to proceeding into the intersection under the circumstances then present, were duplicitous in that the second question also embraced the element of lookout, so that the jury's affirmative answer to the first question and its negative answer to the second one rendered the verdict inconsistent. McCarthy v. Behnke, 273 W 640, 79 NW (2d) 82.

A question asking whether the operator whose auto was struck from behind was negligent as to management and control, which was answered in the affirmative, and a question asking whether he was negligent "with respect to swerving to the left from the shoulder to the concrete," which was answered in the negative, were duplicitous in that such swerving would be a matter of management and control; and such second question, with the negative answer thereto, formed a negative pregnant and resulted in an ambiguity, which the court is unable to interpret except by speculation. Miller v. Kujak, 274 W 370, 80 NW (2d) 459.

In a case involving a driver who is unable to testify as to his lookout because of amnesia or death, he should not be found guilty of causal negligence as to both lookout and management and control. If there is no evidence from which it can be reasonably inferred that he saw the object collided with, then his negligence consists of lookout, not management and control. Wells v. Dairyland Mut. Ins. Co. 274 W 505, 80 NW (2d) 380.

Where the jury found driver M. negligent as to lookout but that such negligence was not a substantial factor in causing a collision with S.'s car, and also found that 20% of total causal negligence was attributable to driver M., but there was no evidence to support a finding that M. was negligent, the answer to the question on comparison of negligence was properly stricken as surplusage. Mackowski v. Milwaukee Auto. Mut. Ins. Co. 275 W 545, 82 NW (2d) 906.

The duty of a left-turning driver to yield the right of way on an audible signal having been given by a following driver of intention to pass, is a duty separate and apart from

anything pertaining to turning movements and related signals, and hence it was error for the trial court not to have submitted a question on yielding the right of way, but the jury's specific finding that the following driver did not give an audible signal of intention to pass removed any duty of the left-turning driver to yield the right of way and rendered such error nonprejudicial. Scott v. Gilbertson, 2 W (2d) 102, 85 NW (2d) 852.

Except for the duty of a driver turning left to look to the rear to discover whether he could make the turn in reasonable safety, there is no duty to look to the rear; to ask both whether the driver was negligent in the manner of turning and as to lookout might render the verdict duplicitous. The situation is different where a car is approaching from the opposite direction. Scott v. Gilbertson, 2 W (2d) 102, 85 NW (2d) 852.

The jury's finding that the employe was negligent as to lookout and coming in contact with the revolving open drive shaft of the saw rig, and thereby inferentially finding that he had a duty to observe the drive shaft and to keep away from it, was not inconsistent with the jury's finding that the defendant farmer-employer had a duty to warn the employe of the danger, particularly in view of the jury's belief expressed in its answers on the comparison of negligence that the employe, because of his relative inexperience, should be held to a far lower standard of realization of the danger than should the employer with his greater experience. Venden v. Meisel, 2 W (2d) 253, 85 NW (2d) 766.

Where the court permitted the jury to include future medical expense in determining damages, and the jury found a lump sum but there was no evidence as to the cost of future treatment, a new trial must be had on the issue of damages. La Fave v. Lemke, 3 W (2d) 502, 89 NW (2d) 312.

The correct test of sufficiency of evidence necessary to sustain the jury's answer to a question in special verdict is whether there is any credible evidence which supports the answer. If there is no credible evidence to sustain it, the trial judge may and should change it. Where the evidence establishes as a matter of law that negligence of defendant was a cause of collision, the trial court can properly change the jury's negative answer to affirmative. Wintersberger v. Pioneer I. & M. Co. 6 W (2d) 69, 94 NW (2d) 136.

Where no request was made in the trial court for instructions as to the doctrine of res ipsa loquitur or its application in the case, it cannot be considered for the first time in the supreme court. Ahola v. Sincock, 6 W (2d) 332, 94 NW (2d) 566.

See note to 895.045, on comparison of negligence, citing Lampertius v. Chmielewski, 6 W (2d) 555, 95 NW (2d) 435.

Where the jury was entitled to find that the northbound driver was causally negligent with respect to management and control because of his failure to apply his brakes or to do anything to avoid the collision except to turn to the left, and the jury was also entitled to find that such driver was over the center line at the time of the collision, the questions submitted thereon, together with the jury's affirmative answers thereto, were not duplicitous. Vanderbloemen v. Suchosky, 7 W (2d) 367, 97 NW (2d) 183.

A quotient verdict is not legally objectionable if after an amount has been ascertained, the respective jurors deliberately assent to and accept the amount so obtained and so return it. Schiro v. Oriental Realty Co. 7 W (2d) 556, 97 NW (2d) 385.

A jury's finding that a driver of a motor vehicle failed to apply his brakes or turn his car as soon as he should have done so is not necessarily inconsistent with a finding that his failure to do so did not cause the collision. Andersen v. Andersen, 8 W (2d) 278, 99 NW (2d) 190.

Findings of negligence both as to lookout and as to management and control are not necessarily duplicitous, since one can fail to see danger as soon as he should have done so and also fail to do what he ought to do after he has belatedly seen the danger. Becker v. Milwaukee, 8 W (2d) 456, 99 NW (2d) 804.

Where defendant was found not causally negligent and all essential elements were found in his favor, inconsistencies in findings as to the plaintiff become immaterial. Anderson v. Deerwester, 9 W (2d) 428, 101 NW (2d) 640.

In a head-on collision case, where both drivers had the same opportunity of lookout, were driving at the same speed and faced with the same road conditions, the trial court could submit only a question as to position on the highway, and did not err in refusing to submit a question on management and control of one of the drivers. (Vanderbloemen v. Suchosky, 7 W (2d) 367, distinguished.) Koruc v. Schroeder, 10 W (2d) 185, 102 NW (2d) 390.

Questions submitted to the jury both as to management and control and as to the manner in which the driver of one car passed another car, and which the jury answered in the affirmative, were duplicitous. Giemza v. Allied Am. Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

A question submitted to the jury, asking whether at or prior to a collision between two cars the driver of another car was negligent in respect to the manner "in which he passed" one of such cars, was defective as assuming that he had passed the car prior to the collision, when the testimony on this point was in conflict and unresolved. Giemza v. Allied Am. Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

The failure of the jury to answer questions of the special verdict as to whether a motorist involved in a collision was negligent with respect to position on the highway and lookout was tantamount to a negative answer in each of these particulars. Rude v. Algiers, 11 W (2d) 471, 105 NW (2d) 825.

The trier of fact may base a finding of fact with respect to an issue of negligence in an automobile accident case on a reasonable inference drawn from the physical facts, thereby rejecting the testimony of the only eyewitness, even though such physical facts are capable of permitting more than one inference to be deduced therefrom. (Rule laid down in

certain prior cases, modified.) Pagel v. Holewinski, 11 W (2d) 634, 106 NW (2d) 425.

A verdict is not duplicitous which asks both as to negligence in making a left turn and lookout. Rasmussen v. Garthus, 12 W (2d) 203, 107 NW (2d) 264.

A verdict cannot be sustained where the jury apparently gave the husband an award for personal injuries when he had none and nothing for loss of consortium although his wife was injured. Jennings v. Safeguard Ins. Co. 13 W (2d) 427, 109 NW (2d) 90.

Where the issue of whether the accident in question caused the amputation of the plaintiff's osteomyelitic leg was in no sense evidentiary but rather one of ultimate fact, and where, aside from the questions of negligence, it was the single critical issue in the case, and all of the medical expert opinion evidence was directed to it, it was proper to include in the special verdict a question asking whether such accident was a cause of the amputation. Chapnitsky v. McClone, 20 W (2d) 453, 122 NW (2d) 400.

Where there would be no negligence on the part of the defendant bus company if the jury believed the testimony of the defendant's bus driver, and there could be no negligence on the part of the plaintiff, who fell while trying to board a bus, if his version were adopted, the trial court properly declined to submit a question on contributory negligence of the plaintiff. Spleas v. Milwaukee & S. T. Corp. 21 W (2d) 635, 124 NW (2d) 593.

There was no duplicity in the jury verdict finding defendant negligent as to speed and lookout as well as management and control, where the record disclosed that defendant, proceeding at an excessive speed, entered the highway making so wide a turn as to cross the highway into plaintiff's lane of traffic, along which he continued for some distance prior to impact, and failed to observe the stopped vehicle with its directional lights activated. Zartner v. Scopp, 28 W (2d) 205, 137 NW (2d) 107.

4. Requests; Objections; Waiver.

The refusal to submit a particular question must be at once objected to; it is too late after verdict. Ward v. Busack, 46 W 407, 1 NW 107; Barkow v. Sanger, 47 W 500, 3 NW 16.

The court has a discretion as to submitting questions for a special verdict in replevin. Singer M. Co. v. Sammons, 49 W 316, 5 NW 788.

The court is not required to direct a special verdict when not requested. Fenelon v. Butts, 53 W 344, 10 NW 501.

The statute clearly intends that the questions to be submitted shall be determined before the case is argued, and it is not error to refuse a question not proposed until after the argument. Pool v. Chicago, M. & St. P. R. Co. 56 W 227, 14 NW 46.

Where the only question is whether defendants did more damage than necessary, they are entitled, upon demand, to a special verdict showing in what such excess of injury, if any, consists. Larson v. Furlong, 63 W 323, 23 NW 584.

A judgment will not be reversed for a refusal to submit questions as a part of a special verdict when the answers to such questions most favorable to the appellant could not have changed the result. Coggswell v. Davis, 65 W 191, 26 NW 557.

The question being whether certain injuries were the result of negligence or of some independent cause it was error to refuse to submit it for a special verdict. Krueziger v. Chicago & N. W. R. Co. 73 W 158, 40 NW 657.

It is not error to refuse a request for a special verdict made after the argument to the jury begun. United States E. Co. v. Jenkins, 73 W 471, 41 NW 957.

A special verdict is defective if it does not determine all the material and controverted facts in issue, and if it is not accompanied by a general verdict the defect is not waived by a failure to object to the questions submitted or to request that others be submitted. Sherman v. Menominee River L. Co. 77 W 14, 45 NW 1079; Klatt v. Foster L. Co. 92 W 622, 66 NW 791.

The right to a special finding on each material question is absolute, and it is error to refuse to submit a proper question covering a material controverted fact. F. Dohmen Co. v. Niagara Fire Ins. Co. 96 W 38, 71 NW 69.

It was within the discretion of the trial court as to what questions should be submitted to the jury in connection with the general verdict. McDougall v. Ashland S. F. Co. 97 W 382, 73 NW 327; Carroll v. Chicago, B. & N. R. Co. 99 W 399, 75 NW 176.

Sec. 2858, Stats. 1898, is mandatory and a special verdict must be submitted when requested. Pearson v. Kelly, 122 W 660, 100 NW 1064.

It is not an abuse of discretion to deny a request made at the close of the testimony for submission of a special verdict when there is but a single issue which can be clearly placed before the jury by general verdict. Woteshek v. Neuman, 151 W 365, 138 NW 1000.

An admission in the nature of a concession for the purpose of narrowing the issues, made by defendant before demanding a special verdict, was not the introduction of evidence on his behalf and did not bar his right to demand such a verdict. Klas v. Kuehl, 159 W 561, 150 NW 973.

It is not error to refuse to submit issues by special verdict when the request for such submission is made after the evidence is all in. Callahan v. Chicago & Northwestern R. Co. 161 W 288, 154 NW 449.

The form of a special verdict and the determination whether an issue shall be submitted in one or more than one question rest in the sound discretion of the court. Ehlers v. Automobile L. Co. 169 W 494, 173 NW 325.

Error in submitting to the jury questions concerning issues not pleaded cannot be urged by defendants where the special verdict was requested by them and they made no objection before the trial court as to the inclusion of such questions. Shear v. Woodrick, 181 W 30, 193 NW 968.

The refusal of the court to submit proposed questions relating to alleged contributory negligence, which was covered by another question submitted, is not error. Lozon v. Leamon B. Co. 186 W 84, 202 NW 296.

Where more than one ground of negligence

is alleged in a complaint, the court must submit the same separately to the jury where a request is properly made. Salo v. Dorau, 191 W 618, 211 NW 762.

In an action on a fire policy containing a provision that any fraud or false swearing in the proofs of loss shall render the policy void, refusal to submit, as a part of the special verdict, appropriate questions on the issue of incendiarism, so framed as to permit a direct answer by the jury thereon, was prejudicial error under the evidence. Liberty T. Co. v. La Salle Fire Ins. Co. 206 W 639, 238 NW 399.

Where the defendant, appealing from a judgment, made no objection to the form of the question on damages at the time the court submitted the verdict to the jury, and made no request for an instruction to the jury on the subject, there was no reversible error. Schmidtke v. Great A. & P. Tea Co. 236 W 283, 294 NW 828.

The refusal of the trial court to submit a special verdict, because none was requested before the defendant introduced evidence, was not an abuse of discretion. Roszina v. Nemeth, 251 W 62, 27 NW (2d) 886.

There was no error in the trial court's failure to submit an omnibus question covering all alleged defects in the platform from which plaintiff fell; and where the issues raised during the trial were submitted in a special verdict, and plaintiff did not ask that any additional specifications of negligence be submitted, plaintiff cannot complain of the special verdict as submitted. Stellmacher v. Wisco Hardware Co. 259 W 310, 48 NW (2d) 492.

Any objection to the form of a special verdict is waived by failure to interpose such objection before the case is submitted to the jury. Minkel v. Bibbey, 263 W 90, 56 NW (2d) 844.

It is counsel's responsibility to request the trial court to incorporate the questions which counsel want answered. Counsel, if not satisfied with a question, may not stand by and await the outcome, and if it is unfavorable then, for the first time, raise the objection. Fondow v. Milwaukee E. R. & T. Co. 263 W 180, 56 NW (2d) 841.

Counsel's failure to object to a proposed special verdict before it is submitted to the jury constitutes a waiver of any right thereafter to object to the verdict as submitted. Johnson v. Sipe, 263 W 191, 56 NW (2d) 852.

After arguments to the jury had been made, plaintiff's request to submit a question regarding overtaking truck driver's failure to sound his horn was too late. Engsberg v. Hein, 265 W 58, 60 NW (2d) 714.

The failure of defendant's counsel to object to the form of the special verdict, or to submit requested questions for the same, waived defendant's right to object to any error in the form of the verdict. Deaton v. Unit Crane & Shovel Corp. 265 W 349, 61 NW (2d) 552.

Where the trial court prepared the special verdict, containing no question on assumption of risk by the plaintiff automobile guest, and it was submitted to counsel for consideration, and the defendants made no objection to its submission to the jury in that form, the defendants are precluded from raising the question of assumption of risk on appeal. Shipley v. Krueger, 265 W 358, 61 NW (2d) 326.

Where the defendant approved the form of a question, he cannot complain on appeal that such question was confusing and misleading because of being in negative form. Prochniak v. Wisconsin Screw Co. 265 W 541, 61 NW (2d) 882.

Error, if any, in submitting a question not pleaded by the plaintiff, is waived by the defendant by his failure to object to the inclusion of such question in the special verdict. Lind v. Lund, 266 W 232, 63 NW (2d) 313.

If questions as to plaintiff's negligence in respect to lookout, control, and operating his truck on the left side of the road, and the jury's findings thereon, were objectionable as a duplication rendering the comparison of negligence inaccurate, the objection was waived by the plaintiff's failure to object before the issues were submitted to the jury. Swanson v. Maryland Cas. Co. 266 W 357, 63 NW (2d) 743.

Objection to an allegedly duplicitous question was waived by failure to interpose objection thereto before the issues were submitted to the jury. Bassil v. Fay, 267 W 265, 64 NW (2d) 826.

Where there was a conference, at which all parties were represented and the trial judge was present, on the questions to be submitted, and they gave consideration to the necessity of submitting a question on the management and control of the plaintiff, and counsel for the defendant did not formally request on the record an inclusion of such question, they are barred on appeal from raising the failure to submit such question as error. Kreft v. Charles, 268 W 44, 66 NW (2d) 618.

On an appeal from a judgment in an action for personal injuries, where no request was made that certain issues be submitted to the jury when the special verdict was prepared, and no objection was made to the form of the verdict as submitted, the supreme court may not deal with the issues not submitted but only with the issues tried and submitted. DeWitz v. Northern States P. Co. 269 W 548, 69 NW (2d) 431.

A question asking whether a ramp for lowering the contractor's plaster mixer into the basement of the office building under construction was prepared at and under the direction of the son of the defendant owner of the premises, and not at the direction of the plaintiff contractor, was not duplicitous as embracing more than one inquiry. Where a special verdict is objectionable in form, counsel must object to the refusal of the trial court to correct it. Burmeister v. Damrow, 273 W 568, 79 NW (2d) 87.

Where the complaint did not allege defendant's position on the highway as one of the grounds of negligence, but defendant's counsel did not object to testimony nor to a question in the verdict in regard to such position, defendant is deemed to have waived any right to attack the verdict on that ground on appeal. Pedek v. Wegemann, 275 W 57, 81 NW (2d) 49.

In a case involving possible negligence by both plaintiff and defendant, and the close interdependence of the acts of each on those

of the other, where neither requested a special verdict before introducing testimony, the trial judge did not abuse his discretion by submitting only a general question as to the negligence of plaintiff in respect to his own safety and as to the negligence of defendant as to plaintiff's safety, and in refusing to submit further questions as to particular acts. Matke v. Beilke, 1 W (2d) 543, 85 NW (2d) 342.

Where plaintiff did not plead a failure by defendant to yield the right of way, and only after the verdict was prepared applied for leave to amend his complaint to conform to the proof and asked that a question on right of way be included, it was not error for the trial court to deny the requests as not timely, particularly where plaintiff then indicated that he would be satisfied if the court instructed the jury as to the right of way at intersections. Bensend v. Harper, 2 W (2d) 474, 87 NW (2d) 258.

Where the damage question of the special verdict was so framed that the jury was not required to answer any subdivision thereof unless it answered "Yes" to a prior question asking whether the accident in question was a cause of the amputation of plaintiff's leg, and the plaintiff, after objecting to the submission of such prior question, then consented to the framing of the damage question as submitted, he thereby waived the right to object later to the form of the damage question. Chapnitsky v. McClone, 20 W (2d) 453, 122 NW (2d) 400.

270.27, making it mandatory for the trial court in a civil action to submit a special verdict to the jury if requested by any party prior to the introduction of any testimony on his behalf is inapplicable to a forfeiture action, since the procedural aspects are criminal in nature and the submission of a verdict which inquires as to the defendants' being guilty or not guilty is an appropriate means of obtaining the jury's decision upon a denial of guilt. Milwaukee v. Wuky, 26 W (2d) 555, 133 NW (2d) 356.

270.28 History: 1907 c. 346; Stats. 1907 s. 2858m; 1925 c. 4; Stats. 1925 s. 270.28; Sup. Ct. Order, 217 W ix.

Questions which are considered as decided by the trial court in granting a motion for judgment on the special verdict may be reviewed by the supreme court and may be set aside if against the clear preponderance of the evidence. Case v. Beyer, 142 W 496, 125 NW 947.

The provisions of sec. 2858m, Stats. 1907, apply to controverted matters covering issues actually litigated but do not apply to matters outside of the case as actually tried. Gullard v. Northern C. & D. Co. 147 W 391, 132 NW 755.

Sec. 2858m does not apply to a case where the jury found the plaintiff not negligent but also found that the defendant's negligence was greater than that of the plaintiff and the court changed the answer to the question finding the plaintiff not negligent. Schendel v. Chicago & N. W. R. Co. 147 W 441, 133 NW 830.

In an action to recover for loss sustained in the purchase of property induced by fraudulent representations, plaintiff did not request a finding as to whether he relied on such representations. Entry of judgment against plaintiff was a determination by the trial court of this fact against him. Wolff v. Carstens, 148 W 178, 134 NW 400.

Sec. 2858m does not apply where it was requested that a question be submitted on a particular point. Habhegger v. King, 149 W 1, 135 NW 166; Murray v. Paine L. Co. 155 W 409, 144 NW 982.

A finding by the court will be presumed and a reversal refused if the evidence would have supported a finding, not submitted, that the payment was made with the understanding that the matter would be subject to further investigation. Wooley v. Chicago & N. W. Ry. Co. 150 W 183, 136 NW 616.

If the record shows that neither of 2 causes found by the jury could in fact have been a cause, still, the judgment will not be reversed if the uncontradicted evidence discloses the true cause; nor will it be reversed in a case in which the matter was not brought to the attention of the trial court, a finding of the true cause being presumed to have been made by the court. Guse v. Power & M. M. Co. 151 W 400, 139 NW 135.

In an action on a building contract involving about $9,000 there was a finding that the defects in the work could be repaired for $100 but there was no finding requested or made as to substantial performance. On appeal it must be presumed that the trial court found substantial performance. Toepfer v. Sterr, 156 W 226, 145 NW 970.

During trial, the contract in suit having been executed on Sunday, the complaint was amended, the trial proceeded, and judgment was entered upon quantum meruit. The special verdict did not find whether the conduct of the parties did or did not create a new contract of the same tenor as the old. On appeal it was presumed, there being evidence to support such a finding, that the trial court found no new contract. Gist v. Johnson-Carey Co. 158 W 188, 147 NW 1079.

In an action for the conversion of lumber one of the issues was whether the lumber was a fixture and passed with a conveyance of the land on which it was situated. No finding on that question by the jury having been requested or submitted, it was presumed on appeal that the decision was left to the trial court and its determination, not clearly contrary to the evidence, could not be disregarded. Multerer v. Dallendorfer, 158 W 268, 148 NW 1084.

On appeal from a judgment in an action for deceit, it was presumed in support of the judgment that a representation by the defendant was intended as a statement of fact, and not as an expression of opinion, no finding on the question by the jury having been requested or submitted. Rogers v. Rosenfeld, 158 W 285, 149 NW 33.

In an action for the price of railroad ties the defendant counterclaimed for damages because the plaintiff had failed to deliver the entire cut as agreed. The jury found that plaintiff so agreed, but that defendant failed to reasonably furnish an inspector so that the ties could be shipped; and there was a judgment for the plaintiff's full claim. The failure of the jury to find that the delay in furnishing inspectors was a sufficient ground for breaching the contract was remedied by the presumption of sec. 2858m, Stats. 1913, that the

judge did so find. Langer v. Finch, 160 W 668, 152 NW 416.

An issue involved in the trial of an action in which there was a special verdict covering the other issues will be deemed to have been determined by the trial court in conformity with its judgment, even when attention was called by the court to the questions submitted without any reference to the omitted issue. Tabak v. Milwaukee E. R. & L. Co. 161 W 422, 154 NW 694.

Where the trial court was not asked to submit and did not submit in a special verdict a question to determine whether the defendants accepted the article that was the subject of sale as fulfilling a guaranty, and there was evidence reasonably supporting a negative answer to such a question, it was presumed that the trial court determined that question in harmony with the judgment rendered. Rhein v. Burns, 162 W 309, 156 NW 138.

In an action against a railroad company for personal injuries received at a highway crossing in consequence of failure to signal the approach of a train, the jury found that the plaintiff was not guilty of gross negligence, but did not find, and there was no request for a finding, whether he was guilty of any other degree of negligence. There was a presumption that the court found that the plaintiff was not guilty of a slight want of ordinary care. Kaufmann v. Chicago, M. & St. P. R. Co. 164 W 359, 159 NW 552 and 1067.

Where the court submitted in a special verdict the question whether the carrying out of a commission contract failed through the fault of the plaintiff, as to which question there was no allegation or proof, and did not submit and was not requested to submit the question whether such failure was the fault of the defendant, the court struck out the word "yes" given by the jury as the answer to the question submitted and substituted the word "no." This action on the part of the court was equivalent to a finding by the court that the failure was the fault of the defendant, a finding the court was authorized to make. Phelps v. Monroe, 166 W 315, 165 NW 471.

In the trial of a counterclaim for damages resulting from fraud practiced by the plaintiff in a transaction wherein defendant was induced to accept a deed of land, the verdict contained no finding of freedom from negligence on the defendant's part in accepting the deed. Although the verdict was defective, the defect was waived because there was no request for the submission of that issue. De Groot v. Veldboom, 167 W 107, 166 NW 662.

The presumption created by sec. 2858m will not avail if there was no evidence supporting such a finding. Strang v. Kenosha, 174 W 480, 182 NW 741.

Where the attention of the trial court was properly called to an issue tendered by the pleadings, and such issue was not submitted to the jury, the court could make no finding thereon. Under such circumstances, where the facts are undisputed, or where only one conclusion respecting them can be reached, the appellate court will determine the issue; but where evidence leaves the issue debatable, the judgment will be reversed. Farmers' Co-op. P. Co. v. Boyd, 175 W 544, 185 NW 234.

Although it was not urged before the trial court or presented in defendant's brief on appeal that plaintiff was not the real party in interest, but it was alleged in the answer, and therefore, an issue, upon defendant's motion for judgment, and it being an element necessary to support the judgment that the plaintiff be the real party in interest, findings to that effect must be deemed to have been made. Desmond v. Pierce, 185 W 479, 201 NW 742.

Where no request was made to submit to the jury the question whether defendants were not to be liable for a commission to a real estate broker unless they could secure the removal of a tenant in possession of property sold, the issue of fact under 270.28 was deemed to have been determined by the trial court in favor of the prevailing party. Genske v. Leutner, 191 W 125, 210 NW 369.

Although there was no question submitted to the jury in an action arising out of a collision between a train and an auto at a railroad grade crossing, as to whether there was negligence of the flagman stationed at the crossing, the judgment could not be sustained on the ground that the trial court found in plaintiff's favor on the issue; the real cause of the accident was the negligence of the driver of the auto who did not look for a possible approaching train. Rusczk v. Chicago & Northwestern R. Co. 191 W 130, 210 NW 361; Rutkowski v. Chicago & Northwestern R. Co. 191 W 402, 211 NW 158.

Where, in an action by an employe for money deposited with his employer, tried on the theory that the statute of limitations was involved and controlled the case, it appeared that the vital issue was whether the employer as a bailee was guilty of gross negligence in the safekeeping of the money and this issue was not litigated, the judgment could not be sustained. Smith v. Poor Hand Maids of Jesus Christ, 193 W 63, 213 NW 667.

The trial court will be presumed to have found in favor of respondent upon a material issue of fact not covered by the special verdict, if there was evidence sufficient to support such a finding and the appellant failed to ask the submission of the question to the jury. Korrer v. Madden, 152 W 646, 140 NW 325; Duel v. Bluembke, 154 W 519, 143 NW 179; Delfose v. New F. O. Co. 201 W 401, 230 NW 31.

The court's finding that a building insured was vacant an unreasonable time was binding on an insured suing on a fire policy, where the case was submitted on a special verdict and no request was made for submission of such question. Conway v. Providence W. Ins. Co. 201 W 502, 230 NW 630.

270.28 does not apply where the assumed determination by the court would leave out of consideration erroneously excluded testimony. Brauer v. Arenz, 202 W 453, 233 NW 76.

Facts essential to recovery must be deemed to have been submitted and decided in the trial court in such a way as to support its judgment. Lefebvre v. Autoist Mut. Ins. Co. 205 W 115, 236 NW 684.

No questions being requested or submitted to the jury as to whether lapse of time relieved the dredging contractor from legal responsibility for the absence of barriers, the

issues in respect thereto must be taken as submitted to the trial court and decided in such a way as to support the judgment. Schumacher v. Carl G. Neumann D. & I. Co. 206 W 220, 239 NW 459.

270.28 is inapplicable to issues raised by an insurer's amended answer, alleging additional defense after the court prepared a special verdict for the plaintiff, where the record admitted of no finding for the plaintiff on such issues. Kline v. Washington N. Ins. Co. 217 W 21, 258 NW 370.

In an action by an insured against an automobile liability insurer based on bad faith of the insurer in refusing to settle a claim against the insured, a question of lack of cooperation by the insured in defending against such claim, not requested to be submitted to the jury, is deemed found by the trial court in support of the judgment. Lanferman v. Maryland Cas. Co. 222 W 406, 267 NW 300.

Where the question of agency was for the jury, but no request was made for its submission, the question of agency was determined by the judgment. Laurent v. Plain, 229 W 75, 281 NW 660.

270.28 is not applicable to an instruction to the jury, the propriety and application of which depends on certain facts as to which there is an issue under the evidence. Brabazon v. Joannes Bros. Co. 231 W 426, 286 NW 21.

In an action by an insured against its insurer on a public liability policy insuring against loss from liability for bodily injuries "accidently sustained," wherein the insured denied liability because the injury in question was caused by an assault, but made no request to submit a question to the jury to determine whether the assault involved was provoked, it is presumed that the trial court found the fact covered by the omitted question in such a way as to support the judgment for the insured, there being evidence in the record to support a finding that the assault was not provoked. Archer Ballroom Co. v. Great Lakes Cas. Co. 236 W 525, 295 NW 702.

Where no request was made for submission to the jury of a question whether an insurance agent agreed to waive his commission, the fact is deemed to have been found by the trial court in support of the judgment for the insured on the policy. Fry v. Integrity Mut. Ins. Co. 237 W 292, 296 NW 603.

Where no request was made for submission to the jury of a question whether an automobile host was negligent as to speed, the fact is deemed to have been found by the trial court in support of the judgment for the guest. Zoellner v. Kaiser, 237 W 299, 296 NW 611.

Where a question submitted and answered by the jury was so ambiguous as not to provide for a clear-cut determination of the real issue, the trial court was bound to make its own findings of fact. Schoonover v. Viroqua, 245 W 239, 14 NW (2d) 9.

When a buyer's action against a seller was brought and tried on the theory of breach of warranty, for which the plaintiff was not entitled to recover because of failure to give the required notice of claim of breach, and the trial court, denying the plaintiff's motion to amend his pleadings to include a cause of action for fraud and denying the defendant's motion for a directed verdict, submitted the case by a special verdict covering breach of warranty, a judgment for the plaintiff cannot be upheld by presuming an implied finding of fraud by the trial court. Tews v. Marg, 246 W 245, 16 NW (2d) 795.

Where, with the consent of counsel, in an action against a mortgagee in peaceable possession for double damages for the cutting of trees, the only questions submitted to the jury were as to the market value of the plaintiff's real estate before and after the cutting, it is to be presumed, under 270.28, Stats. 1843, that the trial court found that the trespass was wilful and that the alleged defenses were without merit in granting judgment for double damages but on the record in the case, indicating a miscarriage of justice, the judgment is reversed, under authority of 251.09. Boneck v. Herman, 247 W 592, 20 NW (2d) 664.

Where both parties asked for a special verdict specifying, except as to damages, no particular issues to be submitted, and the trial court submitted a special verdict as to damages, the parties must be deemed to have waived their right to a jury trial on the other contested issues of fact, and these issues must be deemed determined by the court in conformity with its judgment. Jansen v. Herkert, 249 W 124, 23 NW (2d) 503.

Where issues essential to sustain a judgment of no damages in an action for breach of a lease were not submitted to the jury, nor requested to be submitted by either party, they must be deemed determined by the court in conformity with the judgment, if there is evidence which can be deemed sufficient to establish the necessary factual basis for such determination. Schuld v. Sterbenz, 250 W 185, 26 NW (2d) 642.

270.28 may not be applied as to a controverted matter which the court regarded as immaterial under the erroneous theory of law on which it submitted the case to the jury. Jespersen v. Metropolitan Life Ins. Co. 251 W 1, 27 NW (2d) 775.

In an action by a tenant against a landlord for damages for a constructive eviction, it was immaterial that no finding of an obligation by the defendant landlord to furnish heat and hot water was expressly made, since no request therefor was made by the defendant. The finding is supplied in conformity with a judgment against the defendant. Besinger v. McLoughlin, 257 W 56, 42 NW (2d) 358.

The failure of the defendant insurers to request a question on an issue of fact asserted as a defense constituted a waiver of their right to have the same submitted to the jury, and such matter of fact is deemed determined by the trial court in conformity with its judgment. Widness v. Central States Fire Ins. Co. 259 W 159, 47 NW (2d) 879.

See note to 270.29, citing Smith v. Benjamin, 261 W 548, 53 NW (2d) 619.

Where the special verdict, containing no question on the plaintiff's negligence, was submitted to counsel before the case was argued to the jury, and counsel for the defendant made no request for findings by the jury in respect to the plaintiff's conduct, except as might be inferred from their argument on their motion for a directed verdict, it will be presumed that the decision of the matter was

left to the trial court, and the court's implied finding that the plaintiff was not negligent, supported by sufficient evidence, may not be disturbed. Siblik v. Motor Trans. Co. 262 W 242, 55 NW (2d) 8.

On an appeal from a judgment for the defendant in an action for injuries sustained by the plaintiff when she attempted to board a one-man streetcar and the defendant's motorman started the streetcar, the failure of the special verdict to include a question asking whether the plaintiff was a passenger or a trespasser at the time, where no request was made for the submission of such question and no objection was made to the special verdict without it, does not constitute grounds for reversal but, the omitted question, if material, will be deemed determined by the trial court in conformity with its judgment. Fondow v. Milwaukee E. R. & T. Co. 263 W 180, 56 NW (2d) 841.

Violation of a safety statute is negligence per se but its causal effect is for the jury and where no question as to cause was submitted or requested the issue is deemed determined by the court in rendering judgment. Miller v. Keller, 263 W 509, 57 NW (2d) 711.

Where the subject of the plaintiff salesman's waiver of his right to certain additional commissions was brought to the attention of the trial court in the instant case, and no issue thereon was submitted to the jury, the trial court could not properly make findings of fact thereon either by virtue of 270.28 or otherwise. Davies v. J. D. Wilson Co. 1 W (2d) 443, 85 NW (2d) 459.

Under 270.28 the supreme court must assume the trial court determined a causation issue, not included in a verdict, in favor of plaintiff in conformity with the judgment entered, but such assumption was not available to support the judgment where there was no credible evidence to sustain such determination. Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

270.28 was not applicable where the court did not enter a judgment but, instead, declined to rule on the question of fact, stated that he could not decide the issue as matter of law, and granted a new trial. Garcia v. Samson's, Inc. 10 W (2d) 515, 103 NW (2d) 565.

Where the trial court did not pass directly on a matter of fact omitted from the verdict, the supreme court, pursuant to 270.28, Stats. 1959, must deem that such matter of fact was determined by the trial court in conformity with the judgment entered. Roze v. Architectural Building Products, 12 W (2d) 644, 108 NW (2d) 140.

270.29 History: 1856 c. 120 s. 173; R. S. 1858 c. 132 s. 11, 15; R. S. 1878 s. 2859; Stats. 1898 s. 2859; 1925 c. 4; Stats. 1925 s. 270.29; Sup. Ct. Order, 217 W ix.

On motion for a new trial (inadequacy or excessiveness of damages) see notes to 270.49.

If the pleadings and evidence show that the party recovering has only a special property in the goods, and that the general property is in the other party, the jury should assess only the value of such special property. Gage v. Allen, 84 W 323, 54 NW 627.

In the absence of exceptional circumstances, in actions for the tortious taking or conversion of goods, the plaintiff is entitled to recover as damages the value of the chattels at the time and place of the wrongful taking or conversion, with interest to the time of trial. Topzant v. Koshe, 242 W 585, 9 NW (2d) 136.

Where defendant's counsel made no objection to the receipt in evidence of the plaintiff's itemized statement of the amount due to him for materials sold and for money advanced, raised no issue as to the correctness of such statement, and made no request that a question be submitted in the special verdict regarding the amount due to the plaintiff, the failure to make such request constituted a waiver of the provision of 270.29, that the jury must assess the plaintiff's damages, and hence, the special verdict containing no question thereon, the trial court had the right to fix the amount under 270.28. Smith v. Benjamin, 261 W 548, 53 NW (2d) 619.

Where the buyer's action for damages was based on the seller's false representation that an engine was new and unused, the measure of damages is the difference between the value of the property as it was when purchased and what it would have been had it been as represented, and it was not necessary to submit to the jury, which heard the testimony as to the value of a new fuel pump installed by the seller after the sale, a separate question as to the value of the engine after the installation of the fuel pump. Polley v. Boehck Equip. Co. 273 W 432, 78 NW (2d) 737.

When only a portion of a machine is damaged and repairs are necessary before any of it can be used, the reasonable cost or value of the repairs is the proper measure of damages. L. L. Richards Mach. Co. v. McNamara M. Exp. 7 W (2d) 613, 97 NW (2d) 396.

270.30 History: 1856 c. 120 s. 171, 172; R. S. 1858 c. 132 s. 11, 14; R. S. 1878 s. 2860; Stats. 1898 s. 2860; 1925 c. 4; Stats. 1925 s. 270.30.

The presumption is that the fact found in each special finding is supported by a preponderance of evidence and has been established to the satisfaction of the jury. Each finding of the special verdict will control as to the particular fact found therein, as against any other finding upon other issues, the same as it would control in case of inconsistency with a general verdict. Shenners v. West S. S. R. Co. 78 W 382, 47 NW 622.

Lack of a special finding by the trial court of a fact established by uncontradicted evidence will be supplied by the supreme court on appeal. Laughnan v. Estate of Laughnan, 165 W 348, 162 NW 169.

270.31 History: 1856 c. 120 s. 171, 173, 174; R. S. 1858 c. 132 s. 15, 16; R. S. 1878 s. 2861; Stats. 1898 s. 2861; 1925 c. 4; Stats. 1925 s. 270.31.

In equitable actions the clerk has no authority to enter judgment until the court has in some way declared what the nature thereof shall be. Stahl v. Gotzenberger, 45 W 121.

If the court makes no contrary direction, the entry of judgment is required immediately upon rendition of verdict; and if such entry is made pending a motion for a new trial the judgment is not void. Davison v. Brown, 93 W 85, 67 NW 42.

Giving notice of a motion for a new trial

does not operate to stay entry of a judgment. Wheeler v. Russell, 93 W 135, 67 NW 43.

Sec. 2861, Stats. 1898, is mandatory to the effect that the clerk, in case of a verdict, shall enter judgment in the absence of some special direction to the contrary. Colle v. Kewaunee, G. B. & W. R. Co. 149 W 96, 135 NW 536.

A judgment of the circuit court need not be signed by the judge. Will of Burghardt, 165 W 312, 162 NW 317.

A court may grant judgment notwithstanding the verdict without changing any of the answers or without a motion to set aside the verdict, though the proper practice would be to change the answers in the verdict so that on its face it forms a basis for judgment, or to set aside the verdict because it is not supported by the evidence. Senft v. Ed. Schuster & Co. 250 W 406, 27 NW (2d) 464.

Where the issues were for the jury and there was an inconsistency in the jury's finding that the plaintiff was not negligent in failing to operate his car on his right side of the roadway but nevertheless finding that his negligence in that respect was a cause of the collision, and the jury also found that he was negligent, and causally so, in failing to have his car under control, and also found that 65% of the total causal negligence was attributable to him, the trial court could not set aside and change the findings and enter a judgment for plaintiff's recovery. Leisch v. Tigerton Lumber Co. 250 W 463, 27 NW (2d) 367.

The acts of the clerk of the court are ministerial and clerical, and he may not exercise judicial power except in accordance with a statute conferring such power on him. In an action by insurance companies as subrogees for fire damage where the jury found that the defendant had deposited material against the walls of a building and that such material was a cause of a fire which destroyed a portion of the building, but that the defendant was not negligent and that such negligence was not a natural and direct cause of the fire, a determination as to the proper judgment required the exercise of judicial power and the performance of a judicial act, so that the clerk could not enter judgment. Pacific Nat. Fire Ins. Co. v. Irmiger, 254 W 207, 36 NW (2d) 89.

270.32 History: 1856 c. 120 s. 176; 1857 c. 69 s. 1; R. S. 1858 c. 132 s. 19; 1865 c. 195 s. 1; R. S. 1878 s. 2862; Stats. 1898 s. 2862; 1925 c. 4; Stats. 1925 s. 270.32; Sup. Ct. Order, 217 W ix; Sup. Ct. Order, 245 W viii; Sup. Ct. Order, 248 W 113, 121.

On trial by jury in civil actions see notes to sec. 5, art. I.

Trial by the court may be waived in a proper case by going to trial before a jury. McCormick v. Ketchum, 48 W 643, 4 NW 798.

Where defendant proceeded to trial without suggesting that a trial by jury was desired or demanded, his right on such issue was waived. Wooster v. Weyh, 194 W 85, 216 NW 134.

Where the amended complaint for the first time raised an issue of defective workmanship and was answered by an impleaded tile contractor who assumed the defense and made no objection to evidence on such issue, permitting the building contractor at the close of the testimony to amend its cross complaint against the tile contractor by alleging defective workmanship is not error, as against the contention that the tile contractor was thereby deprived of a jury trial on such issue as between it and the building contractor in that the tile contractor's consent to a trial without a jury covered only the issues existing when the consent was given. Milwaukee County v. H. Neidner & Co. 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

Defendants, by agreeing to try an action without a jury, waived their right to a jury trial. Gifford v. Thur, 226 W 630, 276 NW 348.

Where the defendant wife consented to a waiver of trial by jury in writing filed with the clerk, the trial clerk had no choice but to permit this waiver to stand, as against the defendant's contention on appeal that the parties did not have a right to waive a jury trial in an adultery issue. Hartman v. Hartman, 253 W 389, 34 NW (2d) 137.

270.33 History: 1856 c. 120 s. 177; R. S. 1858 c. 132 s. 19; R. S. 1878 s. 2863; Stats. 1898 s. 2863; 1917 c. 169; 1925 c. 4; Stats. 1925 s. 270.33; 1927 c. 473 s. 49; Sup. Ct. Order, 217 W ix; 1963 c. 37.

An amended finding may be filed, the first having been excepted to as insufficient. Keep v. Sanderson, 12 W 352.

It is immaterial that the court signs the judgment in another county during another term. Ottillie v. Waechter, 33 W 252.

Where the recitals of the judgment amounted to a finding of facts no further finding is necessary. Wrigglesworth v. Wrigglesworth, 45 W 255.

A finding made a year after trial, expressed in the present tense, is taken to relate to the time of commencement of the action. Riess v. Delles, 45 W 662.

The findings are not identical with the judgment; they are merely the order for judgment. Andrews v. Welch, 47 W 132, 2 NW 98.

Findings authorize judgment; there need be no order for judgment aside from findings. Seymour v. Laycock, 47 W 272, 2 NW 297.

The failure to state findings of facts and conclusions of law separately is not error. Willer v. Bergenthal, 50 W 474, 7 NW 352.

It is proper for the clerk to draw and enter judgment after term where a sufficient finding has been filed during the term. Manitowoc County v. Sullivan, 51 W 115, 8 NW 12.

Where a finding is so indefinite, inconsistent and contradictory that it will not support a judgment for either party a new trial will be ordered. Cramer v. Hanaford, 53 W 85, 10 NW 15.

An entire absence of findings is ground for reversal where the evidence has not been preserved in a bill of exceptions. Luthe v. Farmers Mut. Fire Ins. Co. 55 W 543, 13 NW 490.

If no issue is joined formal findings are not necessary. Potter v. Brown County, 56 W 272.

The presumption is that the date of filing is correctly stated in the clerk's indorsement on a paper, although a different date is on the paper. State v. Reesa, 57 W 422, 15 NW 383.

If no conclusion of law is based upon a finding of fact and it does not affect the judgment it is immaterial whether it be supported by the evidence. Ferguson v. Mason, 60 W 377, 19 NW 420.

Sec. 2863, R. S. 1878, is directory. Klatt v. Mallon, 61 W 542, 21 NW 532.

When the findings of a referee are approved it will be assumed that the court adopted them. White v. Magann, 65 W 86, 26 NW 260.

When the decision renders certain issues immaterial no finding of such issues need be made. Brand v. James, 67 W 541, 30 NW 934.

Where a judgment is reversed and the case remanded a new and additional finding, there being no further evidence given or trial had, is unauthorized. Tipping v. Robbins, 71 W 507, 37 NW 427.

When there is a direct conflict in the testimony the finding will not be disturbed. Bruce v. Miller, 72 W 404, 39 NW 554.

A finding in the language of sec. 2319, R. S. 1878, that a mortgage was fraudulent and void as to the creditors of the mortgagor is sufficient. Evans v. Williams, 82 W 666, 53 NW 32.

If a particular and essential finding is contradicted by other findings the supreme court will not pass upon their correctness. If the findings do not support the judgment a new trial will be awarded. Safford v. Conan, 88 W 354, 60 NW 429.

While lack of or defects in the findings are not ground for reversal if the judgment is supported by the evidence (Jones v. Jones, 71 W 513, 38 NW 88; Wilkinson v. Wilkinson, 59 W 557, 18 NW 527), still the command is obligatory upon the court in an equitable action as well as in others. Dietz v. Neenah, 91 W 422, 64 NW 299, 65 NW 500.

If it is not shown that the bill of exceptions contains all the evidence the presumption is that the findings are correct. Williamson v. Neeves, 94 W 656, 69 NW 806.

In causes tried by the court or a referee, the judgment will not be reversed on questions of fact, unless it is clearly against the weight of the evidence. Momsen v. Plankinton, 96 W 166, 71 NW 98; McCallan v. Buckstaff, 96 W 316, 71 NW 604.

A party who desires a particular finding should call the attention of the court thereto, and if he does not do so, and the findings made are correct, there is no error. Darling v. Neumeister, 99 W 426, 77 NW 175.

Where a cause is tried by the court and a jury is impaneled for the purposes of an advisory verdict, and the cause is fully tried and submitted, neither party is entitled to a hearing as a matter of right after the coming in of the special verdict and before the findings by the court are filed. Adams v. Rodman, 102 W 456, 78 NW 588, 759.

The responsibility for the correctness of the findings is thrown upon the judge. If he does not himself draw them he should clearly inform counsel of his conclusions of fact and law, and carefully examine the findings to see if they conform to his decision. Galusha v. Sherman, 105 W 263, 81 NW 495.

The findings being silent as to the real issue, but a written decision having been filed signed "By the Court" passing to some extent upon that issue, and the appellant having treated the same as a finding by filing exceptions thereto, such decision is treated as a finding of fact. Duncan v. Duncan, 111 W 75, 86 NW 562.

It is necessary that finding of facts be made and if the evidence fails to disclose reasonable certainty of the rights of the case there is nothing to sustain a judgment. Kinn v. First Nat. Bank, 118 W 537, 95 NW 969.

Where essential facts have not been found, and cannot be ascertained from the record on appeal, the cause will be remanded for further trial and findings as to such facts. Fishbeck v. Millenz, 119 W 27, 96 NW 426.

The requirement that the facts shall be found by the trial judge demands that the conclusions of fact essential to the settlement of the conflicting claims of the parties should be set out. McKenzie v. Haines, 123 W 557, 102 NW 33.

A finding as to the existence of a partnership is sufficient if it meets the test of a good pleading. Briere v. Searls, 126 W 347, 105 NW 817.

Sec. 2863, Stats. 1898, requires findings of fact and conclusions of law to be made by the judge covering singly the issues of fact raised by the pleadings and minor conclusions of law and the final results entirely free from extraneous matters. Fanning v. Murphy, 126 W 538, 105 NW 1056.

The court may take a specific finding in a special verdict as a fact, although such finding is involved in an issue covered by another question. Curkeet v. Steinhoff, 130 W 146, 109 NW 975.

Sec. 2863, Stats. 1898, contemplates that findings shall be signed. Sackett v. Price County, 130 W 637, 110 NW 821.

No finding on a fact established by stipulation, or admission of pleading, is necessary. Catlin & Powell Co. v. Schuppert, 130 W 642, 110 NW 818.

Findings amounting to conclusions of law do not conclude the supreme court where the facts are uncontradicted and there was a manifest misapprehension of the law. George Walter B. Co. v. Lockery, 134 W 81, 114 NW 120.

For failure of the trial judge to comply with sec. 2863, Stats. 1898, the supreme court will not reverse but will examine the record to see whether the judgment is supported by a fair preponderance of the evidence. Young v. Miner, 141 W 501, 124 NW 660.

The requirement that a judge must state separately all the facts found means pleadable facts and separately refers to such facts, so that each fact which is actually in effect pleaded should have a separate finding. Calumet S. Co. v. Chilton, 148 W 334, 135 NW 131.

Where the court includes evidence in the findings it will be disregarded and only the ultimate facts found will be considered. Martin v. Board of Directors, 149 W 19, 134 NW 1125.

Accord and satisfaction having been pleaded and having been the chief subject of controversy, it was error for the court to refuse to make a finding on that issue; and where the evidence clearly preponderates in favor of the appellant the supreme court, upon reversal, will remand with directions to dismiss the complaint instead of granting a new trial. Kelm v. Woodbury, 150 W 499, 137 NW 757.

The facts which the trial judge should find are the issuable facts contained in the pleadings and upon which the plaintiff's right of

recovery or the defendant's defense necessarily depends. Cointe v. Congregation of St. John the Baptist, 154 W 405, 143 NW 180.

Sec. 2863, Stats. 1913, is directory and a valid judgment may be pronounced orally before any written findings and conclusions are made. Wallis v. First Nat. Bank of Racine, 155 W 533, 145 NW 195.

An opinion of the trial court filed with the findings of fact and conclusions of law will be used on appeal only as explanatory of them. Becker v. Beaver M. Co. 158 W 471, 149 NW 209.

A finding by the trial court which, though nominally a finding of fact, is in the nature of a legal conclusion from undisputed evidence has not the same conclusiveness on appeal as a finding resting upon probative disputed facts, but may be disregarded almost as readily as a pure error of law. Weigell v. Gregg, 161 W 413, 154 NW 645. See also Vogt, Inc. v. International Brotherhood, 270 W 315, 71 NW 359, 74 NW 749.

Findings of fact should not be recitals of evidence or history of the litigation, but should cover only the ultimate issues raised by the evidence. Laney v. Ricardo, 169 W 267, 172 NW 141.

On appeal directly to the supreme court from a county court, findings of fact and conclusions of law are important. Will of Britt, 174 W 145, 182 NW 738.

The failure to make proper formal findings is not necessarily reversible error. Schmoldt v. Loper, 174 W 152, 182 NW 728; Will of Britt, 174 W 145, 182 NW 738.

A general finding of a trial court, instead of a separate finding as to each issuable fact as required by sec. 2863 is not within the rule that the decision of a trial court will not be disturbed unless clearly against the evidence. Durkin v. Machesky, 177 W 595, 188 NW 97.

Opinions of a trial court, while helpful and required to be returned with the record, are not findings, nor are they part of the record. An opinion may, however, contain, informally, a finding which may save the judgment from reversal. Adams v. Adams, 178 W 522, 190 NW 359.

Where the trial court committed serious errors of law, and it is not clear that the court's findings of fact would have been the same if these errors had not been committed, its findings of fact are not entitled to the weight usually accorded them. Truelsch v. Miller, 186 W 239, 202 NW 352.

A finding from undisputed evidence that testator's obsession as to the illegitimacy of his children did not influence him in disinheriting them is in reality a conclusion drawn from the testimony, and therefore does not have the force of a finding of fact based upon conflicting testimony. In re Behm's Will, 187 W 10, 203 NW 718.

In determining the validity of a law taxing national bank stock, the supreme court is not concluded, as in an ordinary case, by the findings of fact made by the trial court, because the law is of state-wide application and is valid or void in toto. First Nat. Bank v. Hartford, 187 W 290, 203 NW 721.

The requirement as to findings is not satisfied by an opinion of the court and in case of substantial conflict in the evidence the case may be sent back by the supreme court for a finding of facts. Zimmerman v. Treleven, 192 W 214, 212 NW 266.

Findings of fact of the trial court which are so combined with the opinion as to make separation of findings, observations, conclusions and argument difficult are not in compliance with 270.33. Boehm v. Wermuth, 194 W 82, 215 NW 818.

The trial court should not incorporate arguments, citations of authority and other extraneous matters in findings of fact. Petrus v. Pierick, 199 W 147, 225 NW 695.

If there is irreconcilable conflict in competent and relevant evidence, it cannot be said that findings thereon are against the great weight and clear preponderance of the evidence, and, consequently, they cannot be set aside on appeal. Interior W. Co. v. Buhler, 207 W 1, 238 NW 822.

In case of conflict between a court's opinion and findings the findings must control. Coolidge v. Rueth, 209 W 458, 245 NW 186.

Where the trial court without a jury gives no indication of the possible theories upon which its decision may have been based, all of them must be examined, and if all are sound the judgment must be affirmed, but if any of them is unsound the cause must be remanded for more specific findings. Julius v. Druckrey, 214 W 643, 254 NW 358.

Plaintiff could not complain of the court's failure to make more specific fact findings or to separately state facts found, where she failed to request such findings or statement. Finkelstein v. Chicago & N. W. R. Co. 217 W 433, 259 NW 254.

Where the trial court in its decision made a full analysis of all the facts, the decision must be accorded the consideration and weight of formal findings. Will of Daniels, 225 W 502, 274 NW 435.

Findings of fact made by a trial court, in a controversy concerning the administration of a trust estate, will not be disturbed unless they are against the great weight and clear preponderance of the evidence. Welch v. Welch, 235 W 282, 290 NW 758, 293 NW 150.

The failure of the trial court to satisfy the requirement of 270.33 is not necessarily reversible error, but the supreme court may reverse the judgment for want of appropriate findings, or it may affirm the judgment if the evidence shows that the trial court reached a result which the evidence would sustain if specifically found. Interstate Finance Corp. v. Dunphy, 239 W 98, 300 NW 750.

Failure of the trial court to make findings does not require that the case be returned to the trial court for specific findings, the opinion of the trial court being capable of aiding the supreme court in determining what the trial court found as facts. United Parcel Service v. Public Service Comm. 240 W 603, 4 NW (2d) 138.

Where findings of the trial court are not as direct as they might have been, but any possible confusion disappears in the light of the decisions of the court, the findings, thus supplemented, become sufficient. Nickel v. Theresa Farmers Co-op. Asso. 247 W 412, 20 NW (2d) 117.

A recital in an order is equivalent to a finding. Wolfrom v. Anderson, 249 W 433, 24 NW (2d) 881, 25 NW (2d) 880.

See note to 103.56, citing Brown v. Sucher, 258 W 123, 45 NW (2d) 73.

Where, in a proceeding on a claim against the estate of a decedent, the trial court did not make formal findings but did file a written opinion and judgment stating findings and conclusions, there was a sufficient compliance with 270.33. Estate of Vogel, 259 W 73, 47 NW (2d) 333.

In a trial to the court, findings of fact will not be set aside on appeal unless they are contrary to the great weight and clear preponderance of the evidence. Angers v. Sabatinelli, 246 W 374, 17 NW (2d) 282; Swazee v. Lee, 259 W 136, 47 NW (2d) 733.

A trial court may file a separate opinion when he wishes to set forth his own views on the questions presented, supplemented by citations of legal authorities, but such opinion should not be combined with a formal order, or formal findings of fact, or conclusions of law. State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

A finding of the trial court may not be disturbed as being contrary to the preponderance of the evidence solely on the ground that one significant circumstance, which might suggest a contrary finding, tends to contradict the determination of the trial court. Engle v. Peters, 261 W 347, 52 NW (2d) 8.

A finding as to the reasonable value of personal services rendered to a corporation by its directors-officers, in the capacity of skilled executives in operating a large and thriving business, based on the independent judgment of the trial court, however experienced he may be, cannot stand where such finding is against the evidence in the case. Gauger v. Hintz, 262 W 333, 55 NW (2d) 426.

In a replevin action by the lessee of a farm and machinery, livestock, and other personal property, to recover the increase of calves, or the value thereof, from the lessor and a purchaser to whom the lessor had sold the farm and personal property at the expiration of the one-year lease, the value found by the trial court as to 2 of the calves was based on a misinterpretation of the testimony, requiring that the judgment be reversed and the plaintiff be given the option to accept judgment for a specified less amount or a new trial on the issue of damages only. Jankowski v. Komisarek, 262 W 435, 55 NW (2d) 361.

Where a release from all claims, on account of "unknown" as well as known injuries resulting from an auto collision was executed in reliance by both parties on a written report of the releasor's physician, and the trial court set aside the release on the ground of "mutual" mistake, and there was no mistake of fact on the part of the releasee on one point, and there was conflicting testimony as to the extent of injury but the trial court made no specific finding on this point, the cause must be remanded for the trial court to make a specific finding thereon. Doyle v. Teasdale, 263 W 328, 57 NW (2d) 381.

270.33 is directory, and it is not error to make and file the findings and judgment after the expiration of the 60-day period. Galewski v. Noe, 266 W 7, 62 NW (2d) 703.

Positive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court in the absence of something in the case which discredits the same or renders it against the reasonable probabilities. Thiel v. Damrau, 268 W 76, 66 NW (2d) 747.

The judgment entered pursuant to the stipulation for settlement of the action was not reversible for the trial court's failure to make findings of fact and conclusions of law, since findings are necessary only when there is to be a determination of facts, and no such determination was necessary in this case in view of the stipulation. Czap v. Czap, 269 W 557, 69 NW (2d) 488.

The findings, conclusions and judgment, as to the time within which the defendant wife was to remove her personal effects and other property from the home, took precedence over a memorandum decision fixing a somewhat different time, and such difference did not constitute a basis for a claim of error. Gordon v. Gordon, 270 W 332, 71 NW (2d) 386.

Where no formal findings are made, the decision of the trial court is accorded the same consideration and weight on appeal as the findings; where both are filed and there is conflict between them, the findings control; and where the findings are insufficient in themselves, they may be supplemented by the decision. Estate of Wallace, 270 W 636, 72 NW (2d) 383.

Where no formal findings of fact are made, or the findings do not cover a point in issue, facts which are stated in the trial court's memorandum decision will be accorded the same weight on appeal as if contained in formal findings. The trial court, where it files no formal findings of fact apart from its memorandum decision, should set apart a portion of the memorandum decision and expressly designate such portion as "Findings of Fact" in which are stated the facts as found by the court. Estate of Olson, 271 W 199, 72 NW (2d) 717.

Where the trial court in its memorandum decision makes a full analysis of all the facts, the decision is accorded the consideration and weight of formal findings. Responsibility for the correctness of the findings is on the trial judge, and separate facts should be found on each controverted issue. L. Rosenheimer Malt & Grain Co. v. Kewaskum, 1 W (2d) 558, 85 NW (2d) 336.

The trial court's findings, if incomplete on the reasons therefor, may be supplemented by the written decision of the trial court, and its findings of fact will not be set aside unless they are contrary to the great weight and clear preponderance of the evidence. Breeden v. Breeden, 6 W (2d) 149, 93 NW (2d) 854.

Findings of fact by trial courts may not be disturbed on appeal unless the findings are contrary to the great weight and clear preponderance of the evidence. Weber v. Kole, 7 W (2d) 107, 95 NW (2d) 784. See also: Kuehn v. Kuehn, 11 W (2d) 15, 104 NW (2d) 138; and First Credit Corp. v. Behrend, 45 W (2d) 243, 172 NW (2d) 668.

"A finding of fact of a trial court made up-

on conflicting evidence should not be set aside on review if a judicial mind could, on due consideration of the evidence as a whole, reasonably have reached the conclusion of the court below." Estate of Larson, 7 W (2d) 263, 273-274, 96 NW (2d) 489, 494. See also C. Hennecke Co. v. Cardinal B. & W. Corp. 16 W (2d) 493, 498, 114 NW (2d) 869, 872.

Where, in a trial to the court, evidence incompetent under 325.16 was admitted over objection, and where such evidence would support the judgment but where the finding might have been different without the evidence, a new trial may be ordered. Kading v. Roark, 7 W (2d) 483, 97 NW (2d) 187.

The failure of the court to give his decision in writing and file it as required by 270.33, the drafting of findings by counsel without guidance by the court, and the failure of counsel to submit the proposed findings to opposing counsel prior to adoption by the court is condemned in the interest of justice. Kamuchey v. Trzesniewski, 8 W (2d) 94, 98 NW (2d) 403.

In proceedings on motions after judgment granting a divorce to a wife on the ground of cruel and inhuman treatment, the trial court had the power to amend its findings of fact and conclusions of law nunc pro tunc. Hirmer v. Hirmer, 10 W (2d) 365, 103 NW (2d) 55.

Where the formal findings of fact by the trial court do not cover a point, a statement covering the point in the memorandum opinion of the court has the weight of a finding of fact. Morn v. Schalk, 14 W (2d) 307, 111 NW (2d) 80.

It was improper procedure for the trial court to fail to render a written opinion and to approve new findings of fact and conclusions of law prepared by the defendant, without motion or hearing, following a reversal by the appellate circuit court. Wisconsin Dairy Fresh v. Steel & Tube Prod. Co. 20 W (2d) 415, 122 NW (2d) 361.

If all facts are undisputed and subject to but one reasonable inference, a question of law rather than a question of fact is presented, and the rule that a trial court's finding of fact will be sustained on appeal unless contrary to the great weight and preponderance of the evidence is inapplicable to the question on such issue. In re Adams Machinery, Inc. 20 W (2d) 607, 123 NW (2d) 558.

The trier of fact judges the credibility of the witnesses and the weight of the testimony. Guinther v. Schucht, 26 W (2d) 97, 131 NW (2d) 861.

See note to 274.35, citing State ex rel. Skibinski v. Tadych, 31 W (2d) 189, 142 NW (2d) 838.

A dismissal of a complaint on the ground of insufficiency of the evidence requires findings to be made even though a literal reading thereof might indicate to some that findings and conclusions need only be made when there is a dispute in the evidence. Findings in special proceedings are now required. State ex rel. Skibinski v. Tadych, 31 W (2d) 189, 142 NW (2d) 838.

The rule applied by the supreme court upon appellate review where the evidence is documentary, that it is not bound by inferences drawn therefrom by the trial court, is predicated upon the concept that when a question of fact is dependent upon understanding or interpretation of language the supreme court is as able to draw an inference therefrom as the judge or jury who considered the matter at trial. The rule is inapplicable where the facts to be derived from the exhibits are not so uniquely in the area of expertise of the supreme court that it can draw an unequivocal conclusion. Delap v. Institute of America, Inc. 31 W (2d) 507, 143 NW (2d) 476.

Any inconsistency between the findings of fact and the judgment must be resolved in favor of the judgment. Giertsen Co. v. State, 34 W (2d) 114, 148 NW (2d) 741.

In a case tried to the court without a jury, its findings will not be reversed on appeal unless they are contrary to the great weight and clear preponderance of the evidence. It is not necessary that the evidence in support of the findings constitutes the great weight or clear preponderance of the evidence. Nor is it sufficient that there is evidence to support a contrary finding. To command a reversal, such evidence, although sufficient to support a verdict, must constitute the great weight and the clear preponderance of the evidence. Eberle v. Joint School Dist. No. 1, 37 W (2d) 651, 155 NW (2d) 573.

See note to 274.35, citing Moonen v. Moonen, 39 W (2d) 640, 159 NW (2d) 720.

While a trial court's duty only extends to finding ultimate facts upon which a judgment rests, and there is no exception for divorce cases in 270.33, nevertheless more specific findings should be made upon request of counsel. Walber v. Walber, 40 W (2d) 313, 161 NW (2d) 898.

On appeal from a judgment following trial to the court, where the facts are stipulated and the remaining issues constitute questions of law, the supreme court in considering such questions will not give any special weight to the conclusions of the trial court. National Amusement Co. v. Dept. of Revenue, 41 W (2d) 261, 163 NW (2d) 625.

The rule that findings of the trial court cannot be set aside unless against the great weight and clear preponderance of the evidence does not apply where the interpretation of a will rests on the application of legal principles or rules of construction to known facts. Estate of Erbach, 41 W (2d) 335, 164 NW (2d) 238.

Since 270.33, Stats. 1967, applicable to all courts of record, requires that the decision of a trial court be filed with the clerk of the court, there was no merit to the claim that the decision was not filed because of conditions imposed by the judge when the decision was ordered impounded and deposited with the clerk. State ex rel. Journal Co. v. County Court, 43 W (2d) 297, 168 NW (2d) 836.

270.34 History: 1856 c. 120 s. 180; R. S. 1858 c. 132 s. 22; 1864 c. 288 s. 1; R. S. 1878 s. 2864; Stats. 1898 s. 2864; 1905 c. 146 s. 1; Supl. 1906 s. 2864; 1925 c. 4; Stats. 1925 s. 270.34; Court Rule XXI s. 1, 2, 4; Sup. Ct. Order, 212 W xvi.

On trial by jury in civil actions (general) see notes to sec. 5, art. I.

It was erroneous for the court, without any trial of the issues raised by the answers in a

foreclosure suit, to grant an ex parte order of reference, to compute the amount due, etc., as in case of default. Bassett v. McDonel, 13 W 444.

An order of reference appearing of record must be presumed to have been made by written consent of the parties, unless the contrary appears. Dinsmore v. Smith, 17 W 20.

The reversal of an order of reference avoids all proceedings thereunder. Mead v. Walker, 20 W 518.

To give effect to a trial by stipulation at chambers the stipulation must contain provision for the rendition of judgment on the finding of the judge in open court. Hills v. Passage, 21 W 294.

The judge of another circuit may be a referee. Andrews v. Elderkin, 24 W 531.

The reference must be by order of the court, appearing in some way of record. Appearance of the parties and trial before the referee is not a waiver of such order. Stone v. Merrill, 43 W 72.

Where the answer denies the correctness of the amounts charged, without disputing the items, there must be an examination. Carpenter v. Shephardson, 43 W 406.

After appeal from an order setting aside a report a second reference may be made to complete the proof, upon an affidavit excusing failure to make such proof on the first reference. Bannister v. Patty's Executors, 43 W 427.

Issues in abatement cannot be referred. Brown County v. Van Stralen, 45 W 675.

Where the items of the account were admitted by the answer, so as to preclude their examination, a reference was error. Monitor I. W. Co. v. Ketchum, 47 W 177, 2 NW 80.

Defendant not having disputed any debit in plaintiff's account, and the court having no knowledge of the character of his evidence of payment, or that it involved a long account on his part, but acting upon the pleadings alone, it was error to order a reference for trial without consent. Knips v. Stefan, 50 W 286, 6 NW 877.

After a new issue is made by amendment of an answer, the cause may be again sent to the same referee. Where a new trial is ordered a new referee should be appointed. Fairbank v. Newton, 50 W 628, 7 NW 543.

Where defendants' motion for a reference on their counterclaim had been overruled and they withdrew the counterclaim and went to trial they waived the right to a reference. McCormick v. Ketchum, 51 W 323, 8 NW 208.

In an action to foreclose a mechanic's lien the court cannot direct a reference if either party demands a trial by jury. Druse v. Horter, 57 W 644, 16 NW 14.

"Important issues requiring the discretion, experience, learning and judgment of the court" ought not to be referred. Druse v. Horter, 57 W 644, 646, 16 NW 14, 15. See also Littlejohn v. Regents, 71 W 437, 442, 37 NW 346, 348.

This statute authorizes a compulsory reference of actions in equity as well as actions at law. Druse v. Horter, 57 W 644, 16 NW 14.

"Account," as here used, means an account in fact kept by a party; and a "long account" is a series of charges made at various times. Druse v. Horter, 57 W 644, 16 NW 14.

After judgment on the merits the prevailing party may have a reference to assess damages sustained by reason of a preliminary injunction improperly granted. Parish v. Reeve, 63 W 315, 23 NW 563.

A compulsory reference may be ordered in an action in which a long account must be proved by the plaintiff. United States R. S. Co. v. Johnston, 67 W 182, 30 NW 211.

An order dissolving an injunction and a judgment dismissing the action for want of prosecution constitute a final determination which warrants an assessment of the defendant's damages caused by the injunction; the court may appoint a referee to make such assessment. Kane v. Casgrain, 69 W 430, 34 NW 241.

An order denying a reference absolute in its terms may be vacated at the same term and a reference granted. Turner v. Nachtsheim, 71 W 16, 36 NW 637.

An action on contract to recover for extra work performed under a building contract, and for damages for delay in not furnishing certain material at the proper time by the owner, may be referred against objection. Littlejohn v. Regents, 71 W 437, 37 NW 346.

The court has a wide discretion in the matter as to what issues shall be referred. Littlejohn v. Regents, 71 W 437, 37 NW 346.

An action of tort cannot be referred without written consent. Stacy v. Milwaukee, L. S. & W. R. Co. 72 W 331, 39 NW 532.

Numerous items of damage do not constitute an account. Andrus v. Home Ins. Co. 73 W 642, 41 NW 956.

The validity of an account cannot be inquired into on a motion to refer. Sutton v. Wegner, 74 W 347, 43 NW 167.

If plaintiff's case necessarily depends upon his proving a long account a reference may be granted notwithstanding the defendant alleges that the services for which plaintiff claims compensation were all rendered under a special contract fixing the amount to be paid and that they have been fully paid for. The referee may, in his discretion, try the issue as to whether there was such a contract, and if he finds affirmatively he may so report without taking action on the account. Briggs v. Hiles, 79 W 571, 48 NW 800.

If consent was necessary to authorize a reference and nothing appears in the record to the contrary it will be presumed on appeal that it was given. The objection that such consent was not given must be made before the trial court. Duncan v. Erickson, 82 W 128, 51 NW 1140.

Where the record contained a bill of particulars covering about 150 items of an expense account, the case was a proper one for a reference. La Coursier v. Russell, 82 W 265, 52 NW 176.

An account which contains 20 charges for different kinds of services rendered at different times during a period of several months is a long account. Turner v. Nachtsheim, 71 W 16, 36 NW 637; Van Oss v. Synon, 85 W 661, 56 NW 190.

Two long series of charges in the form of accounts, made by a railway company against persons who had unduly detained its cars, and attached as schedules to the complaint in an action to recover for such detention, and show-

ing the number of each car detained, the date and time of its detention, and the amount claimed by reason thereof, are "accounts." Chicago & Northwestern R. Co. v. Faist, 87 W 360, 58 NW 744.

Consent is an admission that the action involves a referable issue, and on the subsequent consolidation of another action with that referred the court may refer the whole case. Eau Claire F. & S. Co. v. Laycock, 92 W 81, 65 NW 732.

By moving to consolidate a pending action with one which has been referred the mover consents that the consolidated action shall be tried before the referee. Eau Claire F. & S. Co. v. Laycock, 92 W 81, 65 NW 732.

If judgment is demanded for a specific and liquidated sum, with interest, which is alleged to be withheld by the defendant in violation of the contract under which he collected it, the action is on contract. Casgrain v. Hamilton, 92 W 179, 66 NW 118.

A motion for a reference is too late, unless perhaps in exceptional circumstances, when it is first made near the close of the trial. Kellogg v. Costello, 93 W 232, 67 NW 24.

In an action to dissolve a partnership and for an accounting, etc., a reference "to take an account between the parties herein and report the same to the court" is made under sec. 2864 (2), R. S. 1878, and the referee was without power to pass upon the question of whether a partnership in fact had existed, and his report does not have the effect of a special verdict or preclude the court from making its own findings. Best v. Pike, 93 W 408, 67 NW 697.

Where the suit was on an account and the other matters were merely incidental to it, it was proper to refer the case. Jordan v. Estate of Warner, 107 W 539, 83 NW 946.

The provision that all of the issues may be referred allows such a reference, but a party has no right to such reference. Where application for the reference was denied as res adjudicata because a previous application had been made to another judge, the order would be reversed and the circuit judge required to exercise discretion in the matter. Hart v. Godkin, 122 W 646, 100 NW 1057.

The use of fact-finding referees (as authorized by 270.34, Stats. 1965) is commended by the supreme court, particularly in a time of heavy work loads and backlogs of pending cases facing trial courts. Debelak Bros., Inc. v. Mills, 38 W (2d) 373, 157 NW (2d) 644.

A referee has power to go outside of the county where he was appointed. Winnebago County v. Dodge County, 125 W 42, 103 NW 255.

An order for a compulsory reference is not appealable but is reviewable on appeal from the judgment. Wilt v. Neenah C. S. Co. 130 W 398, 110 NW 177.

Where the claim of the plaintiff involved an account of numerous transactions of debit and credit covering over 9 months' time, and all of these items were subject to dispute under the pleadings, it was a case for compulsory reference. Brillion L. Co. v. Barnard, 131 W 284, 111 NW 483.

The court may order a compulsory reference where the affidavit states that the examination of the account would cover more than 500 entries. Fowler v. Metzger S. & O. Co. 131 W 633, 111 NW 677.

Findings of a referee have the same force that findings of a trial court have upon review in the supreme court. Wojahn v. National Union Bank, 144 W 646, 129 NW 1068.

Whether an account is subject to compulsory reference as a long account is a matter of judgment and sound discretion. Astor Co. v. Dengle, 161 W 1, 152 NW 460.

The denial of an application for a reference unless it is an abuse of discretion is not generally reversible error. Volk v. Flatz, 206 W 270, 239 NW 424.

Mere items of damage do not constitute an "account," within 270.34 (1), Stats. 1931. To warrant a compulsory reference, mutuality in accounts is not a prerequisite nor need action be one on account; but there must be some memorandum containing items of work, materials, or payments. Memoranda containing charges and credits are a "long account," constituting regularly kept memoranda of account. State ex rel. Hustisford L. P. & M. Co. v. Grimm, 208 W 366, 243 NW 763.

A compulsory reference was not improper on the ground that the items of commission sought to be recovered did not arise from transactions between the plaintiff salesman and the defendant purchaser of the assets of a manufacturing company, since, under the contract between the defendant and the manufacturing company, the defendant stood in the same relation to the transactions so far as accounting was concerned between itself and the plaintiff as the manufacturing company stood. Dunham v. Howard Industries, Inc. 253 W 347, 34 NW (2d) 140.

270.35 History: 1856 c. 120 s. 182; R. S. 1858 c. 132 s. 22; R. S. 1878 s. 2865; 1893 c. 242; Stats. 1898 s. 2865; 1905 c. 146 s. 2; Supl. 1906 s. 2865; 1925 c. 4; Stats. 1925 s. 270.35; 1963 c. 429.

Where a referee commits an error in the course of the trial, which does not grow out of the plaintiff's pleading, and for which the defendant is entitled to have the report set aside, and a new trial granted, the plaintiff should not be required to pay all the costs of the former trial, but they should be left to abide the event of the suit. Learmonth v. Veeder, 11 W 138.

The failure to give notice is error unless there is an appearance. Bassett v. McDonel, 13 W 444.

The unsuccessful party before a referee cannot be compelled to pay them, if the referee is entitled to fees before filing his report. King v. Whiton, 15 W 691.

The referee's finding must be sufficient to support the judgment. Smith v. Lewis, 20 W 350.

Evidence taken down but rejected should be reported. The rejection by the referee of proper evidence, which he takes down and reports, is no ground for a new trial. Yates v. Shepardson, 25 W 239.

The referee may allow amendment to conform the pleadings to the proof. Gilbank v. Stephenson, 31 W 592.

The circuit court may order judgment on

the report, modify it or recommit it. If there be a variance and no amendment asked the court can only set aside the report. Bannister v. Patty's Executors, 35 W 215.

The objection to the failure to report all the evidence must be taken in the court below. Milwaukee County v. Ehlers, 45 W 281.

The better practice is to admit evidence if there is any doubt of its admissibility. Holendyke v. Newton, 50 W 635, 7 NW 558.

Where the court failed to pass specifically on exceptions the supreme court will pass on them or reverse the judgment and direct the court below to pass on them. The latter course is pursued only in doubtful cases. (Fairbank v. Newton, 46 W 644, corrected.) Lemke v. Daegling, 52 W 498, 9 NW 399.

The finding of the referee will stand unless against the weight of evidence. Walker v. Newton, 53 W 336, 10 NW 436.

Taking testimony before a referee appointed to take and report the same is a "trial of the cause," within the meaning of the statute relative to costs, and the usual fee for attendance may be taxed. Hill v. Durand, 58 W 160, 15 NW 390.

Where the bill of exceptions states that on a motion to confirm the opposite party moved to set aside the report and re-refer, which was denied, the question whether such motion should have been granted is reviewable. Mast v. Lockwood, 59 W 48, 17 NW 543.

When the report is so indefinite that it cannot be determined what items in the accounts are allowed or disallowed the cause should be sent back for more definite findings. Mast v. Lockwood, 59 W 48, 17 NW 543.

An order vacating the referee's report and directing a trial before the court vacates the reference and grants a new trial, and will not be disturbed unless there has been a manifest abuse of discretion or an error of law. Fairbanks v. Holliday, 59 W 77, 17 NW 675.

The power of the court to review and to alter, modify or entirely vacate the report is ample. Fairbanks v. Holliday, 59 W 77, 17 NW 675.

Where the attorneys stipulate a certain sum as referee's fees and expenses he may recover from both parties jointly. Malone v. Robey, 62 W 459, 22 NW 575.

The findings of the referee become the findings of the court when confirmed. Crocker v. Currier, 65 W 662, 27 NW 825.

In an action to foreclose a mortgage, where the defendant alleges numerous payments on account, exceeding the debt, and counterclaims for a balance due him the referee should state the account. Where the testimony established the fact that an accounting had been had between the parties a report disregarding such accounting cannot be sustained. Killops v. Stephens, 66 W 571, 29 NW 390.

When the determination of specific issues in a certain way renders other issues immaterial no finding upon or determination of such immaterial issues need be made. The fact that the findings embrace matters not in issue will not work a reversal. Brand v. James, 67 W 541, 30 NW 934.

The fact that a referee's minutes of the evidence have been changed is not ground for setting aside his report. The remedy is by correction of the minutes. Duffy v. Hickey, 68 W 380, 32 NW 54.

A stipulation for $10 per day "for his services as such referee" does not limit the per diem to the time actually occupied by the trial. McDonald v. Bryant, 73 W 20, 40 NW 665.

If the bill of exceptions is not certified to contain all the evidence the allowance by the referee and trial court of disputed items will not be reviewed. Casgrain v. Hamilton, 92 W 179, 66 NW 118.

Sec. 2865, R. S. 1878, does not apply where the referee exercises excess of powers. Best v. Pike, 93 W 408, 67 NW 697.

Where an order of reference directed that the referee "take the testimony and state the account * * *" this reference did not empower the referee to hear and try the case. Parcher v. Dunbar, 118 W 401, 95 NW 370.

The report and order of reference may be set aside when the evidence reported was uncertain and indefinite and the findings did not cover all the issues and some of the findings were contrary to the undisputed evidence. Sullivan v. Sullivan, 122 W 326, 99 NW 1022.

The power to employ aid of bailiffs in a trial before a referee is recognized by sec. 2865, Stats. 1898. Winnebago County v. Dodge County, 125 W 42, 103 NW 255.

Where the finding is based upon evidence it will not be disturbed upon appeal. Wittman v. Berger, 125 W 626, 104 NW 815.

The findings of a referee are on the same basis as those of a trial judge, and are not to be disturbed unless against the clear preponderance of the evidence. They have not the same weight as the findings of a jury. Ott v. Boring, 139 W 403, 121 NW 126.

Findings of a referee to try and determine a case should not, when reviewed by the circuit court, be treated from an original standpoint, but should have the same force and significance that findings of a trial court have upon review in this court. Wojahn v. National Union Bank, 144 W 646, 129 NW 1068.

Where a referee allowed a certain sum as damages it was error for the court to reduce such amount where there was ample evidence to sustain the referee's finding and no clear preponderance against it. Goodwin v. Von Cotzhausen, 171 W 351, 177 NW 618.

A referee's findings, confirmed by the trial court, will not be disturbed unless against the clear preponderance of the evidence. Mohs v. Quarton, 257 W 544, 44 NW (2d) 580.

The findings of a referee, when confirmed by the trial court, become the findings of the court. MacPherson v. Strand, 262 W 360, 55 NW (2d) 354.

In a matter of the custody of a minor child, referred to a court commissioner in habeas corpus proceedings, interested parties should have made timely application to the court to end the reference if they desired to question the jurisdiction of the court commissioner on the ground of delay in making a ruling, and they waived the objection by waiting until after the ruling had been made and then proceeding by writ of certiorari to challenge the validity of the ruling on the ground of un-

reasonable delay. Manninen v. Liss, 265 W 355, 61 NW (2d) 336.

Where an act required to be done by a referee might as well be done after the time fixed as before, no presumption arises that an injury or a wrong was done because of the belated report. A provision as to the time of filing a referee's report is deemed not mandatory but directory merely. Manninen v. Liss, 265 W 355, 61 NW (2d) 336.

Alleged errors of the referee, not pointed out to the trial court or shown in an effort to have the judgment set aside, cannot be reviewed on appeal. Berning v. Giese, 274 W 401, 80 NW (2d) 270.

270.35 does not authorize appeal from an intermediate order of the trial court not otherwise appealable under 274.33. Herman Andrae Electrical Co. v. Packard Plaza, 16 W (2d) 44, 113 NW (2d) 567.

270.36 History: 1856 c. 120 s. 183; R. S. 1858 c. 132 s. 24; R. S. 1878 s. 2866; Stats. 1898 s. 2866; 1925 c. 4; Stats. 1925 s. 270.36.

A circuit judge cannot appoint himself referee, but parties may stipulate that he may act, which is equivalent to stipulating to try the cause at chambers. Dinsmore v. Smith, 17 W 20.

A cause may be referred to the judge of another circuit. Andrews v. Elderkin, 24 W 531.

270.37 History: 1874 c. 19; R. S. 1878 s. 2867; Stats. 1898 s. 2867; 1925 c. 4; Stats. 1925 s. 270.37; 1935 c. 541 s. 157.

Sec. 2867, Stats. 1898, is mandatory and the court has no authority to enlarge the time for filing the referee's report, after motion for a new trial had been made by the adverse party. Miami County Bank v. Goldberg, 126 W 432, 105 NW 816.

270.39 History: 1856 c. 120 s. 174, 178; R. S. 1849 c. 104 s. 12; R. S. 1858 c. 132 s. 16, 20; R. S. 1858 c. 139 s. 37; 1860 c. 264 s. 12 to 14; 1861 c. 139 s. 1; 1871 c. 86 s. 2; 1873 c. 189; 1874 c. 194 s. 2; R. S. 1878 s. 2869 to 2872; Stats. 1898 s. 2869 to 2872; 1903 c. 268 s. 1; Supl. 1906 s. 2869; 1925 c. 4, 286; Stats. 1925 s. 270.39 to 270.42; 1927 c. 473 s. 49a, 49b; Sup. Ct. Order, 204 W vii; Stats. 1931 s. 270.39; Sup. Ct. Order, 17 W (2d) xxi.

Comment of Judicial Council, 1963: The making of exceptions is not only unnecessary, but now forbidden. [Re Order effective Sept. 1, 1963]

On findings upon a trial of an issue of fact by the court see notes to 270.33.

An "objection" to a decision of a court on a matter of law is an "exception," and under the provision that it shall not be necessary to except to errors in the charge to the jury but that the same shall be reviewed by the appellate court without exception, the right of review of an erroneous instruction does not depend on objection (exception) to it at the trial. Reuling v. Chicago, St. P. M. & O. R. Co. 257 W 485, 44 NW (2d) 253.

Where general objections to certain questions asked on the trial were sustained, and counsel did not ask to have the objections made specific and the rulings reconsidered in that light, reversible error may not be claimed on the ground that the objections should have been specific, and particularly where there were grounds on which the rulings might be sustained and it is not shown that the trial court ruled as it did for untenable reasons. Briggs Transfer Co. v. Farmers Mut. Auto. Ins. Co. 265 W 369, 61 NW (2d) 305.

270.39 does not do away with the necessity of objecting to rulings of the trial court, but merely provides that if the rulings are unfavorable after objections have been made, it is not necessary to note an exception in order to preserve the right to review on appeal. Berning v. Giese, 274 W 401, 80 NW (2d) 270.

After the trial court had rendered its memorandum decision ordering judgment for plaintiff without defendants having completed their case, and before entry of findings, conclusions, and judgment, it was incumbent on counsel for defendants to call to the trial court's attention the failure to have completed the taking of testimony, if counsel desired to raise such issue on appeal. Grether v. Derzon, 6 W (2d) 443, 95 NW (2d) 226.

270.49 History: 1856 c. 120 s. 174; R. S. 1858 c. 132 s. 16; R. S. 1878 s. 2878; Stats. 1898 s. 2878; 1901 c. 100 s. 1; Supl. 1906 s. 2878; 1917 c. 477; 1925 c. 4, 286; Stats. 1925 s. 270.49; Sup. Ct. Order, 207 W iv; Court Rule XXXIII s. 2; Sup. Ct. Order, 212 W xvi; 1941 c. 141; 1961 c. 494; Sup. Ct. Order, 17 W (2d) xxi.

On appellate jurisdiction of the supreme court see notes to sec. 3, art. VII, and notes to 251.08; on discretionary reversal see notes to 251.09; on verdicts in civil actions (five-sixths rule) see notes to 270.25; and on appeals see notes to various sections of ch. 274.

1. Errors in the trial.
2. Verdict contrary to law or the evidence.
3. Damages, excessive or inadequate.
4. In the interest of justice.
5. Generally.

1. Errors in the Trial.

Violation of the agreement of an attorney to postpone a trial is no ground for a new trial. Ableman v. Roth, 12 W 81.

Failure to enter a proper judgment is no ground for new trial. Everit v. Walworth County Bank, 13 W 420.

A declaration of a juror unfavorable to the moving party, made during trial, is misconduct; but the verdict will not be set aside therefor where not occasioned by the opposite party nor appearing to have had an effect favorable to him. Jackson v. Smith, 21 W 26.

Where the trial is by the court alone a new trial may be granted for the failure to produce evidence on one point. Curtis v. Brown County, 22 W 167.

Where defect in answer first discovered at trial and no motion to amend made through confusion a new trial may be granted. Kennedy v. Waugh, 23 W 468.

If the moving party is not injured by the judgment entered upon the verdict a new trial granted. Shaw v. Allen, 24 W 563.

A failure of counsel to reach the trial caused by a delay of trains is excusable. Stoppelfeldt v. Milwaukee, M. & G. B. R. Co. 29 W 688.

In an action for slander, where the verdict was for the defendant, and should have been

for the plaintiff for nominal damages only, no rule of law having been violated by the court, and the jury not having acted improperly, a new trial will not be granted. Jones v. King, 33 W 422.

Surprise caused by conversation of opposing attorneys occasioning neglect was excusable. State ex rel. Voight v. Hoeflinger, 33 W 594.

The admission or statement of a juror, after verdict, that he was not impartial is insufficient to set aside the verdict. Langton v. Hagerty, 35 W 151.

Where the charge may have misled the jury it is no error to grant a new trial. Dever v. Anson, 43 W 60.

Denial of a motion, based upon the ground that counsel had overlooked the effect of certain evidence, is proper. Kalckhoff v. Zoehrlaut, 43 W 373.

Examining a map not in evidence, in an action for obstructing a highway, is misconduct and it is error not to grant a new trial therefor. State v. Hartman, 46 W 248, 50 NW 193.

Where counsel was called by the clerk when case was reached, but reached the courtroom too late, there was ground for a new trial. Hinman v. Hamilton P. Co. 53 W 169, 10 NW 160.

Where the trial court, in directing a new trial, decided that the use of the word "permanent" in the charge was prejudicial to the defendant, the order was not erroneous. Stutz v. Chicago & Northwestern R. Co. 69 W 312, 34 NW 147.

A stipulation, contrary to the rules of court, that a case shall be placed at the foot of the calendar with the understanding that, if reached in its regular order by a certain day, it should then be tried, furnishes no reason for setting aside a verdict rendered in defendant's absence. Falkenberg v. Gorman, 71 W 8, 36 NW 599.

On a motion for a new trial founded on the minutes of the judge, all the proceedings in the case, whether or not of record, are before the court for its consideration. Hinton v. Coleman, 76 W 221, 45 NW 26.

A jury having retired with leave, if they agree upon a verdict, to seal it and separate, sealed a pretended verdict to the effect that they agreed to disagree, and separated. The next day the cause was resubmitted to them, and a verdict was found in favor of one of the parties. Such verdict, because of the conduct of the jury, was not sufficient support for a judgment. Sawvel v. Bitterlee, 86 W 420, 56 NW 1086.

A motion for a new trial because of the improper line of argument pursued by counsel is addressed to the discretion of the trial court. Laue v. Madison, 86 W 453, 57 NW 93.

The supreme court will not reverse an order granting a new trial because of the misconduct of a juror if the order was based on the minutes of the court as well as the affidavits, such minutes not being before it. Hoffman v. Chicago, M. & St. P. R. Co. 86 W 471, 56 NW 1093.

If the circumstance that one of the jurors and plaintiff's attorney were together a short time during the trial is satisfactorily explained to the trial court its refusal to set aside the verdict is not error. Delaney v. Hartwig, 91 W 412, 64 NW 1035.

If the record shows upon what grounds the court granted a new trial no presumption in favor of its action will be indulged in outside of what there appears. Wheeler v. Russell, 93 W 135, 67 NW 43.

An abuse of discretion will not be attributed to the trial judge in refusing to set aside a verdict where each question covers a controverted fact upon which there was evidence to be considered by the jury. Austin v. Chicago, M. & St. P. R. Co. 93 W 496, 67 NW 1129.

A new trial cannot be granted on an affidavit of a juror that he answered a question in a special verdict in a certain way because he believed the answer to be immaterial and that it would not preclude recovery by the plaintiff. Owen v. Portage Tel. Co. 126 W 412, 105 NW 924.

A new trial granted because of an alleged mistake of the jurors in rendering their verdict is not granted within the discretionary power of the circuit court, and the order will be reversed where it appears that the effect of such order would be to impeach the verdict of the jury. Butteris v. Mifflin M. Co. 133 W 343, 113 NW 642.

The constructive denial of a motion for new trial will not be deemed to be the exercise of discretion of a trial court, where such court believing it had jurisdiction after the expiration of the term attempted to grant the motion. Kurath v. Gove A. Co. 149 W 390, 135 NW 752.

Where the trial court granted a new trial on the ground of error in its instructions to the jury, notwithstanding its opinion that the verdict accorded with justice, such new trial was not granted in the discretion of the court. Siegl v. Watson, 181 W 619, 195 NW 867.

Counsel may not remain silent while objectionable arguments or remarks are made to the jury by opposing counsel, and, after verdict, urge the improper remarks as grounds for a new trial. A new trial, in such situations, will be granted only where the trial court improperly refused to sustain objections to the method of argument, notwithstanding the admonitions of the court. Basile v. Fath, 185 W 646, 201 NW 247.

The assessment of damages in a personal injury action is peculiarly for the jury. The question of the contributory negligence of the child a few months less than 7 years of age is for the jury under proper instructions. Schmidt v. Riess, 186 W 574, 203 NW 362.

A new trial because of disqualification of a juror was properly denied where counsel for the city and its surety, having information which charged them with notice of the juror's possible disqualification, accepted the jury and went on with the trial, both city and surety being estopped from raising the question after verdict. Schumacher v. Milwaukee, 209 W 43, 243 NW 756.

On appeal from an order granting a new trial because of error committed on the trial, the supreme court will examine the record for the purpose of determining whether the asserted error, because of which a new trial was ordered, was in fact error. (Edwards v. Milwaukee E. R. & L. Co. 191 W 328, 210 NW

686, modified.) Where the circuit court on appeal from the civil court granted a new trial because it was of the opinion that the civil court erred in directing a verdict, the order granting the new trial was not a discretionary order, and on appeal the supreme court will re-examine the record for the purpose of determining whether the civil court erred in directing a verdict. Rusch v. Sentinel-News Co. 212 W 530, 250 NW 405.

Where a jury with equal particularity finds 2 inconsistent facts to be true the verdict must be set aside and a new trial granted. Rodaks v. Herr, 213 W 310, 251 NW 453.

A guest is not held to that high degree of vigilance required of a driver of an automobile, but must exercise reasonable care for his own safety under all the circumstances; and whether a guest exercised such care in a particular case is generally for the jury. Whether the guest in this case, who failed to observe the presence of the truck parked on the highway at night, with which the car in which he was riding collided, was contributorily negligent, is for the jury. Whether the driver of the automobile, who failed to see the truck parked on the highway at night in time to avoid a collision, was negligent is for the jury, where there was a supportable jury finding that the warning signal on the rear of the truck was insufficient, there was no evidence that the headlights on the automobile were defective or inefficient, and there was evidence that the attention of the driver was directed to a flashlight being waved in the center of the highway; hence the trial court erred in setting aside a verdict in favor of the driver. Brothers v. Berg, 214 W 661, 254 NW 384.

Findings that no causal connection existed between a motorist's negligence and the collision and that the motorist's negligence contributed 10% to produce the collision were not so inconsistent as to require a new trial, where inconsistency of findings was referable to the jury's confusion of terms rather than to perversity. Bodden v. John H. Detter Coffee Co. 218 W 451, 261 NW 209.

Remarks of plaintiff's counsel tending to insinuate that witnesses for the defendant street railway company were venal and not worthy of credence, and arguments referring to the defendant as a soulless corporation and as having slandered the plaintiff, although the trial court sustained objections and instructed the jury to disregard counsel's statements, are so prejudicial as to require a new trial, especially in view of the excessive award of damages. Hanley v. Milwaukee E. R. & L. Co. 220 W 281, 263 NW 638.

Where the court examined a 6-year-old witness but failed to test the witness' understanding of the difference between truth and falsehood, and the witness' testimony contained gross inaccuracies, failure to strike testimony required new trial. De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

Where an order granting a new trial was reversed on appeal by the plaintiff, a defendant who had filed a cross complaint against a codefendant, but had not appealed, could not avail himself of the reversal, but was bound by the order granting a new trial, so far as it granted a new trial on the cross complaint. Baird v. Edmonds, 226 W 209, 276 NW 306.

It was highly prejudicial for plaintiff's counsel to argue to the jury that this was not a lawsuit involving the host but was a lawsuit between the plaintiff and the insurance company, since such statement tended to eliminate the defendant host from liability for damages to the plaintiff and emphasize that the insurance company alone would be liable for the damages assessed. Pecor v. Home Ind. Co. 234 W 407, 291 NW 313.

An order, specifying that a new trial should be granted as between the plaintiff guest and the defendant host to permit the jury to determine whether the host failed to exercise ordinary care which increased the danger or added a new one to those which the guest assumed, must be deemed to have been granted for an error on the trial and consequently no question of abuse of discretion is involved and the order must be reversed if the new trial was granted on an erroneous view of the law. Tracy v. Malmstadt, 236 W 642, 296 NW 87.

In an action against a city for injuries allegedly caused by a defective sidewalk, wherein the jury, after being out almost 11 hours, were divided 8 to 4 on a question relating to the condition of the sidewalk, statements of the court intimating that the 8 were more likely to be right than the 4, and that the 4 were therefore not warranted in standing out against them, and that the jury would be in a cold room all night unless they agreed, constituted prejudicial error where the jury returned a unanimous verdict a half hour later. Mead v. Richland Center, 237 W 537, 297 NW 419.

Where the verdict returned in respect to the amount of damages for the pain and suffering of a person fatally injured in the instant collision was not unanimous, and an erroneous instruction that the same 10 jurors "must" agree to the answers to all of the material questions in the special verdict was given before the jurors entered on their deliberations and was repeated with positive directions on 2 occasions when the jury was sent out to resume deliberations, the instructions are considered coercive as probably causing the jurors to believe that no other course was possible, and the giving thereof is considered prejudicial in the absence of proof clearly showing that no such undue influence was exerted thereby. (Guth v. Fisher, 213 W 323, distinguished.) Kasper v. Kocher, 240 W 629, 4 NW (2d) 158.

When the jury found that the plaintiff was free from all negligence, there was no occasion for its further finding that 20% of the total causal negligence was attributable to the plaintiff and such finding amounted to nothing; hence, when the trial court on motions after verdict properly found that the plaintiff was contributorily negligent as a matter of law, the court could not grant judgment on the basis of the jury's previous ineffectual finding on comparative negligence, but a new trial was required so that a jury might pass on that question. Mahoney v. Thill, 241 W 359, 6 NW (2d) 239.

Where defendants in default are timely in their motion to review a default judgment so as to reduce the recovery to the amount de-

manded in the complaint, the court is within its jurisdiction under 270.49 (1) in reviewing the same. Parish v. Awschu Properties, Inc. 243 W 269, 10 NW (2d) 166.

When part of a written statement is receivable in evidence and part is not, special objection must be made to the inclusion of the part not receivable and the grounds for its exclusion given, else the receipt of the statement as a whole is not erroneous. Jacobson v. Bryan, 244 W 359, 12 NW (2d) 789.

An instruction imposing on the driver of an auto the absolute duty to so limit his rate of speed and so control the movement of his vehicle as not to injure or endanger any person was erroneous, and was prejudicial to the defendant host in this case. Culver v. Webb, 244 W 478, 12 NW (2d) 731.

Refusal to grant a new trial to the defendant not represented by counsel was not error. The record showed that trial had been ordered despite defendant's lack of counsel only after the case had been delayed from time to time at defendant's request and she had failed to secure counsel to replace counsel whom she had dismissed without apparent cause, and that her lack of counsel was her fault, and that all relevant issues had been considered and decided by the trial court, and that defendant had not suffered by reason of the lack of counsel. Lazich v. Arsenovich, 256 W 296, 41 NW (2d) 282.

In an action for damages for assault and battery, wherein the defendant did not take the stand in his own behalf, the plaintiff's questioning of the defendant concerning the defendant's conviction for a crime, on calling the defendant as an adverse witness, was error; and whether the prejudicial effect of thus bringing the defendant's criminal history to the attention of the jury was so serious as to require a new trial was within the sound discretion of the trial court, and its order granting a new trial was not an abuse of discretion. Alexander v. Meyers, 261 W 384, 52 NW (2d) 881.

Where counsel could easily have found out before trial whether a teen-age driver whom they represented was licensed to drive, but merely assumed that he was licensed, and allowed a juror to serve who had stated on voir dire that he would not be prejudiced against a teen-age driver if such driver had a driver's license, and counsel made no objection to a question asked on the trial as to whether such driver was licensed at the time of the collision, and did not move for a mistrial when surprised by his negative answer but waited for the jury's verdict, which was unfavorable, the protest in motions after verdict came too late, and did not entitle the complaining parties to a new trial on the ground of surprise. Briggs Transfer Co. v. Farmers Mut. Auto. Ins. Co. 265 W 369, 61 NW (2d) 305.

Where the jury found the defendant's driver free from all negligence, but found the plaintiff's intestate causally negligent, the granting of a new trial on the ground that the questions in the special verdict inquiring as to the negligence of the plaintiff's intestate were duplicitous cannot be sustained, since the jury's findings freeing the defendant's driver from all negligence required the dismissal of the plaintiff's action regardless of any questions or findings respecting contributory negligence. Starry v. E. W. Wylie Co. 267 W 258, 64 NW (2d) 833.

Conduct of a juror in a personal-injury case, in meeting with some third person after the case had been submitted to the jury and before a verdict was reached, warranted the granting of a new trial, even though no one may have been prejudiced by the incident. Rasmussen v. Miller, 268 W 436, 68 NW (2d) 16.

Alleged errors of the trial court in refusing to submit a requested question and instruction in the special verdict are not properly before the supreme court, since the right to raise them was not properly preserved by motions after verdict. Huffman v. Reinke, 268 W 489, 67 NW (2d) 871.

No error by the trial court should be reviewable as a matter of right on appeal without first moving in the trial court for a new trial bottomed on such error, if the error is of a category that a trial court could correct by granting a new trial. Error by the court includes the giving of an erroneous instruction to the jury, the failure to submit a requested proper question in a special verdict, and the submission of a duplicitous verdict which included questions which should not have been submitted. (Prior rule to the contrary, repudiated.) Wells v. Dairyland Mut. Ins. Co. 274 W 505, 80 NW (2d) 380. See also: Peterson v. Wingertsman, 14 W (2d) 455, 111 NW (2d) 436; Kreklow v. Miller, 37 W (2d) 12, 154 NW (2d) 243; Simonson v. McInvaille, 42 W (2d) 346, 166 NW (2d) 155; Milwaukee v. Berry, 44 W (2d) 321, 171 NW (2d) 305; Jonas v. Northeastern Mut. Fire Ins. Co. 44 W (2d) 347, 171 NW (2d) 185; Ampex Corp. v. Sound Institute, Inc. 44 W (2d) 674, 172 NW (2d) 170; Schuster v. St. Vincent Hospital, 45 W (2d) 135, 172 NW (2d) 421; and Slattery v. Lofy, 45 W (2d) 155, 172 NW (2d) 341.

Where, early in the trial, a juror, a member of the panel who had been excused, and 2 witnesses for the plaintiff, both of which witnesses were friends and one of whom was a friend of the panel member, were seen sitting together in the courtroom, talking, for some 8 minutes at the noon recess and shortly before the convening of court, but there was no circumstance suggesting any impropriety in the content of the conversation, the court did not abuse its discretion in denying a motion for a mistrial immediately after the incident nor in denying a new trial on that ground after verdict. Dostal v. Saint Paul-Mercury Ind. Co. 4 W (2d) 1, 89 NW (2d) 545.

Where a witness persisted in giving irrelevant answers in disregard of warnings of the trial court, the court's admonition, to the effect that if the witness instigated or precipitated a mistrial he would go to jail "for a good long time," although not to be approved, did not constitute error of such a prejudicial character as to require a new trial. Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

Where it appeared that the matters on which a party grounded its motion for a new trial had been adequately disposed of on the trial or, if involving irregularities or error, had resulted in no prejudice to the rights of such party, the trial court did not abuse its discretion in denying a new trial. Supreme

Construction Co. v. Olympic Recreation, 7 W (2d) 74, 95 NW (2d) 826, 96 NW (2d) 809.

Applicable to error in granting a directed verdict is the rule that no error of the court should be reviewable as a matter of right on appeal without first moving in the trial court for a new trial bottomed on such error, if the error is of a category that a trial court could correct it by granting a new trial. (Reserved for future decision is the question of whether the stated rule should be extended to errors committed by a court in a trial to the court.) Peterson v. Wingertsman, 14 W (2d) 455, 111 NW (2d) 436.

Objections to specific prejudicial remarks of counsel to the jury should be pointed out to the trial court on the motion made after verdict for a new trial, and the failure to do so waives the objection. Presser v. Siesel Construction Co. 19 W (2d) 54, 119 NW (2d) 405.

A new trial was properly ordered by the trial court where the jury disregarded instructions as to negligence and the verdict was defective in that it forced the jury to choose between 2 defendants when both could have been found negligent. Quick v. American Legion 1960 Conv. Corp. 36 W (2d) 130, 152 NW (2d) 919.

Defendant could not successfully contend that the trial court abused its discretion in denying his motion for a new trial based upon alleged improprieties of plaintiff's counsel in closing argument following the court and jury's view of the scene of the accident, where neither the transcript of the jury's visit nor the allegedly prejudicial remarks were contained in the record. Berg v. De Greef, 37 W (2d) 226, 155 NW (2d) 7.

2. Verdict Contrary to Law or the Evidence.

Awards of excessively small damages are an indication of perverseness. Emmons v. Sheldon, 26 W 648.

A motion for a new trial, under sec. 2878, R. S. 1878, on the ground that the verdict is contrary to law and the evidence will not raise the question of excessive damages. It should specifically assign that ground. Sloteman v. Thomas & Wentworth M. Co. 69 W 499, 34 NW 225.

Where the jury disregarded the testimony of competent witnesses as to value, and adopted that of those not shown to have any special knowledge on the subject, there was no abuse of discretion in granting a new trial. Allen v. Milwaukee, 72 W 182, 39 NW 347.

There is no abuse of discretion in granting a new trial on the usual terms on the ground that the verdict was against the weight of evidence if the proof is such that opposite conclusions may reasonably be drawn from it by different persons. Kittner v. Milwaukee & N. R. Co. 77 W 1, 45 NW 815.

If there are no circumstances in a case which make the testimony of a plaintiff intrinsically improbable or incredible the fact that it is contradicted by several witnesses will not warrant the reviewing court in holding that there was error in refusing to set aside a verdict in his favor. Hardy v. Milwaukee S. R. Co. 89 W 183, 61 NW 771; Adams v. Chicago & Northwestern R. Co. 89 W 645, 62 NW 525.

A verdict is to be deemed perverse when there is no evidence to support it which the jury had a right to believe. Becker v. Holm, 100 W 281, 75 NW 999.

The trial judge should not set aside the verdict and order a new trial because of mere doubt on his part as to the correctness of the verdict. If, however, he is affirmatively convinced that the jury's verdict is contrary to the preponderance of the evidence, he should set the verdict aside. Pierson v. Citizens' T. and T. Co. 135 W 73, 115 NW 336.

Where the answer to one question in a special verdict plainly shows that the jury made the answer perversely or by reason of passion or prejudice, the court should set the whole verdict aside unless satisfied that the answers to the other questions were not affected by such perversity, passion or prejudice. State Journal P. Co. v. Madison, 148 W 396, 134 NW 909.

The mere fact that a verdict may be against the testimony of the greater number of witnesses does not justify its being set aside where it is based upon competent credible evidence. Olson v. Holway, 152 W 1, 139 NW 422.

A trial court may set aside a second concurring verdict and grant a new trial on the ground that the verdict is against the clear preponderance of the evidence and the justice of the case. Gross C. Co. v. Milwaukee, 170 W 467, 175 NW 793.

Where a verdict based on opinion evidence does not commend itself to the court as reasonable or sound, it will not be given the weight accorded to a verdict resting upon inferences drawn from facts as distinguished from mere opinions. Krueger v. Chase, 172 W 163, 177 NW 510.

A finding by the jury that the defendant suffered no damage, when it was undisputed that he sustained damage to the amount of $58.40, does not show that the verdict for plaintiff was perverse, the jury evidently understanding that the defendant's negligence precluded recovery by him and the other findings being supported by the evidence. Paul v. Pfefferkorn, 172 W 61, 178 NW 247.

On appeal a finding by the jury must be regarded as a verity if the court cannot say that it was against the clear preponderance or great weight of the evidence. Joseph F. Rothe F. Co. v. Harding, 180 W 14, 191 NW 551.

A verdict is perverse or mistaken where it found that neither party suffered damage if in fact both parties suffered damage. Jefferies v. Streit, 183 W 298, 197 NW 706.

Manifest contradiction in the answers to the questions of a special verdict requires a new trial. Large discrepancies between the amounts claimed and the amount found by the jury do not, as matter of law, establish fraud. Wiesman v. American Ins. Co. 184 W 523, 199 NW 55, 200 NW 304.

Where a new trial is denied, if there is any credible competent evidence sustaining the verdict, the determination of the trial court will not be disturbed. Lange v. Olson, 185 W 657, 202 NW 361.

In an action for personal injuries the jury in answer to the question of damages found

so small a sum as to show that the jury was actuated by prejudice and passion. The jury having also found that the plaintiff was guilty of contributory negligence, and the evidence on that subject being such that reasonable men might come to opposite conclusions, the court could not say that the perverseness of the jury as manifested by its answer on the subject of damages did not extend to the determination of the question of negligence. Olsen v. Brown, 186 W 179, 202 NW 167.

Where an action for the death of the driver of an auto in a collision was tried separately from actions by injured guests in the other auto, the fact that under substantially like evidence the jury in the first case found the deceased not negligent and another jury in the second case found him negligent does not require the conclusion that the jury's findings in the second case were not supported by the evidence. Reardon v. Terrien, 214 W 267, 252 NW 691.

A jury does not necessarily have to act dishonestly or from improper motives to render its verdict perverse; it is sufficient that the jury disregarded the court's instructions and rendered a verdict clearly contrary to the evidence. Grammoll v. Last, 218 W 621, 261 NW 719.

The findings of the jury must stand as verities if there is any credible evidence to support them. Fawcett v. Gallery, 221 W 195, 265 NW 667.

To constitute a perverse verdict, there must be something to warrant a finding that consideration ulterior to a reasonably fair application of the judgment of the jury to the evidence, under the instruction by the trial court, have controlled the jury. A party who has exercised an election to accept an amount fixed by the trial court in reduction of the amount of damages awarded by the jury is not entitled to a review of the action of the court in the matter. Brown v. Montgomery Ward & Co. 221 W 628, 267 NW 292.

Where the jury in an automobile collision case found the defendant's negligence wholly responsible for the collision under highly controverted facts, and in the same verdict, in total disregard of proper instructions, found no damages to 2 of the plaintiffs and only $50 to the third plantiff, when the evidence was undisputed that each of them had suffered material damages, the verdict was perverse and the granting of a new trial absolutely was warranted. Wollangk v. Jurgella, 248 W 178, 21 NW (2d) 272.

In view of conflicts in the evidence in relation to the issues submitted in the special verdict and the jury's findings, the only relief which the trial court could grant to the plaintiff in respect to such findings would have been to set aside the verdict and order a new trial, if in the court's judgment the evidence entitled the plaintiff to more favorable findings. Leisch v. Tigerton L. Co. 250 W 463, 27 NW (2d) 367.

In an action to recover for work performed in constructing a roadway, the conflicts and confusion in the plaintiff's proof in material respects warranted the conclusions that there was a failure of proof to sustain the amount assessed by the jury, that the jury disregarded the court's instructions, and that the verdict was perverse, so that it was within the discretion of the court to set aside the verdict and order a new trial. Fulkerson v. Risberg, 253 W 466, 34 NW (2d) 662.

The weight of the testimony of experts, as of other witnesses, is for the jury. (Morrill v. Komasinski, 256 W 417, 41 NW (2d) 620. See also: Chitek v. Horn, 257 W 9, 42 NW (2d) 162, and Richl v. De Quanine, 24 W (2d) 23, 127 NW (2d) 788.

Where there is evidence which makes a jury issue the court is precluded from changing the answers of the jury and ordering judgment on the verdict so changed, but where the answers are against the great weight of the evidence the court does have discretion to grant a new trial. Popko v. Globe Ind. Co. 258 W 462, 46 NW (2d) 224.

An order granting a new trial in the interest of justice for the stated reason that the affirmative answer of the jury to a question in the special verdict was contrary to the overwhelming weight of the credible evidence, and for other stated reasons, constituted a valid and effective order, and it was not necessary for the court to state that the testimony in support of the verdict was false. Roskom v. Bodart, 260 W 276, 50 NW (2d) 451.

In an action for injuries sustained by the plaintiff when she was thrown or bounced while riding as a passenger in the defendant's cab, wherein there was no evidence of the cabdriver's negligence except as negligence might be inferred from the fact that an injury was sustained, the trial court erred in granting a new trial in the interest of justice on the ground that the jury's findings that the cabdriver was not negligent in respect to lookout or management and control were contrary to the great weight of the evidence. Jury findings are not required to be in accord with the great weight of the evidence in order to stand. Mayer v. Boynton Cab Co. 267 W 486, 66 NW (2d) 136.

"It is axiomatic that testimony is to be viewed in the light most favorable to support the verdict and if any credible testimony so viewed does sustain the verdict, the verdict must stand." Neinfeldt v. Schultz, 269 W 37, 39, 68 NW (2d) 452, 454. See also: Buckley v. Brooks, 217 W 287, 258 NW 614, and Ebbon v. Farmers Mut. Auto. Ins. Co. 254 W 249, 36 NW (2d) 75.

Where an order granting a new trial did not expressly state the reasons therefor but did state that the trial court was convinced that the damages were excessive, such statement will be considered on appeal as being the equivalent of a finding that the damages found were not supported by the evidence. Blong v. Ed. Schuster & Co. 274 W 237, 79 NW (2d) 820.

In an alternative motion for a new trial, which specified 5 grounds in support thereof, but none of which specifically referred to a duplicitous verdict, an allegation merely that the verdict was contrary to the evidence and contrary to law was not sufficient in itself to properly raise the issue of duplicitous verdict before the trial court after verdict. Wells v. Dairyland Mut. Ins. Co. 274 W 505, 80 NW (2d) 380.

"It is the rule that where human testimony is in direct conflict with established physical facts and common knowledge, it is incredible and will not support the verdict of the jury. * * * However, such rule applies only when the physical facts are irrefutably established and permit of but one inference." Milwaukee Auto. Mut. Ins. Co. v. Farmers Mut. Auto. Ins. Co. 2 W (2d) 205, 208, 85 NW (2d) 799, 800. See also: New Amsterdam Cas. Co. v. Farmers Mut. Auto. Ins. Co. 5 W (2d) 646, 94 NW (2d) 175, and Pagel v. Holewinski, 11 W (2d) 634, 106 NW (2d) 425.

When a jury's findings are attacked on appeal, particularly when they have had the trial court's approval, the supreme court's inquiry is limited to the issue whether there is any credible evidence which, under any reasonable view, supports such finding. Olson v. Milwaukee Auto. Ins. Co. 266 W 106, 62 NW (2d) 549; Maccaux v. Princl, 3 W (2d) 44, 87 NW (2d) 772; Knosnar v. J. C. Penney Co. 6 W (2d) 238, 94 NW (2d) 642.

In passing on contention that answers of jury favorable to plaintiff are not supported by credible evidence, the evidence must be viewed from a standpoint most favorable to plaintiff, and it is only necessary to consider the testimony which sustains the verdict. Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

Where the jury found no damages for personal injuries but $700 for hospital and medical expenses, the answers were inconsistent and the verdict perverse. Feldstein v. Harrington, 8 W (2d) 569, 99 NW (2d) 694.

Where several inferences may reasonably be drawn from credible evidence and one of which will support a claim or contention of any party and the others will not, the proper inference to be drawn is for the jury. Evjen v. Packer City Transit Line, 9 W (2d) 153, 100 NW (2d) 580.

The jury could consider that what pain, if any, a party suffered was not sufficient to be compensated with money, and the jury's finding to such effect did not render the verdict perverse or the result of passion or prejudice, bearing in mind also that the jury did recognize the party's damages for loss of earnings and discriminated between the damage questions, and was uninfluenced by its answers to the negligence questions. When a jury has absolved a defendant of causal negligence, which finding is supported by credible evidence, the denial of damages or the granting of inadequate damages to the plaintiff does not necessarily show prejudice or render the verdict perverse. Dickman v. Schaeffer, 10 W (2d) 610, 103 NW (2d) 922.

If the answer to one material question of a special verdict plainly shows that the jury made the answer perversely, the trial court may well set aside the verdict unless satisfied that the answers to the other questions were not affected by such perversity. Kuentzel v. State Farm Mut. Auto. Ins. Co. 12 W (2d) 72, 106 NW (2d) 324.

When the findings of a jury are attacked on appeal, such findings must be examined from the standpoint most favorable to them, and the jury's answers to the questions submitted must stand if there is credible evidence to support them. Hibner v. Lindauer, 18 W (2d) 451, 118 NW (2d) 873.

A jury verdict will not be upset if there is any credible evidence which, under any reasonable view, fairly admits of an inference supporting the finding. Rodenkirch v. Johnson, 9 W (2d) 245, 101 NW (2d) 83; St. Paul F. & M. Ins. Co. v. Burchard, 25 W (2d) 288, 130 NW (2d) 866; Zweifel v. Milwaukee Auto. Mut. Ins. Co. 28 W (2d) 249, 137 NW (2d) 6.

Where, under any reasonable view, credible evidence exists to support the jury's apportionment of negligence, its finding should not be disturbed, since allocation under such circumstances is within the jury's province. Barber v. Oshkosh, 35 W (2d) 751, 151 NW (2d) 739; Gustin v. Johannes, 36 W (2d) 195, 153 NW (2d) 70; Berg v. De Greef, 37 W (2d) 226, 155 NW (2d) 7. See also: Hadjenian v. Sears, Roebuck & Co. 4 W (2d) 298, 90 NW (2d) 786; Hollie v. Gilbertson, 38 W (2d) 245, 156 NW (2d) 462; Bruno v. Biesocker, 40 W (2d) 305, 162 NW (2d) 135; and Neider v. Spoehr, 41 W (2d) 610, 165 NW (2d) 171.

In a suit by a former employe against a contractor-employer for overtime wages and for other remuneration which included another cause of action for alleged defamation, reduction by the trial court of awards aggregating some $69,000 to $21,500, various answers being changed in the process, did not support defendant's claim that the verdict was perverse, where the record disclosed that the trial court correctly determined that while the awards were excessive they did not reflect passion and prejudice. Lisowski v. Chenenoff, 37 W (2d) 610, 155 NW (2d) 619.

In an action to foreclose a mechanics lien for the balance due under a construction contract, which the owner defended on the ground of defective workmanship, counterclaiming for alleged consequential damages, perversity could not be attributed to a jury verdict in favor of the contractor where there was ample credible evidence to sustain a finding favoring either side, but, resolving a sharp conflict in expert testimony, the jury found and the trial court agreed that the contractor's performance was workmanlike. Schultz v. Mueller, 39 W (2d) 216, 159 NW (2d) 63.

Failure of the jury to award damages notwithstanding proof of injury and that they were sustained did not, on the state of the record, and in light of the jury findings, indicate perversity as a matter of law or abuse of discretion by the trial court which passed upon the issue of perversity and declined to order a new trial. Voeltzke v. Kenosha Memorial Hospital, 45 W (2d) 271, 172 NW (2d) 673.

3. Damages, Excessive or Inadequate.

Awards of damages have been reviewed by the supreme court in numerous cases; some of the cases, grouped according to subject matter, are cited below.

(1) Cases involving wrongful death, caused by negligence: Potter v. Chicago & Northwestern R. Co. 22 W 615; Castello v. Land-

wehr, 28 W 523; Even v. Chicago & Northwestern R. Co. 38 W 613; Hoppe v. Chicago, M. & St. P. R. Co. 61 W 357, 21 NW 227; Johnson v. Chicago & Northwestern R. Co. 64 W 425, 25 NW 223; Schrier v. Milwaukee, L. S. & W. R. Co. 65 W 457, 27 NW 167; Mulcairns v. Janesville, 67 W 24, 29 NW 565; Annas v. Milwaukee & N. R. Co. 67 W 46, 30 NW 282; Wiltse v. Tilden, 77 W 152, 46 NW 234; Thompson v. Johnston Brothers Co. 86 W 576, 57 NW 298; Bright v. Barnett & Record Co. 88 W 299, 60 NW 418; Leque v. Madison G. & E. Co. 133 W 547, 113 NW 946; Ryan v. Oshkosh G. L. Co. 138 W 466, 120 NW 264; Hackett v. Wisconsin C. R. Co. 141 W 464, 124 NW 1018; West v. Bayfield Mill Co. 149 W 145, 135 NW 478; Secord v. John Schroeder L. Co. 160 W 1, 150 NW 971; First Wisconsin Trust Co. v. Schmidt, 173 W 477, 180 NW 832; Sharp v. Milwaukee E. R. & L. Co. 176 W 340, 187 NW 198; McGonegal v. Wisconsin G. & E. Co. 178 W 595, 190 NW 471; Thomas v. Lockwood Oil Co. 178 W 599, 190 NW 559; Wasicek v. M. Carpenter Baking Co. 179 W 274, 191 NW 503; Maloney v. Wisconsin P. L. & H. Co. 180 W 546, 193 NW 399; Rogers v. Luryo Furniture Co. 193 W 496, 215 NW 216; Schaefer v. Rambo, 208 W 421, 243 NW 204; Bump v. Voights, 212 W 256, 249 NW 508; Warrichaiet v. Standard Oil Co. 213 W 619, 252 NW 187; Erikson v. Wisconsin Hydro-Electric Co. 214 W 614, 254 NW 106; Madison Trust Co. v. Helleckson, 216 W 443, 257 NW 691; Potter v. Potter, 224 W 251, 272 NW 34; Kuhle v. Ladwig, 237 W 147, 295 NW 41; Straub v. Schadeberg, 243 W 257, 10 NW (2d) 146; Zigler v. Kinney, 250 W 338, 27 NW (2d) 433; Wolfe v. Briggs, 260 W 443, 50 NW (2d) 680; Johnson v. Sipe, 263 W 191, 56 NW (2d) 852; Costello v. Schult, 265 W 243, 61 NW (2d) 296; Wing v. Deppe, 269 W 633, 70 NW (2d) 6; Paul v. Hood, 271 W 278, 73 NW (2d) 412; Spiegel v. Silver Lake Beach Enterprise, 274 W 439, 80 NW (2d) 401; Spang v. Schroeder, 275 W 92, 80 NW (2d) 768; Bellmann v. National Container Corp. 5 W (2d) 318, 92 NW (2d) 762; Steffes v. Farmers Mut. Auto. Ins. Co. 7 W (2d) 321, 96 NW (2d) 501; Martell v. Klingman, 11 W (2d) 296, 105 NW (2d) 446; Gustafson v. Bertschinger, 12 W (2d) 630, 108 NW (2d) 273; Mertens v. Lundquist, 15 W (2d) 540, 113 NW (2d) 149; Vande Hei v. Vande Hei, 40 W (2d) 57, 161 NW (2d) 379; Crotty v. Bright, 42 W (2d) 440, 167 NW (2d) 201.

(2) Cases involving personal injuries, caused by assault and battery: Mechelke v. Bramer, 59 W 57, 17 NW 682; Draper v. Baker, 61 W 450, 21 NW 527; Depner v. Thompson, 247 W 633, 20 NW (2d) 576; Donlea v. Carpenter, 21 W (2d) 390, 124 NW (2d) 305.

(3) Cases involving personal injuries, caused by negligence: Knowlton v. Milwaukee City R. Co. 59 W 278, 18 NW 17; Cummings v. Nat. Furnace Co. 60 W 603, 20 NW 665; McLimans v. Lancaster, 63 W 596, 23 NW 689; Meracle v. Down, 64 W 323, 25 NW 412; Hinton v. Cream City R. Co. 65 W 323, 27 NW 147; Schroth v. Prescott, 68 W 678, 32 NW 621; Abbot v. Tolliver, 71 W 64, 36 NW 622; Heddles v. Chicago & Northwestern R. Co. 74 W 239, 42 NW 237; Waterman v. Chicago & A. R. Co. 82 W 613, 52 NW 247 and 1136; McCoy v. Milwaukee S. R. Co. 88 W 56, 59 NW 453; Baltzer v. Chicago, M. & N. R. Co. 89 W 257, 60 NW 716; Heath v. Stewart, 90 W 418, 63 NW 1051; McMahon v. Eau Claire W. Co. 95 W 640, 70 NW 829; Beach v. Bird & Wells L. Co. 135 W 550, 116 NW 245; Wankowski v. Crivitz P. & P. Co. 137 W 123, 118 NW 643; Airoux v. Baum, 137 W 197, 118 NW 533; Gay v. Milwaukee E. R. & L. Co. 138 W 348, 120 NW 283; Bucher v. Wisconsin C. R. Co. 139 W 597, 120 NW 518; Schwind v. Chicago, M. & St. P. R. Co. 140 W 1, 121 NW 639; Ruck v. Milwaukee Brew. Co. 148 W 222, 134 NW 914; Callahan v. Chicago & Northwestern R. Co. 161 W 288, 154 NW 449; Murray v. Yellow Cab Co. 180 W 314, 192 NW 1021; Tomasik v. Lanferman, 206 W 94, 238 NW 857; Beno v. Peasley, 206 W 237, 239 NW 407; March W. P. Co. v. Babcock & Wilcox Co. 207 W 209, 240 NW 392; Wilke v. Milwaukee E. R. & L. Co. 209 W 618, 245 NW 660; Butts v. Ward, 227 W 387, 279 NW 6; Dunham v. Wisconsin G. & E. Co. 228 W 250, 280 NW 291; Murphy v. Hotel Pfister, Inc. 245 W 211, 13 NW (2d) 927; Mayer v. Boynton Cab Co. 267 W 486, 66 NW (2d) 136; Frankland v. Peterson, 268 W 394, 67 NW (2d) 865; Van Matre v. Milwaukee E. R. & T. Co. 268 W 399, 67 NW (2d) 831; Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571; Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756; Wolf v. United Shipping Co. 269 W 623, 70 NW (2d) 184; Taylor v. Western Casualty & Surety Co. 270 W 408, 71 NW (2d) 363; Montalto v. Fond du Lac County, 272 W 552, 76 NW (2d) 279; Blong v. Ed. Schuster & Co. 274 W 237, 79 NW (2d) 820; Frian v. Craig, 274 W 550, 89 NW (2d) 808; Pedek v. Wegemann, 275 W 57, 81 NW (2d) 19; Twist v. Aetna Casualty & Surety Co. 275 W 174, 81 NW (2d) 623; Blaisdell v. Allstate Ins. Co. 1 W (2d) 19, 82 NW (2d) 886; Le May v. Marks, 1 W (2d) 487, 85 NW (2d) 360; Hardee v. Metropolitan Cas. Ins. Co. of N. Y. 2 W (2d) 15, 85 NW (2d) 785; Schneider v. Neuman, 2 W (2d) 160, 85 NW (2d) 813; Sawdey v. Schwenk, 2 W (2d) 532, 87 NW (2d) 500; Winston v. Weiner, 2 W (2d) 584, 87 NW (2d) 292; Bolssen v. Heenan, 3 W (2d) 110, 88 NW (2d) 32; Korpela v. Redlin, 3 W (2d) 591, 88 NW (2d) 305; McCourt v. Algiers, 4 W (2d) 607, 91 NW (2d) 194; Kincannon v. National Ind. Co. 5 W (2d) 231, 92 NW (2d) 884; Peterson v. Western Casualty & Surety Co. 5 W (2d) 535, 93 NW (2d) 433; Vandnack v. Crosby, 6 W (2d) 292, 94 NW (2d) 621; Sennott v. Seeber, 6 W (2d) 590, 95 NW (2d) 269; Rasmussen v. Richards, 7 W (2d) 22, 95 NW (2d) 791; Steffes v. Farmers Mut. Auto. Ins. Co. 7 W (2d) 321, 96 NW (2d) 501; Nolop v. Skemp, 7 W (2d) 462, 96 NW (2d) 826; Boughton v. State Farm Mut. Auto. Ins. Co. 7 W (2d) 618, 97 NW (2d) 401; Romberg v. Nelson, 8 W (2d) 174, 98 NW (2d) 379; Patterson v. Silverdale Resort, 8 W (2d) 572, 99 NW (2d) 730; Erdmann v. Wolfe, 9 W (2d) 307, 101 NW (2d) 44; Rude v. Algiers, 11 W (2d) 471, 105 NW (2d) 825; Podoll v. Smith, 11 W (2d) 583, 106 NW (2d) 332; Bauman v. Gilbertson, 11 W (2d) 627, 106 NW (2d) 298; Konieczki v. Great Am. Ind. Co. 12 W (2d) 311, 107 NW (2d) 150; Burmek v. Miller Brew. Co. 12 W (2d) 405, 107 NW (2d) 583; Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499; Red-

dick v. Reddick, 15 W (2d) 37, 112 NW (2d) 131; Wendel v. Little, 15 W (2d) 52, 112 NW (2d) 172; Teufel v. Home Ind. Co. 15 W (2d) 67, 111 NW (2d) 893; DeLong v. Sagstetter, 16 W (2d) 390, 114 NW (2d) 788, 116 NW (2d) 137; Freuen v. Brenner, 16 W (2d) 445, 114 NW (2d) 782; Yingling v. Tie, 16 W (2d) 474, 114 NW (2d) 815; Lisowski v. Milwaukee Auto. Mut. Ins. Co. 17 W (2d) 499, 117 NW (2d) 666; La Vallie v. General Ins. Co. 17 W (2d) 522, 117 NW (2d) 703; Rogers v. Adams, 19 W (2d) 141, 119 NW (2d) 349; Dwyer v. Jackson Co. 20 W (2d) 318, 121 NW (2d) 881; Lee v. Milwaukee G. L. Co. 20 W (2d) 333, 122 NW (2d) 374; Allen v. Bonnar, 22 W (2d) 221, 125 NW (2d) 570; Doolittle v. Western States Mut. Ins. Co. 24 W (2d) 135, 128 NW (2d) 403; Kablitz v. Hoeft, 25 W (2d) 518, 131 NW (2d) 346; Moritz v. Allied Am. Mut. Fire Ins. Co. 27 W (2d) 13, 133 NW (2d) 235; Ketterer v. Maerker, 28 W (2d) 463, 137 NW (2d) 385; Gleason v. Gillihan, 32 W (2d) 50, 145 NW (2d) 90; Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65; Bentzler v. Braun, 34 W (2d) 362, 149 NW (2d) 626; Ostreng v. Lowrey, 37 W (2d) 556, 155 NW (2d) 558; Dutcher v. Phoenix Ins. Co. 37 W (2d) 591, 155 NW (2d) 609; Burke v. Poeschl Brothers, Inc. 38 W (2d) 225, 156 NW (2d) 378; Bash v. Employers Mut. Liability Ins. Co. 38 W (2d) 440, 157 NW (2d) 634; Michels v. Green Giant Co. 41 W (2d) 427, 164 NW (2d) 217; Lautenschlager v. Hamburg, 41 W (2d) 623, 165 NW (2d) 129; Schmiedeck v. Gerard, 42 W (2d) 135, 166 NW (2d) 136; Page v. Am. Family Mut. Ins. Co. 42 W (2d) 671, 168 NW (2d) 65; Young v. Anaconda American Brass Co. 43 W (2d) 36, 168 NW (2d) 112; McCraw v. Witynski, 43 W (2d) 313, 168 NW (2d) 537; Hillstead v. Smith, 44 W (2d) 560, 171 NW (2d) 315; Krause v. Milwaukee Mut. Ins. Co. 44 W (2d) 590, 172 NW (2d) 181; and Slattery v. Lofy, 45 W (2d) 155, 172 NW (2d) 341.

(4) Cases involving loss of services and society of injured spouse: Matosian v. Milwaukee Auto. Ins. Co. 257 W 599, 44 NW (2d) 555; Atkinson v. Huber, 268 W 615, 68 NW (2d) 447; Blong v. Ed. Schuster & Co. 274 W 237, 79 NW (2d) 820; Bolssen v. Heenan, 3 W (2d) 110, 88 NW (2d) 32; and Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65.

(5) Cases involving wrongful ejection of passenger from a train: Wightman v. Chicago & Northwestern R. Co. 73 W 169, 40 NW 689; Phettiplace v. Northern Pacific R. Co. 84 W 412, 54 NW 1092; Gillen v. Minneapolis, St. P. & S. S. M. R. Co. 91 W 633, 65 NW 373; and Masterson v. Chicago & Northwestern R. Co. 102 W 571, 78 NW 757.

(6) Cases involving defamation: Spear v. Hiles, 67 W 350, 30 NW 506; and Lisowski v. Chenenoff, 37 W (2d) 610, 155 NW (2d) 619.

(7) Case involving slander: Templeton v. Graves, 59 W 95, 17 NW 672.

(8) Case involving conspiracy to monopolize trade: Murray v. Buell, 74 W 14, 41 NW 1010.

(9) Case involving damage to realty, caused by trespass: Koenigs v. Jung, 73 W 178, 40 NW 801.

Excessively small damages are an indication of perverseness. Emmons v. Sheldon, 26 W 648.

An order granting a new trial for excessive damages will be reversed if the supreme court is of the opinion that the damages were not excessive. Duffy v. Chicago & N. W. R. Co. 34 W 188.

When the damages awarded are so large or so small as to force the conviction that the jury have acted under the influence of a perverted judgment the court may set the verdict aside. Templeton v. Graves, 59 W 95, 17 NW 672.

Only in a clear case will the verdict in an action of tort be set aside on the ground that the damages are excessive. Wright v. Ft. Howard, 60 W 119, 18 NW 750; Cummings v. National F. Co. 60 W 603, 20 NW 665.

A motion for a new trial on the minutes, because the verdict is contrary to law and evidence, will not raise the question of excessive damages. Sloteman v. Thomas & Wentworth M. Co. 69 W 499, 34 NW 225.

A verdict should not be set aside on the ground that it is excessive unless it is so to such an extent as to create the belief that the jury have been misled either by passion, prejudice or ignorance. Donovan v. Chicago & N. W. R. Co. 93 W 373, 67 NW 721.

A motion for a new trial must specifically assign that the damages are excessive in order to raise that question. Duffy v. Radke, 138 W 38, 119 NW 811.

"There is no accurate scale by which either court or jury can determine damages for pain and suffering. They must, however, exercise their judgment and discretion." Wasicek v. M. Carpenter Baking Co. 179 W 274, 278, 191 NW 503, 504. See also Helleckson v. Loiselle, 37 W (2d) 423, 155 NW (2d) 45.

Where the jury found on sufficient evidence that the plaintiff's negligence was equal to the defendant's, and the court was of the opinion that the evidence would warrant a finding attributing to the plaintiff considerably more than 50% of the total negligence, that the jury was sympathetic toward the plaintiff, the court was justified in not setting aside the verdict merely because of the inadequacy of the damages assessed. Schuster v. Bridgeman, 225 W 547, 275 NW 440.

The inadequacy of damages awarded, in order to be held perverse, should be of such a nature and be sufficient to justify the court in saying that the verdict was perverse; and this must be in the exercise of sound discretion. Wagner v. Peiffer, 259 W 566, 49 NW (2d) 739.

With reference to the issue of damages, plaintiff could offer the American Experience Table on Mortality and defendants then could attack the weight of the evidence with testimony that the plaintiff was subject to infirmities which would shorten his life below the Table's averages. Nolop v. Skemp, 7 W (2d) 462, 96 NW (2d) 826.

A court may take judicial notice of figures based on life expectancies computed on the basis of current statistics and published by

responsible government agencies, and include such expectancies in instructions to the jury in a personal-injury action involving deaths, although such figures may show different life expectancies at particular ages than those shown by the American Experience Table of Mortality. Donlea v. Carpenter, 21 W (2d) 390, 124 NW (2d) 305.

Inadequate damages by themselves do not establish perversity on the part of the jury. Wendel v. Little, 15 W (2d) 52, 112 NW (2d) 172; Ketterer v. Maerker, 28 W (2d) 463, 137 NW (2d) 385.

In determining the reasonableness of an award in a personal-injury action for loss of earnings, the proper test is whether the plaintiff's capacity to earn has been impaired, although the comparison of the earnings before the accident is some measure of earning capacity. Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65.

In a personal injury action by a woman (age 53 years) who, although suffering many serious injuries, after the accident returned to the same factory employment, resumed the same job, performed the same duties at the same hourly pay, increased her overall production, and presented no medical testimony which related the residuals of her injuries to her ability to continue work, the trial court under established rules was justified in setting aside as unsupported by the evidence a jury award for loss of earning capacity. Neider v. Spoehr, 39 W (2d) 552, 159 NW (2d) 587.

One who is injured in his person may recover for any consequent loss or diminution of his earning capacity; the proper element of damages in such cases is loss of earning power (i.e., the permanent impairment of the ability to earn money); the burden is on the plaintiff to establish to a reasonable certainty the damages sustained; the jury is not allowed to speculate; mere proof of a permanent injury is not conclusive evidence of impairment of future earning capacity; and there is no fixed rule for estimating the amount to be recovered for loss or diminution of future earning capacity. The process of ascertaining the amount of compensation to be awarded for loss of future earnings requires (a) the determination of the extent to which such capacity has been diminished, and (b) the fixing of the amount of money which will compensate for the determined extent of impairment. Ianni v. Grain Dealers Mut. Ins. Co. 42 W (2d) 354, 166 NW (2d) 148.

In evaluating loss of consortium, loss of society and companionship is more important than a pecuniary loss or loss of services. Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65.

4. In the Interest of Justice.

It was not an abuse of discretion for the trial court to grant a new trial in the interest of justice upon the ground that witnesses for the defendant had directly contradicted their testimony taken a short time before by the plaintiff as adverse witnesses. Schlag v. Chicago, M. & St. P. R. Co. 152 W 165, 139 NW 756.

Granting a new trial in the interests of justice will not be disturbed in the absence of a clear abuse of judicial discretion. Fontaine v. Fontaine, 205 W 570, 238 NW 410.

Exercise of the highly discretionary power of granting a new trial in the interests of justice is the only thing that stands between the litigant and judgment upon an unjust verdict, because if there is any credible evidence to support it and it has been approved by the trial court, although it may be against the great preponderance of the evidence, it must be sustained whatever the views of the supreme court may be as to its justness or the degree of support found in the evidence; but trial judges should exercise this great power with caution and circumspection. Sichling v. Nash M. Co. 207 W 16, 238 NW 843.

Improper argument, consisting of a statement of plaintiff's counsel that not one of the jurors would trade his left hip for $30,000, justified the trial court in granting a new trial in the interests of justice, in view of the high damages awarded, although the trial judge immediately instructed the jury to disregard the statement. Larson v. Hanson, 207 W 485, 242 NW 184.

Where in an action for alienation of affections the evidence was sufficient to sustain the jury's finding that the defendant's conduct was the controlling cause of the alienation of the affections of the plaintiff's wife, but it appeared that passion and prejudice affected the jury's decision on the issue of damages, and that such elements probably affected the jury's decision on the principal issue, the trial court, instead of merely reducing the award, should have granted a new trial absolutely. Schweiner v. Kralevetz, 216 W 542, 257 NW 449.

Where the answer to a material question of a special verdict plainly shows that the jury made answer perversely or by reason of passion or prejudice, the court must set aside the entire verdict unless the answers to other questions were unaffected. Mauermann v. Dixon, 217 W 29, 258 NW 352.

A new trial must be granted in the interest of justice where justice has not been done at the first trial, as where the verdict is manifestly wrong in point of discretion as contrary to the weight of the evidence. Markowitz v. Milwaukee E. R. & L. Co. 224 W 347, 271 NW 380.

The rule that the granting of a new trial in the interest of justice is highly discretionary applies to an order of the circuit court reversing a judgment of the civil court of Milwaukee county in the interest of justice and remanding the record with directions to reopen the case for the purpose of receiving additional evidence on a material issue. Theilacker v. Time Ins. Co. 233 W 113, 288 NW 813.

In an action on contract the court, after verdict, held that the plaintiff could not recover on the contract, but that he was entitled to recover for money had and received because the defendant had received the money loaned on a note signed by the defendant's branch business manager and the plaintiff; the defendant moved for a new trial in the interest of justice, but not on the ground of sur-

prise or on the ground of newly discovered evidence. He was not entitled to a new trial where he made no claim of the existence of any facts not in evidence that would show nonreceipt of the money by the defendant. Duffy v. Scott, 235 W 142, 292 NW 273.

In an action to foreclose a mortgage by a plaintiff who had furnished money to pay off a previous mortgage indebtedness against the premises, wherein the trial court held that the mortgage was void because forged, the court did not abuse its discretion in granting the plaintiff a new trial in the interest of justice to try an issue as to the right of the plaintiff to subrogation. Home Owner's Loan Corp. v. Papara, 235 W 184, 292 NW 281.

Where an order for a new trial in the interest of justice is based solely on an erroneous view of the law by the trial court, the order will be set aside. Schmutzler v. Brandenberg, 240 W 6, 1 NW (2d) 775; Beattie v. Strasser, 240 W 65, 2 NW (2d) 713.

An order granting a new trial on an erroneous view of the law is not a "discretionary order," and must be reversed. Dach v. General Cas. Co. 241 W 34, 4 NW (2d) 170.

A new trial in the interest of justice may be granted by a trial court on its own motion. Estate of Noe, 241 W 173, 5 NW (2d) 726.

The granting of a new trial in the interest of justice, unless based on an erroneous view of the law, will not be disturbed except for abuse of discretion. Myhre v. Hessey, 242 W 638, 9 NW (2d) 106.

Whether the trial court erred in granting a new trial, in the interest of justice, depends on whether an examination of the whole record clearly leads to the conclusion that there was nothing on which to base the trial court's conclusion. Nowicki v. Northwestern Nat. Cas. Co. 244 W 632, 12 NW (2d) 918.

An order granting a new trial in the interest of justice, in an action for injuries sustained in a collision of automobiles, where it appeared that a jury question clearly existed, that the question was properly submitted and that the verdict was sustained by ample evidence, is not warranted by the fact that the amount of damages assessed by the jury may have been somewhat inadequate, no perversity being established. Dowd v. Palmer, 245 W 593, 15 NW (2d) 809.

The granting of a new trial in the interest of justice is highly discretionary, and the order, although reviewable, will not be reversed by the supreme court unless it clearly appears that there was an abuse of judicial discretion. Kies v. Hopper, 247 W 208, 19 NW (2d) 167.

Ordinarily, an order granting a new trial in the interest of justice will be reversed only where the trial court discloses that its action was based on an erroneous view of the law, or where a verdict should have been directed for the party who prevailed with the jury. Burt v. Meunier, 252 W 581, 32 NW (2d) 241.

An order granting a new trial in the interest of justice, which wholly failed to set forth in detail therein the reasons that prompted the court to make it, was invalid and ineffective and, on appeal therefrom, it must be reversed. Buetow v. Hietpas, 253 W 64, 32 NW (2d) 201.

Reasons stated in an order granting a new trial on the question of damages, that in respect to damages the verdict was perverse and reflected bias and prejudice on the part of the jury, that the evidence failed to establish a fair standard as a basis for compensation of the plaintiff's wage loss and the medical proof was so indefinite and uncertain in respect to the plaintiff's disability that any allowance required resort to speculation and conjecture, and that a new trial as to damages was in the interest of justice, were sufficient to warrant the court's action if the record disclosed a sufficient basis for the reasons. The record here did not disclose a sufficient basis for the reasons stated by the trial court for granting a new trial on the question of damages. Graff v. Hartford Accident & Indemnity Co. 258 W 22, 44 NW (2d) 565.

Where the plaintiff's experienced counsel made no protest when a defense counsel, in argument to the jury, allegedly referred to the plaintiff's counsel as not an ordinary lawyer but one of Wisconsin's noted criminal lawyers, and that he had kept more criminals out of prison than any other lawyer, and was now demanding heavy and exorbitant damages for the plaintiff, the trial court did not err in holding that such argument was not prejudicial to plaintiff's rights and did not warrant a new trial. Stellmacher v. Wisco Hardware Co. 259 W 310, 48 NW (2d) 392.

Where the evidence supported the jury's findings that neither driver was negligent, and the jury had before it all of the testimony which could be adduced, and all of the issues were litigated, the trial court was not justified in ordering a new trial in the interest of justice as between the plaintiff wife and the defendant husband and his insurer. Stikl v. Williams, 261 W 426, 53 NW (2d) 440.

The court should have granted a new trial because of grossly improper and prejudicial argument persistently made to the jury by the plaintiff's attorney notwithstanding the objections of the defendant's attorney and the court's rulings sustaining such objections. Blank v. National Cas. Co. 262 W 150, 54 NW (2d) 185.

Allegedly improper and prejudicial statements by the plaintiff's attorney in argument to the jury, in the absence of the trial judge and the reporter from the courtroom and without any record made as to what the statements were, required the granting of the defendant's motion for a new trial. Caesar v. Wegner, 262 W 429, 55 NW (2d) 371.

The evidence was insufficient to sustain the jury's award of $4,000 for pain and suffering and disability, warranting the granting of a new trial in the interest of justice on the question of damages. Karsten v. Meis, 263 W 307, 57 NW (2d) 360.

A trial court may order a new trial in the interest of justice when a jury's comparison of negligence is against the great weight of the evidence, even though it cannot be held as a matter of law that one of the tort-feasors

was guilty of at least 50 per cent of the total negligence. If the reasons for ordering a new trial in the interests of justice are set forth in a filed written memorandum opinion, an incorporation of the reasons in the order by reference to the memorandum is a sufficient compliance with 270.49 (2). Standing alone, the fact that a verdict is against the great weight of the evidence is not a ground for a new trial. Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571.

Where a new trial has been ordered in the interest of justice, and the record discloses that such granting of the new trial was based on an erroneous view of the law by the trial court, such order constitutes an abuse of discretion. Schill v. Meers, 269 W 653, 70 NW (2d) 234.

The granting of a new trial for error or in the interest of justice rests largely in the discretion of the trial court, but such rule does not apply where it is clear that the court proceeded on an erroneous view of the law. Holtz v. Fogarty, 270 W 647, 72 NW (2d) 411.

In actions by property owners to recover damages in several respects for a nuisance resulting from the defendant's operation of a dump, wherein the trial court granted a new trial in the interest of justice on the issue of damages only because of failure of proof thereon, the court should have granted a new trial on all issues raised under the pleadings, for the reason that the issues were not severable and a new trial, limited to the proof of such damages only, would not bring before the jury sufficient facts to render a just verdict. Nissen v. Donohue, 271 W 318, 73 NW (2d) 418.

Improper argument to a jury is discussed in Pedek v. Wegemann, 275 W 57, 81 NW (2d) 49.

Setting forth the reasons for granting a new trial in the interests of justice in a memorandum decision but not in the order is not a compliance with 270.49 (2). Peters v. Zimmerman, 275 W 164, 81 NW (2d) 565.

In a case involving a head-on collision, where no question of defendant's lack of management and control was submitted, and where the evidence would not support a conclusion that the accident was unavoidable, the granting of a new trial in the interest of justice was not an abuse of discretion. Werren v. Allied Am. Mut. Fire Ins. Co. 3 W (2d) 313, 88 NW (2d) 348.

A new trial may be granted in the interest of justice where the jury exonerated a party who was clearly guilty of some degree of negligence. Wiley v. Fidelity & Casualty Co. 3 W (2d) 320, 88 NW (2d) 366.

The trial court may in the exercise of a proper discretion order a new trial in the interest of justice when a jury's verdict is against the great weight of the evidence, even though it cannot be held as a matter of law that the jury's answer is wrong. Bohlman v. Nelson, 5 W (2d) 77, 92 NW (2d) 345.

270.49 (1) applies only to cases where a verdict has been rendered by a jury, and not to cases where the trial has been by the court without a jury, while 270.49 (2) applies where the trial has been by the court without a jury as well as to jury trials. Where an order granting a new trial in the interest of justice set forth no reasons why the court was prompted to make the order or why a new trial would be in the interest of justice, and the order did not incorporate a sufficient statement of reasons by reference, the order must be reversed for failure to comply with 270.49 (2). Gillard v. Aaberg, 5 W (2d) 216, 92 NW (2d) 856.

In cases where a new trial has been granted in the interest of justice under 270.49 (2), the supreme court does not look for evidence to sustain the jury's findings but seeks to determine whether the trial court abused its discretion in ordering a new trial, and the supreme court seeks reasons to sustain the trial court's finding. A new trial in the interest of justice may be ordered when a jury's verdict is against the great weight of the evidence, even though it cannot be held as a matter of law that the jury's answer is wrong. The trial court has wide discretion in such matters and, although an order so made is not beyond review, it will not be reversed unless it clearly appears to be an abuse of discretion. McFarlin v. Hewitt, 5 W (2d) 488, 93 NW (2d) 445.

Where the trial court included the issue of damages in a new trial in the interest of justice, such decision should not be reversed unless the trial court erred as a matter of law or abused its discretion, and the order for a new trial will not be reversed as constituting an abuse of discretion, in the absence of any evidence or reason making it unjust to require defendant to relitigate the question of damages or why manifest justice demands limitation of issues. Wintersberger v. Pioneer Iron & Metal Co. 6 W (2d) 69, 94 NW (2d) 136.

The written decision of the trial court, which stated that the court was of the opinion that the jury, which apportioned 50% of the causal negligence to the injured child, did not understand the lower standard of care required of a child who was less than one month over 6 years of age at the time of the accident, and which decision summarized the pertinent evidence, sufficiently stated the reasons for granting a new trial in the interest of justice to comply with the requirements of 270.49 (2). Bair v. Staats, 10 W (2d) 70, 102 NW (2d) 267.

Where a child, openly associated with defendant and his counsel, was late in the trial discovered to be the child of the foreman of the jury and this fact was reported to the court but no motion for mistrial made, the trial court could properly grant a new trial in the interest of justice after a verdict finding no negligence. O'Connor v. Brahmstead, 13 W (2d) 432, 108 NW (2d) 920.

Surprise, as such, is not ground for a new trial in the interest of justice. The plaintiff had no right to rely on the position taken by the defendant on motion for summary judgment which was changed at the trial, and it was not an abuse of discretion by the trial court to refuse a new trial. Becker v. La Crosse, 13 W (2d) 542, 109 NW (2d) 102. See

also: Davis v. Ruggles, 2 Pin. 477, and Delaney v. Brunette, 62 W 615, 23 NW 22.

Where both plaintiff and defendants summoned a certain person as a witness, and defendants claimed surprise when such person took the stand for the plaintiff and changed his story, but counsel for defendants had an opportunity and did cross-examine such witness, the surprise thus shown by the defendants was not the type of surprise which warrants the granting of a new trial in the interest of justice. Birnamwood Oil Co. v. Arrowhead Asso. 14 W (2d) 657, 112 NW (2d) 185.

A trial court can properly grant a new trial in the interest of justice after a high verdict where plaintiff put in evidence of a hearing loss although this was not pleaded or covered by medical reports exchanged. Bublitz v. Lindstrom, 17 W (2d) 608, 117 NW (2d) 636.

A trial court has the power to grant a new trial in the interest of justice because the verdict is against the great weight of evidence, even though it cannot be held as a matter of law that a crucial answer to a question of the verdict is wrong in the sense that it is not supported by any credible evidence. Brunke v. Popp, 21 W (2d) 458, 124 NW (2d) 642. See also: Flippin v. Turlock, 24 W (2d) 49, 127 NW (2d) 822, and Pruss v. Strube, 37 W (2d) 539, 155 NW (2d) 650.

An order by the trial judge for a new trial in the interests of justice which referred only to possible resentment of the jury to the dismissal of the action as to an insurance company defendant was insufficient. Moldenhauer v. Faschingbauer, 25 W (2d) 475, 131 NW (2d) 290, 132 NW (2d) 576.

The general rule that an order for a new trial in the interests of justice will be reversed only where the trial court abused its discretion is inapplicable where based on an error of law. Ford Motor Credit Co. v. Amodt, 29 W (2d) 441, 139 NW (2d) 6.

A new trial in the interest of justice is not precluded because the evidence is sufficient to support the jury's finding, for a trial court has wide discretion to order a new trial in the interest of justice if the verdict is against the great weight and clear preponderance of the evidence, although the evidence is not so insufficient as to justify changing the answers to the special verdict questions. McPhillips v. Blomgren, 30 W (2d) 134, 140 NW (2d) 267.

While a new trial may be granted under 270.49 (1), Stats. 1965, in the interests of justice when material evidence which is likely to change the result is discovered after trial, the newly discovered evidence must meet prescribed conditions set forth in established rules and laid down by the supreme court as guidelines which have for their purpose putting a premium on conscientious preparation and rightly discouraging haphazard preparation for trial. Estate of Javornik, 35 W (2d) 741, 151 NW (2d) 721.

Where, under 270.49 (2), a trial court orders a new trial in the interest of justice, the order must set forth the reasons therefor in detail or incorporate by reference a memorandum decision that does so. Leatherman v. Garza, 39 W (2d) 378, 159 NW (2d) 18.

5. Generally.

A motion on the minutes to set aside the verdict and grant a new trial, and the decision thereon, are a part of the trial and do not require any notice apart from the trial. Hansen v. Fish, 27 W 636.

Where the verdict for plaintiff was considerably in excess of the amount claimed in the complaint, a new trial should not have been denied, except upon condition that plaintiff enter a remittitur for the excess. Manson v. Robinson, 37 W 339.

A second motion for a new trial is barred if the first motion be unconditionally denied. Hoppe v. Chicago, M. & St. P. R. Co. 61 W 357, 21 NW 227.

The general rule is that a new trial should be granted only on the terms that the moving party shall pay the costs of the former trial. Cases in which the verdict is perverse or entirely unsupported by evidence, or in which the court has misdirected the jury as to the law of the case, are exceptions to the above rule. Schweickhart v. Stuewe, 75 W 157, 43 NW 722.

On the reversal of a judgment with leave to the trial court, on defendant's application showing good cause therefor, to grant a new trial, the application should be ex parte, and not on counter affidavits. McLennan v. Prentice, 79 W 488, 48 NW 487.

Where there is no responsibility on the successful party for the misconduct of a juror in not fully, fairly and truthfully answering the questions put to him on his voir dire, and such misconduct does not of itself render the verdict perverse, a new trial should be granted only on condition that the costs of the former trial be paid by the moving party. Hoffman v. Chicago, M. & St. P. R. Co. 86 W 471, 56 NW 1093.

A motion for a new trial suspends all proceedings in the action until it is disposed of. Steinhofel v. Chicago, M. & St. P. R. Co. 92 W 123, 65 NW 852.

Giving notice or entering a motion for a new trial does not stay entry of judgment on the verdict. Wheeler v. Russell, 93 W 135, 67 NW 43.

It seems that in no case can a motion for a new trial be made after judgment unless joined with a motion to vacate the judgment. Bailey v. Costello, 94 W 87, 68 NW 663.

The granting of a new trial rests largely in the discretion of the trial court. Bailey v. McCormick, 132 W 498, 112 NW 257.

Where a motion for a new trial is made at the same term and before entry of judgment, the court may vacate and set aside the judgment and grant a new trial without notice. Frost v. Meyer, 137 W 255, 118 NW 811.

A motion for a new trial should state the grounds upon which it is based at least as specifically as they are mentioned in the statute. Beebe v. Minneapolis, St. P. & S. S. M. R. Co. 137 W 269, 118 NW 808.

Where a motion is made to change an answer to a question in a special verdict and also for a new trial and the former motion is granted so that the motion for a new trial is constructively denied, the supreme court on reversing the judgment entered on the verdict as corrected will remand the case for a new trial rather than for a judgment on the original verdict. Collier v. Salem, 146 W 106, 130 NW 877.

Where the supreme court reversed an order of the circuit court granting a new trial after the term at which it was made, the circuit court cannot after the return of the record amend its minutes so as to show the consent to the decision of the case after the term. State ex rel. Kurath v. Ludwig, 146 W 385, 132 NW 130.

"A motion for a new trial is only necessary to preserve for review errors committed by the jury. Errors committed by the court can be reviewed without such motion." Sullivan v. Minneapolis, St. P. & S. S. M. R. Co. 167 W 518, 524, 167 NW 311, 313. See also Strnad v. Co-operative Ins. Mut. 256 W 261, 270, 40 NW (2d) 552, 558.

A failure to decide a question for a new trial within 60 days is a denial of the motion of like effect as a denial by formal order. Notbohm v. Pallange, 168 W 225, 169 NW 557.

Sec. 2878, Stats. 1921, applies to motions for a new trial where special verdicts have been taken; and such motions made in due time may be adjourned for hearing to a time beyond the 60 days prescribed in the first instance. An oral order actually made for such adjournment is as effectual as if entered in writing. State ex rel. Potrykus v. Schinz, 176 W 646, 187 NW 743.

Where the 60 days for granting a new trial have expired without any extension, the trial court has no jurisdiction to order a new trial. Prokopovitz v. Carl Manthey & Sons Co. 181 W 401, 195 NW 402; Bankers F. Corp. v. Christensen, 181 W 398, 195 NW 319.

In the order extending the time for entertaining a motion for a new trial the cause should be stated. Borowicz v. Hamann, 189 W 212, 207 NW 426.

Failure to decide motions for a new trial within 60 days resulted in a constructive denial. A new trial having been granted the supreme court takes jurisdiction only to reverse the void order. Brown v. Gaulke, 191 W 347, 210 NW 687.

The supreme court will not reverse an order granting a new trial because on the record the court might come to a different conclusion. Stockhausen v. Oehler, 191 W 403, 211 NW 287.

If a party has made timely application for a new trial and the motion is not decided within the time prescribed by 270.49, his motion is deemed denied, but he is entitled to review as though the court had in fact denied the motion. Borowicz v. Hamann, 193 W 324, 214 NW 431.

The granting of a new trial rests largely in the discretion of the trial court. Failure to impose costs in granting a new trial raises no presumption that the new trial was granted as a matter of right rather than in the court's discretion. Mellor v. Heggaton, 205 W 42, 236 NW 558.

Where the defendant moved for a new trial on the ground of the illness of his counsel and consequent inability to make a proper presentation of the case, the court did not abuse its discretion in denying the motion where the case had been ably presented by counsel assisted by 2 other able attorneys. Wittenberg v. Lehman, 213 W 7, 250 NW 756.

With respect to a new trial, although the plaintiffs should have provided for the attendance of the driver of the car on the issue of his agency for the alleged owner, the plaintiffs are excused from the usual effect of a failure in this regard in view of the assurances given to their attorney by the attorney for the defendants that the driver would be in attendance. Philip v. Schlager, 214 W 370, 253 NW 394.

Where a motion for a new trial was denied on May 12 and judgment was entered on May 19, without notice to defendants, who on June 7 procured permission for further argument on motion for new trial, which was heard on June 25 at which plaintiff was present, and procured time to file briefs and the court extended time for hearing the motion until July 30, an order granting a new trial on July 12 was valid. Paulsen v. Gundersen, 218 W 578, 260 NW 448.

Ordinarily a motion below for a new trial is necessary in order to move the supreme court to direct a new trial. Krudwig v. Koepke, 223 W 244, 270 NW 79.

Where the damages are excessive, if the record discloses that the trial judge, in giving the prevailing party an option to take judgment for a reduced amount or stand a new trial, failed to determine the lowest amount that an impartial jury properly instructed would reasonably fix, the supreme court must return the case to the trial judge for his further action in the matter unless it can determine from the evidence the proper amount. Swanson v. Schultz, 223 W 278, 270 NW 43.

Where the jury found on sufficient evidence that the plaintiff's negligence was equal to the defendant's, and the court was of the opinion that the evidence would warrant a finding attributing to the plaintiff considerably more than 50 per cent of the total negligence, that the jury was sympathetic toward the plaintiff, the court was justified in not setting aside the verdict merely because of the inadequacy of the damages assessed. Schuster v. Bridgeman, 225 W 547, 275 NW 440.

Where the trial judge did not decide motions for a new trial on the judge's minutes and on newly discovered evidence within 60 days after verdict and did not make any order extending the time, the judge had no power to grant the motion for a new trial on the minutes, notwithstanding the attorneys had stipulated that the time should be extended for an additional 60-day period, since the statute does not permit an extension by stipulation. The judge may on his own motion for cause enter an order extending the time in which to decide a motion but his action should be evi-

denced by an effective order. Beck v. Wallmow, 226 W 652, 277 NW 705.

Where the plaintiff elected to abide by the order granting a new trial such order must be affirmed, irrespective of the plaintiff's right to judgment notwithstanding the verdict. Hoar v. Rasmusen, 229 W 509, 282 NW 652.

The restriction that the motion must be made and heard within 60 days after the verdict is rendered is applicable only to motions for orders granting a new trial in conjunction with setting aside a verdict. It is not applicable to motions after verdict for other purposes or to orders granted otherwise than for a new trial. Webster v. Krembs, 230 W 252, 282 NW 564.

The plaintiff desiring to contest the reduction of damages awarded by the jury, when given opportunity to accept the reduction or stand a new trial, must reject the reduction and appeal from the order granting the new trial. Nygaard v. Wadhams Oil Co. 231 W 236, 284 NW 577.

On a motion to extend the time to decide a motion for a new trial, where good cause was not shown and where the order extending the time did not recite facts which constituted a good cause, an order extending the time was void. Beck v. Fond du Lac Highway Committee, 231 W 593, 286 NW 64.

The provision that a motion for a new trial made on the minutes must be decided within 60 days after the verdict is rendered, otherwise the motion will be deemed denied, does not apply to a motion for a new trial made on affidavits setting up facts dehors the record. A motion for a new trial on the ground of disqualification of a juror, not timely filed, could not be "tacked" to a prior motion for a new trial on the ground of newly discovered evidence, timely filed. Osmundson v. Lang, 233 W 591, 290 NW 125.

The power of the trial court, in relation to reducing excessive verdicts and granting options to accept reduced amounts or stand a new trial, is not limited to cases where the damages found by the jury are so excessive as to show that the jury was misled by prejudice, passion, ignorance or bias. Urban v. Anderson, 234 W 280, 291 NW 520.

Under 270.49 (1) not only must there be good cause for extending the time for hearing and deciding a motion for a new trial on the minutes but the cause must be shown, and good practice requires that the cause should appear in an order extending the time. A recital that an extension is granted for cause is not a compliance with the statute. In the absence of an order extending the time, the trial court is without jurisdiction to set aside a verdict and order a new trial on his minutes after the expiration of the period of 60 days. Anderson v. Eggert, 234 W 348, 291 NW 365.

The circuit court is without jurisdiction to grant a new trial on a motion on the minutes where more than 60 days have elapsed after the verdict was rendered and no order has been made extending the time. Volland v. McGee, 236 W 358, 294 NW 497, 295 NW 635.

There is no limit on the power of the court to grant successive new trials, but motions for a new trial after successive trials are granted with greater reluctance where the verdicts are concurring. Losching v. Fischer, 237 W 193, 295 NW 712.

See note to 895.045, on comparison of negligence, citing Jackowska-Peterson v. D. Reik & Sons, 240 W 197, 2 NW (2d) 873.

Orders for extension made by the trial judge at chambers, on his own motion, and not in the presence of the parties or their attorneys, were not "court orders," and were ineffective while not filed, and where they were not filed until after the expiration of the statutory 60-day period, they were ineffective, since the trial court then was without jurisdiction to authorize an extension, and hence the trial court was without jurisdiction later to make an order granting a new trial. Yanggen v. Wisconsin Michigan P. Co. 241 W 27, 4 NW (2d) 130.

Orders granted by the trial judge in the exercise of the discretion conferred upon him by the statute will not be reversed by the supreme court unless there has been a clear or gross abuse of the discretion; but where it is clear that the trial court, in setting aside or approving a verdict, proceed upon an erroneous view of the law, the determination will be reversed. Day v. Pauly, 186 W 189, 202 NW 363; Schmidt v. Chicago & Northwestern R. Co. 191 W 184, 210 NW 370; Kramer v. Bins, 205 W 562, 238 NW 407; Huebner v. Fischer, 232 W 600, 288 NW 254; Goelz v. Knoblauch, 242 W 186, 7 NW (2d) 420. See also: Schillinger v. Verona, 85 W 589, 55 NW 1040; Wilson v. Eau Claire, 89 W 47, 61 NW 290; and Farley v. Chicago, M. & St. P. R. Co. 89 W 206, 61 NW 769.

Where an alternative motion for a new trial was made in connection with a motion for judgment and the trial judge granted the motion for judgment without deciding the motion for a new trial and the judgment is reversed, the cause is remanded for determination by the trial judge of the motion for a new trial. Wisconsin Tel. Co. v. Russell, 242 W 247, 7 NW (2d) 825.

269.45 does not apply so as to authorize a court to extend the time for hearing a motion for a new trial on the judge's minutes after that time has expired. In such case the special provision in 270.49 (1) governs. Boyle v. Larzelere, 245 W 152, 13 NW (2d) 528.

Where the trial court granted a new trial and reserved action on motions to change the answers in the special verdict or to grant judgment notwithstanding the verdict, its action on such motions more than 60 days after the verdict was within its power. Teichmiller v. DuFrane Moving Co. 254 W 525, 37 NW (2d) 83.

Where the trial court ordered a new trial because the verdict was contrary to the evidence and in the interest of justice, but stated no reasons in the order and supplied no written opinion, and the evidence amply supported the verdict, the order is reversed and the cause remanded with directions to reinstate the verdict and enter judgment thereon. Bradle v. Juuti, 257 W 523, 44 NW (2d) 242.

See note to 270.53, citing Matosian v. Milwaukee Auto. Ins. Co. 257 W 599, 44 NW (2d) 555.

Where 2 cases were consolidated for trial, and the trial court referred to only one cause in its opinion on motions for a new trial but the reasoning applied to both, the omission was obviously oversight, and the order granting a new trial applied with equal force to both cases. Popko v. Globe Ind. Co. 258 W 462, 46 NW (2d) 224.

A plaintiff who has elected to take a reduced amount of damages rather than a new trial may not ask for a review of the trial court's action in reducing the award of damages when an appeal has been taken by the defendant. Rasmussen v. Milwaukee E. R. & T. Co. 259 W 130, 47 NW (2d) 730.

A defendant, whose motion for a reduction in damages was granted by the trial court with an option which the defendant did not accept, did not lose its right to an appeal on the other issues in the case. Umnus v. Wisconsin P. S. Corp. 260 W 433, 51 NW (2d) 42.

Where damages found by a jury are excessive, the trial court may grant a new trial unless the plaintiff exercises the option given him by the court to remit the excess and consents to take judgment for the least amount that an unprejudiced jury, properly instructed, would, under the evidence, probably assess; but in every such case the proper rule as to the measure of damages must be applied. Kimball v. Antigo Bldg. Supply Co. 261 W 619, 53 NW (2d) 701.

The giving of options to consent to judgment for reduced damages or to submit to a new trial was properly based on the ground that the jury's award of damages for the plaintiff's loss of earnings and impairment of earning capacity was not supported by the evidence, and it was not necessary also that the excessive award be the result of passion or prejudice. The granting of a new trial is a highly discretionary action on the part of the trial judge, and such action will not be disturbed by the supreme court unless it clearly appears that there has been an abuse of judicial discretion; and likewise as to the determination of the trial court in fixing the maximum and minimum amounts of damages in connection with options. Flatley v. American Ins. Co. 262 W 665, 56 NW (2d) 523.

An order providing that the defendants should have the option to pay a reduced amount of damages or submit to a new trial on such issue, if a judgment for the defendants should be reversed on appeal and the plaintiffs be permitted to recover, must be treated as imposing a condition on the judgment, and void under the rule that the court cannot render a conditional judgment in an ordinary action at law. Coenen v. Van Handel, 269 W 6, 68 NW (2d) 435.

Under the requirement of 270.49 (1), that a motion for a new trial must be "decided" within 60 days after the verdict, an order for a new trial is timely made where a written decision or opinion of the trial court, determining that the motion for a new trial should be granted, is filed with the clerk within 60 days after the return of the verdict, even though the formal order itself, directing the new trial, is not entered until after the 60-day period. Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571.

Where the trial court ordered a new trial on the ground of an excessive award of damages, this was sufficient under 270.49 (2). The grounds must be set forth in detail only when the new trial is ordered "in the interest of justice." Dittman v. Western Casualty & Surety Co. 267 W 42, 64 NW (2d) 436.

When the trial court, reducing the damages awarded, sets the reduced amount at the highest amount which a fair-minded jury properly instructed would probably allow, the option to accept it or have a new trial must be given to the defendant, the plaintiff getting the option only when the court sets the lowest amount. McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

Where the trial court, on motions after verdict in an action for injuries sustained in an automobile collision, reduced the damages awarded by the jury and gave to the defendants the option of permitting entry of judgment on the verdict as so amended, or a new trial concerning damages only, a defendant who accepted the new trial on damages thereby accepted the findings on liability, and waived its right to appeal on those issues. Steinfeldt v. Pierce, 2 W (2d) 138, 85 NW (2d) 754.

Where the damages awarded for future medical expenses are excessive, but the record establishes the maximum amount recoverable therefor and that an award of more than such amount would be excessive, the defendant may be accorded the option of having the judgment reduced to such amount or having a new trial limited to the issue of damages for such item, instead of the court's following the customary practice of fixing the least amount that an unprejudiced jury properly instructed would allow for such item and according to the plaintiff the first option of either consenting to having the judgment reduced to such amount or having a new trial, since, in the situation noted, the plaintiff suffers no prejudice by not being accorded the option of a new trial. Sawdey v. Schwenk, 2 W (2d) 532, 87 NW (2d) 500.

Where the jury award was excessive, but there was some confusion as to options to be offered to the parties in the hope of avoiding a new trial as to damages, and the trial court, without providing any option, finally determined what it considered was the least amount an unprejudiced jury, properly instructed, would probably assess, and entered judgment therefor, but as a matter of fact this was about the highest amount that could have been sustained, and there was evidence which would have supported a much-lower award, there should be a new trial on the question of damages. Gennrich v. Schrank, 6 W (2d) 87, 93 NW (2d) 876.

An order setting forth that a new trial was granted on the ground of excessive damages sufficiently complied with 270.49 (2). Boughton v. State Farm Mut. Auto. Ins. Co. 7 W (2d) 618, 97 NW (2d) 401.

Where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court determines is the reasonable amount of the plaintiff's damages, or of having a new trial on the issue of damages. (Heimlich v. Tabor, 123 W 565, and Campbell v. Sutliff, 193 W 370, so far as holding that such a rule violates the defendant's constitutional right to a trial by jury, overruled.) Powers v. Allstate Ins. Co. 10 W (2d) 78, 102 NW (2d) 393.

The rule of Powers v. Allstate Ins. Co. 10 W (2d) 78, applied to compensatory damages, extends to punitive damages, so that a trial court, in case of an excessive award by the jury, has the power to reduce the amount of punitive damages to what the court determines is a fair and reasonable amount for such kind of damages, and to grant to the party entitled to such damages the option to accept such amount or have a new trial. In determining whether punitive damages assessed by the jury are excessive, consideration should be given to the wrongdoer's ability to pay and the grievousness of his acts, the degree of malicious intention, and potential damage which might have been done by such acts as well as the actual damage. Malco v. Midwest Aluminum Sales, 14 W (2d) 57, 109 NW (2d) 516.

270.49 (1), which is limited to setting aside a verdict on specified grounds, is not so restrictive as to preclude a trial court from granting a new trial on other grounds. Peterson v. Wingertsman, 14 W (2d) 455, 111 NW (2d) 436.

It was not an abuse of discretion for the trial court to grant an extension of time on its own motion within 60 days after rendition of verdict when the court learned that the defendants' brief, though filed with the court, had not been served on the plaintiffs. Harweger v. Wilcox, 16 W (2d) 526, 114 NW (2d) 818.

A decision on motions after verdict, which is given orally from the bench and then transcribed and filed with the clerk of court as part of the record in the case, constitutes a "memorandum decision" within the meaning of 270.49 (2), but the memorandum decision must be in existence and on file when the order incorporating the same is entered. Campbell v. Wilson, 18 W (2d) 22, 117 NW (2d) 620.

See note under 269.46, on review of judgments and orders, citing Alberts v. Rzepiejewski, 18 W (2d) 252, 118 NW (2d) 172, 119 NW (2d) 441.

The rule of granting an option to the plaintiff to remit excess damages when the "excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during the course of trial," adopted in Powers v. Allstate Ins. Co. 10 W (2d) 78, is modified by the decision herein to the extent of making the rule applicable also to prejudicial errors directly related to damages. Spleas v. Milwaukee & S. T. Corp. 21 W (2d) 635, 124 NW (2d) 593.

The procedure to be followed where the trial judge reduces a verdict is outlined in Lucas v. State Farm Mut. Auto. Ins. Co. 17 W (2d) 568, 117 NW (2d) 660. See also Vasselos v. Greek Orthodox Community, 24 W (2d) 376, 129 NW (2d) 243, where the verdict was for a nominal amount.

A trial court can, within 60 days after verdict, extend the time for motion and hearing an application for setting aside the verdict and granting a new trial on its own motion without notice to an adverse party and without a supporting affidavit. The cause necessary can be shown by recitation in the order of facts constituting cause. Weihbrecht v. Linzmeyer, 22 W (2d) 372, 126 NW (2d) 44.

Where a trial court has reviewed the evidence and has found a jury verdict awarding damages to be excessive and has fixed a reduced amount therefor, and has determined that there should be a new trial on damages unless the plaintiff exercises an option to take judgment on the reduced amount, the supreme court will reverse only if it finds an abuse of discretion on the part of the trial court. Boodry v. Byrne, 22 W (2d) 585, 126 NW (2d) 503.

A motion for a new trial filed, argued, and orally decided within 60 days of the verdict, although not reduced to writing until some 8 months thereafter, constituted substantial compliance with 270.49 (1). Flippin v. Turlock, 24 W (2d) 49, 127 NW (2d) 822.

The court will apply the rule of Powers v. Allstate Ins. Co. 10 W (2d) 78, to a case where the jury awards inadequate damages. Parchia v. Parchia, 24 W (2d) 659, 130 NW (2d) 205.

If the decision on motion to grant a new trial is not announced in open court within the statutory allotted time, it will not be valid unless the written decision or order of the court deciding such motion either is filed or otherwise authenticated, or all parties adversely affected thereby are notified thereof within such period. Graf v. Gerber, 26 W (2d) 72, 131 NW (2d) 863.

Failure to file a motion for a new trial in conformity with 270.49 (3) precludes the defaulting party from urging upon review his entitlement thereto as a matter of right. Medved v. Medved, 27 W (2d) 496, 135 NW (2d) 291.

An order for a new trial will be sustained where the trial court listed several items as grounds therefor and also stated "also on the general grounds of being in the interests of justice". McPhillips v. Blomgren, 30 W (2d) 134, 140 NW (2d) 267.

Where a trial court under the rule of Powers v. Allstate Ins. Co. 10 W (2d) 78, reduces a verdict below a figure the supreme court believes reasonable, the supreme court will set a figure at the bottom of the range of reasonableness. This will be done only when the supreme court reviews an adjustment by the trial court but not when either court examines the jury verdict. Moldenhauer v. Faschingbauer, 30 W (2d) 622, 141 NW (2d) 875.

A damage verdict which has been approved by the trial court will not be disturbed if

there exists a reasonable basis for the trial court's determination after resolving any direct conflicts in the testimony in favor of the plaintiff. In deciding whether there is a reasonable basis for the trial court's determination approving a damage verdict, the supreme court is aided by the trial court's analysis of the evidence and appraisal of the award. Gleason v. Gillihan, 32 W (2d) 50, 145 NW (2d) 90.

If the verdict is excessive the rule of Powers v. Allstate Ins. Co. 10 W (2d) 78, should be applied even though it does not indicate passion and prejudice. Tuttle v. Virginia Surety Co. 32 W (2d) 665, 146 NW (2d) 400.

Where the trial court sustains an award of damages, it should state in its memorandum opinion its rationale in doing so; if it does not the party loses the additional weight given to a verdict approved by the trial judge, and the supreme court will review the evidence, giving no weight to the conclusion of the trial judge that the damages are not excessive. Ballard v. Lumbermens Mut. Cas. Co. 33 W (2d) 601, 148 NW (2d) 65.

In applying the rule of Powers v. Allstate Ins. Co. 10 W (2d) 78, to an inadequate award of damages with an option to defendant to accept judgment for an increased amount in lieu of a new trial, plaintiff cannot successfully challenge the adequacy of the increased award without showing that the trial court abused its discretion. Hack v. State Farm Mut. Auto. Ins. Co. 37 W (2d) 1, 154 NW (2d) 320.

Where a personal injury damage award approved by the trial court is challenged as inadequate, the supreme court will follow the same procedure and apply the same criteria that it applies in cases where it is claimed that an approved damage award for personal injuries is excessive. Helleckson v. Loiselle, 37 W (2d) 423, 155 NW (2d) 45.

Reduction by the trial court of an award from $7,000 to $3,500 for injuries sustained by one of the drivers involved in a collision, and reduction of an award of $1,500 (for future medical expenses in connection therewith) to $650, was not unwarranted, where none of the injuries were of permanent nature. Bash v. Employers Mut. Liability Ins. Co. 38 W (2d) 440, 157 NW (2d) 634.

Since 270.49 (2) contemplates more than a statement of an ultimate conclusion, the order granting a new trial in the interest of justice (because the verdict is against the great weight and clear preponderance of the evidence) should recite, or the incorporated opinion should contain, the subsidiary reasons and basis for the general statement. Loomans v. Milwaukee Mut. Ins. Co. 38 W (2d) 656, 158 NW (2d) 318.

270.49 (1), which requires that a motion for a new trial must be made and heard within 2 months after the verdict is rendered unless the court by order made before the expiration of the 2 months' period extends such time for cause, means that the court must also make its decision within said period although the order need not be filed within that period. Loomans v. Milwaukee Mut. Ins. Co. 38 W (2d) 656, 158 NW (2d) 318. See also Spath v. Sereda, 41 W (2d) 448, 164 NW (2d) 246.

When an order of the trial court granting a new trial does not comply with 270.49, the supreme court will review the record to determine whether it should exercise discretion under 251.09. Spath v. Sereda, 41 W (2d) 448, 164 NW (2d) 246.

Under the rule of Powers v. Allstate Ins. Co., 10 W (2d) 78, there must be a formal order setting aside the verdict (not changing answers) and granting a new trial on the damage issue, but both on the condition the plaintiff at his option might in lieu thereof have a judgment entered on the verdict for the lower amount determined by the court if he so notified the court within a specified time that he will remit the excess of the verdict. Wells v. National Ind. Co. 41 W (2d) 1, 162 NW (2d) 562.

The rule of Powers v. Allstate Ins. Co., 10 W (2d) 78, extends to punitive damages and a trial court has the power to reduce the amount of punitive damages deemed excessive to what it determines is a fair and reasonable amount of such kind of damages. Jones v. Fisher, 42 W (2d) 209, 166 NW (2d) 175.

In applying the rule of Powers v. Allstate Ins. Co. 10 W (2d) 78, the trial court must set the amount of damages at a figure which it considers to be the most reasonable in view of the evidence, and since reasonable men may differ, the trial court's determination will be upheld if it falls within the range of reasonableness. Crotty v. Bright, 42 W (2d) 440, 167 NW (2d) 201.

Personal injury damage verdicts; supreme court rulings since the Powers case. Wilkie, 47 MLR 368.

Damages: remittitur and additur in Wisconsin: bringing the Powers rule up to date. Erdmann, 51 MLR 354.

Dealing with excessive verdicts. Hanley, 34 WBB, No. 6.

New trial, because the verdict is contrary to the evidence or in the interest of justice or both. 1959 WLR 360.

Judicial and legislative approaches to automobile accident compensation. Martin, 1968 WLR 527.

270.50 History: 1876 c. 150; R. S. 1878 s. 2879; Stats. 1898 s. 2879; 1925 c. 4; Stats. 1925 s. 270.50; 1935 c. 541 s. 160; Sup. Ct. Order, 17 W (2d) xxi; 1963 c. 429.

Where new evidence consists of testimony of a new witness his affidavit must be given or its absence explained. Dunbar v. Hollinshead, 10 W 505.

A motion for a new trial is received with great caution. Jalie v. Cardinal, 35 W 118.

Where evidence is discovered after hearing but before decision and diligence is shown, the court should grant a rehearing. Stewart v. Stewart, 41 W 624.

When the new evidence does not clearly support the issues a new trial should be refused. Russell v. Loomis, 43 W 545.

When new evidence consists of testimony

of a witness who committed perjury on the former trial, but who will give contrary testimony, it is error to grant a new trial. Loucheine v. Strouse, 49 W 623, 6 NW 360.

It is error to refuse a new trial for material newly-discovered evidence and not error to grant it for such evidence. Wilson v. Plank, 41 W 94; Smith v. Smith, 51 W 665, 8 NW 868.

A motion for a new trial founded on the complaint, phonographer's minutes and affidavits showing the character of new evidence is sufficient in form. Smith v. Smith, 51 W 665, 8 NW 868.

An order refusing to grant a new trial will not be reversed unless the testimony given on the trial is preserved in a bill of exceptions. Carroll v. Hangartner, 66 W 511, 29 NW 210.

Newly-discovered evidence upon points not involved in the issues nor capable of being determined on a new trial is not ground for granting a new trial. Brickley v. Milwaukee, 68 W 563, 32 NW 773.

Where the main question was whether defendant gave an attorney power to hire the plaintiff, and the only testimony was that of the attorney, newly-discovered evidence that a new witness heard defendant give the attorney such authority it was not an abuse of discretion to set aside a verdict. Smith v. Grover, 74 W 171, 42 NW 112.

A new trial ought not to be granted on account of newly-discovered evidence of impeachment. Hooker v. Chicago, M. & St. P. R. Co. 76 W 542, 44 NW 1085.

A motion for a new trial was denied properly where the motion was made nearly a year after the complaint was dismissed, the reason urged being that a witness present at the trial left before he was called to testify. O'Brien v. Home Ins. Co. 79 W 399, 403, 48 NW 714.

One who has defended on his own account may not claim a new trial in order to bring in persons whom he alleges are ultimately liable. Thrasher v. Postel, 79 W 503, 48 NW 600.

Such evidence is not merely cumulative when it tends to prove a distinct fact not testified to at the trial. Bigelow v. Sickles, 75 W 427, 44 NW 761; Keeler v. Jacobs, 87 W 545, 58 NW 1107.

If the new evidence is merely cumulative the order of the court denying a new trial will not be reversed. Wheeler v. Russell, 93 W 135, 67 NW 43.

After judgment a new trial cannot be held unless a motion to vacate it be joined. Wheeler v. Russell, 93 W 135, 67 NW 43.

Some good reason must be shown why the evidence relied upon was not offered on the trial. Lewis v. Newton, 93 W 405, 67 NW 724.

When the motion is based upon fraud the limitation prescribed by sec. 4222 (7), Stats. 1898, will govern. Crowns v. Forest L. Co. 102 W 97, 78 NW 433.

A motion for a new trial was properly denied when the newly-discovered evidence consisted largely in the admission of the plaintiff and no substantial excuse appeared for not having such testimony present at the trial. Kurtz v. Jelleff, 104 W 27, 80 NW 41.

New evidence that a witness was offered money to change her testimony without showing who made the offer; and that a witness saw the proponent of a will, the morning after the testator's death, tear up a paper with the statement that this was the last one, and to "let them look if they want to," is not enough to secure a new trial. Mueller v. Pew, 127 W 288, 106 NW 840.

Where there is a dissimilarity in the kind of evidence the last is not cumulative to the first. Anderson v. Arpin L. Co. 131 W 34, 110 NW 788.

A new trial will not be granted on the production of a letter which was in the letter files of the losing party. Kiefer-Haessler Co. v. Paulus, 149 W 453, 135 NW 832.

An affidavit in support of a motion for a new trial, stating that the affiant did not learn of the existence of the evidence until after the term of court because the persons present at a specified conversation had moved away and "none of them had ever informed affiant of the facts as to such conversation until recently," did not show the requisite diligence. Weichman v. Kast, 157 W 316, 147 NW 369.

No relief against a judgment can be had except pursuant to sec. 2879, or sec. 2832, or in equity to restrain the enforcement of an unconscionable judgment. Gimbel v. Wehr, 165 W 1, 160 NW 1080.

On a motion by plaintiff for a new trial on newly-discovered evidence, such evidence should be construed favorably to plaintiff in determining whether it would show a cause of action. Welch v. Morton S. Co. 175 W 415, 184 NW 678.

A new trial will not be granted on newly-discovered evidence that is merely cumulative. It will be denied where there was lack of diligence on the part of the applicant in preparing his evidence for the trial. Seemann v. Kastner, 176 W 51, 186 NW 153.

To justify the reversal of an order refusing a new trial it should appear that the newly-discovered evidence is of such a character as would probably change the result of the trial. Miller S.-T. Co. v. Cheshire, 177 W 354, 189 NW 465.

The trial court may grant a new trial on newly-discovered evidence notwithstanding the supreme court has affirmed the judgment. Belt L. R. Co. v. Dick, 202 W 608, 233 NW 762.

Granting of a new trial constituted an abuse of discretion, because plaintiff's attorneys, when the appeal was heard in the supreme court, had knowledge of newly-discovered evidence, but failed to disclose it to the court, and because plaintiff's attorneys, having knowledge of newly-discovered evidence, should have attempted to bring about dismissal of the appeal so that the original judgment in plaintiff's favor might have been set aside and a new trial granted. Scharbillig v. Dahl, 211 W 436, 248 NW 438.

Where newly-discovered evidence is immaterial, or if material is cumulative and there was not a sufficient showing of diligence on defendant's part, a grant of a new trial on the ground of newly-discovered evidence was

an abuse of discretion. Toledo S. Co. v. Colleran, 212 W 502, 250 NW 377.

The granting or refusing of a new trial on the ground of newly-discovered evidence rests largely in the sound discretion of the trial court. Foreman v. Milwaukee E. R. & L. Co. 214 W 259, 252 NW 588.

Where a stipulation was controlling as to what findings the court might enter, a new trial would not be granted for newly-discovered evidence respecting such facts. Thayer v. Federal Life Ins. Co. 217 W 282, 258 NW 849.

The refusal of the trial court to reopen a case one month after the close of the testimony to permit an impleaded tile contractor to show the result of an experiment was not erroneous, where the proffered evidence was only cumulative, and where there had been ample time to make experiments and present evidence thereof at the trial. Milwaukee County v. H. Neidner & Co. 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

Before a new trial is granted on newly-discovered evidence, the applicant must make out a case free from delinquency and show that, notwithstanding he used all reasonable diligence in preparing his case, the newly-discovered evidence escaped his search. A mere statement of diligence or want of negligence is not sufficient. Mickoleski v. Becker, 252 W 307, 31 NW (2d) 508.

A statement or admission by a witness that he committed perjury on the trial of a cause is not a ground for a new trial based on "newly-discovered evidence." Mickoleski v. Becker, 252 W 307, 31 NW (2d) 508.

A rule, that the supreme court may not order a new trial on the ground of newly-discovered evidence unless it appears that proof of the facts offered would compel a different conclusion or, at least, that it is reasonably probable that a different result would be reached on another trial, applies in divorce cases as in other civil actions. Starzinski v. Starzinski, 263 W 104, 56 NW (2d) 784.

Before a new trial will be granted on the ground of newly-discovered evidence, the evidence must have come to the moving party after the trial, such party must not have been negligent in seeking to discover it, and it must be material to the issue and must not be merely cumulative to testimony introduced at the trial, and it must be reasonably probable that a different result would be reached on a new trial. Estate of Teasdale, 264 W 1, 58 NW (2d) 404.

In the absence of a bill of exceptions, the supreme court is without power to consider the appellant's affidavits supporting his motion for a new trial on the ground of newly-discovered evidence, since the supreme court cannot determine whether the trial court erred in denying such motion unless the supreme court knows what evidence was already before the trial court. Harvey v. Hartwig, 264 W 639, 60 NW (2d) 377.

In an action arising out of a head-on collision, wherein the jury found the defendant free from negligence, and wherein a passenger in a car following the plaintiff's car testified that she did not see the defendant's car on the wrong side of the road until after the collision, and the driver of such following car, who had made similar but unsworn statements before the trial to investigators for each party and to the plaintiff's counsel, was not called to testify, but contacted plaintiff's counsel after the trial and told him that she had been mistaken in her former statements and that she had in fact seen the defendant's car across the center line of the road just before the collision, the granting of a new trial on the ground of newly-discovered evidence was not an abuse of discretion. The statements in question, although contradictory, but made out of court and not under oath, did not constitute an admission of perjury making the utterer's testimony unworthy of belief. Erickson v. Clifton, 265 W 236, 61 NW (2d) 329.

In affidavits in support of a motion for a new trial on the ground of newly-discovered evidence, general averments as to diligence are not sufficient, but the facts should be set out so as to negative fault on the part of the movant. Estate of Eannelli, 269 W 192, 68 NW (2d) 791.

Where the trial court stated in a memorandum decision that he had carefully considered the filed affidavits and letters in the light of the testimony adduced at the time of the trial and even if he construed them most favorably to the defendant there would be no change in the outcome of the case, it did not err in denying a new trial. Schubert v. Midwest Broadcasting Co. 1 W (2d) 497, 85 NW (2d) 449.

A new trial on the ground of newly-discovered evidence may be based on an affiant's admission of perjury as a witness at the trial, if the facts in the affidavit are corroborated by other newly discovered evidence; it is not necessary that all the facts stated to be the truth in the perjuror's affidavit must be corroborated by other newly-discovered evidence in order to grant a new trial on this ground, but only that the corroboration extend to some material aspect thereof. It is mandatory that a motion for a new trial founded on newly-discovered evidence, when not supported by the papers in the action, must be supported by facts sworn to in a duly executed affidavit. Dunlavy v. Dairyland Mut. Ins. Co. 21 W (2d) 105, 124 NW (2d) 73.

It was not necessary that the affidavits aver that there was no negligence in not discovering the new evidence before trial, since the other facts established by such affidavits tended to negative any negligence, and none of the counter-affidavits showed any lack of due diligence. Dunlavy v. Dairyland Mut. Ins. Co. 21 W (2d) 105, 124 NW (2d) 73.

270.52 History: R. S. 1858 c. 118 s. 30; R. S. 1878 s. 2881; Stats. 1898 s. 2881; 1925 c. 4; Stats. 1925 s. 270.52.

270.53 History: 1856 c. 120 s. 157, 302; R. S. 1858 c. 132 s. 25; R. S. 1858 c. 140 s. 28; R. S. 1878 s. 2812, 2882; Stats. 1898 s. 2812, 2882; 1925 c. 4; Stats. 1925 s. 269.26, 270.53; 1935 c. 541 s. 140, 162; Stats. 1935 s. 270.53.

Though special proceedings should be terminated by an order, an entry in the form of

a judgment granting the proper relief is an immaterial error. Auerback v. Marks, 94 W 668, 69 NW 1001.

The fact that an order may be enforced as a judgment does not make it one. Lewis v. Chicago & Northwestern R. Co. 97 W 368, 72 NW 976.

An order dismissing an appeal from the action of a county board is not a judgment. Ellis v. Barron County, 120 W 390, 98 NW 232.

An order dismissing the case for want of jurisdiction is not a judgment. Dr. Shoop M. Co. v. Schowalter, 120 W 663, 98 NW 940.

An order dismissing an action for want of prosecution is not a judgment. State v. Eigel, 210 W 275, 246 NW 417.

A judgment is rendered when it is pronounced by the court notwithstanding the fact that the clerical acts necessary to preserve the evidence of the judgment have not been performed. Baker v. Baker, 51 W 538, 8 NW 289; Fulton v. State ex rel. Meiners, 103 W 238, 79 NW 234; Finlay v. Knickerbocker I. Co. 104 W 375, 80 NW 436; Allen v. Voje, 114 W 1, 89 NW 924; German American Bank v. Powell, 121 W 575, 99 NW 222; Zahorka v. Geith, 129 W 498, 109 NW 552; Comstock v. Boyle, 134 W 613, 114 NW 1110; Wehr v. Gimbel Brothers, 161 W 485, 154 NW 972; State ex rel. Wingenter v. Circuit Court, 211 W 561, 248 NW 413.

An existing final judgment rendered upon the merits without fraud or collusion by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties and their privies, though made on demurrer. Lewko v. Chas. A. Krause M. Co. 219 W 6, 261 NW 672.

The verdict of a jury in a jury case, the findings of the court in a court case, as well as findings of fact and conclusions of law in general, even though they be incorporated in the same instrument, are not a part of the judgment. Thoenig v. Adams, 236 W 319, 294 NW 826.

An order in a proceeding at the foot of a foreclosure judgment was an "order" and not a "judgment" within the meaning of 270.53. Newlander v. Riverview Realty Co. 238 W 211, 298 NW 603.

To all intents and purposes the determination establishing the construction of a will in response to a petition is a judgment and satisfies the definition of the term in 270.53 (1). Estate of Bosse, 246 W 252, 16 NW (2d) 832. See also Estate of Audley, 256 W 433, 41 NW (2d) 378.

A determination of the county court admitting a will to probate is a judgment, not an order. Will of Wehr, 247 W 98, 18 NW (2d) 709.

The mere fact that an order may make a final determination as to certain rights of the parties does not make it a judgment. Kling v. Sommers, 252 W 217, 31 NW (2d) 206.

A written decision of the trial court, giving the plaintiffs an option to enter judgment for reduced amounts of damages by notifying the defendant of their acceptance within 10 days after entry of "the order herein" or stand a new trial, contemplated the signing of formal orders pursuant thereto. The trial court did later sign formal orders. The court's interpretation of its decision will not be disturbed, as against a contention that the decision was an "order" so that the defendant was entitled to a new trial because the plaintiffs did not accept the reduced amounts within 10 days thereafter although they did accept within 10 days after the formal orders. A court of general jurisdiction has complete control of its orders during the term in which they are made or entered, except in cases especially covered by statute. Matosian v. Milwaukee Auto. Ins. Co. 257 W 599, 44 NW (2d) 555.

In proceedings on an order to show cause why a defendant should not be granted relief from a default judgment on a note, and be permitted to defend the action, the trial court's opinion, so entitled, and reciting the contentions of the parties and citing legal authorities on the question of permitting the defendant to defend the action, was intended to be merely an opinion to be followed by a formal order to be thereafter drafted, and the concluding words, "Defendant's motion must be granted," did not amount to a formal direction within the meaning of 270.53 (2), and did not make the opinion an "order" on which the time for relieving a party therefrom under 269.46 (1) would run. State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

The rule, that it is not within the province or power of a court to enter orders or decrees without notice, because to do so would be a violation of due process, has reference to orders which affect substantive rights, and not to mere procedural orders. Briggson v. Viroqua, 264 W 40, 58 NW (2d) 543.

Whether a written direction of a court constitutes a judgment or an order is not to be determined by the designation that the court which entered the same may have placed thereon. State v. Donohue, 11 W (2d) 517, 105 NW (2d) 844.

As used in 270.53 (2), denominating an order as being every direction of a court or judge made or entered in writing and not included in a judgment, the word "direction" is not to be construed narrowly so as to be confined as to an express command but, rather, should be interpreted broadly to embrace a ruling or adjudication as well. A memorandum opinion or decision may constitute an order if it in fact constitutes the final ruling of the court, but it is much the preferable practice for trial courts to draft and enter a separate order apart from the memorandum decision embodying the adjudication determined on. Estate of Baumgarten, 12 W (2d) 212, 107 NW (2d) 169.

An order overruling a demurrer and dismissing the complaint amounts to a final determination of the rights of the parties to the action, and therefore is in effect a judgment, and appealable as such. Last v. Puehler, 19 W (2d) 291, 120 NW (2d) 120.

A judgment entered in an action to abate a nuisance granting the requested relief, i.e., that the nuisance be abated—although requiring the taking of testimony 6 months later on the limited issue of whether or not the nui-

sance had been abated—was a final judgment, since no unresolved questions remained in regard to whether or not there was a nuisance, and hence it fully determined the rights of the parties. Even assuming that the judgment was interlocutory, appeal must be taken from the judgment within the period specified in 274.01. Participation in the settling of the transcript does not constitute a waiver of objection to jurisdiction. Rachlin v. Drath, 26 W (2d) 321, 132 NW (2d) 581.

Res adjudicata and estoppel by judgment. Charlos, 32 WBB, No. 3.

270.535 History: 1860 c. 264 s. 12, 13; R. S. 1878 s. 2876; Stats. 1898 s. 2876; 1925 c. 4; Stats. 1925 s. 270.47; Sup. Ct. Order, 204 W viii; Sup. Ct. Order, 17 W (2d) xxi; Stats. 1963 s. 270.535.

Comment of Judicial Council, 1963: Eliminates the provision that the time for approving the transcript (formerly settling the bill of exceptions) begins to run from service of notice of entry of judgment. [Re Order effective Sept. 1, 1963]

270.54 History: R. S. 1858 c. 132 s. 26; R. S. 1878 s. 2883; Stats. 1898 s. 2883; 1925 c. 4; Stats. 1925 s. 270.54; Sup. Ct. Order, 217 W x.

In a tort action against 3 defendants judgment may be against one; plaintiff need not ask to discontinue against the others. Thompson v. Reinhard, 11 W 306.

The right exists whether the complaint alleges a joint or several liability; but its test is whether a separate action might have been maintained. Van Ness v. Corkins, 12 W 186.

Before the last sentence was enacted in 1897 interlocutory judgments were unknown to the practice; there could be but one final judgment. St. Clara F. A. v. Delaware Ins. Co. 93 W 57, 66 NW 1140; Hyde v. German Nat. Bank, 96 W 406, 71 NW 659.

Where action is brought against defendants as copartners, judgment may be rendered against one of them notwithstanding the entire failure of proof as to partnership liability. Little v. Staples, 98 W 344, 73 NW 653.

Where an order is entered which does not determine the action and which is thus not appealable, but which in effect decides all of the issues of the case and leaves judgment to be entered later, the entering of an interlocutory judgment would be inadvisable. Maynard v. Greenfield, 103 W 670, 79 NW 407.

An order discharging a defendant stockholder upon payment into court of the par value of his stock is not a final or an interlocutory judgment. Allen v. Boberg, 108 W 282, 84 NW 421.

Sec. 2883, Stats. 1898, contains the only exception to the rule that defendant in an action should have but one final judgment. Egaard v. Dahlke, 109 W 366, 85 NW 369.

A judgment granting divorce from bed and board for a limited period which was without prejudice to the right to apply for an absolute divorce if the defendant did not refrain from the use of intoxicating liquors was an interlocutory judgment. Lamberton v. Lamberton, 125 W 616, 104 NW 807.

Sec. 2883, Stats. 1898, together with the appeal allowed by sec. 3047, provides an adequate remedy to review an order staying proceedings until the reassessment could be had. Land & S. Co. v. South Milwaukee, 127 W 284, 106 NW 850.

An interlocutory judgment is conclusive except as to the matters reserved for further settlement. Gates v. Paul, 127 W 628, 107 NW 492.

A judgment for defendant unless plaintiff shall pay certain money before its entry, and on such payment all right and title to be established in plaintiff, is interlocutory. Maxcy v. Simonson, 130 W 650, 110 NW 803.

A judgment of divorce from bed and board which provided that at the end of 2 years either party might proceed in the action is not an interlocutory judgment and the court has no authority to enter an absolute divorce at the end of that time. Graham v. Graham, 149 W 602, 136 NW 162.

The provisions of sec. 2883, Stats. 1898, are peculiarly applicable in actions to foreclose mechanic's liens. Warren & Webster Co. v. Beaumont H. Co. 151 W 1, 138 NW 102.

A decree liquidating an insolvent mutual insurance corporation, which decree formed the basis of the obligation of policyholders, was final and binding on them and not subject to collateral attack, though they were not expressly made parties; the corporation, to all legal intents and purposes, represented them. Such decree, disposing of the entire matter of the assessment of policyholders, but leaving undetermined matters of computation, was an interlocutory judgment and was appealable. Application of Whitman, 186 W 434, 201 NW 812.

The trial court, in the judgment of foreclosure of the land contract, could reserve the power to extend the period of redemption prescribed in the judgment, and could reserve such power so as to be exercisable at a later term of court. The judgment, reserving the power to extend the period of redemption, was an interlocutory judgment. Security S. Bank v. Monona Golf Club, 213 W 581, 252 NW 287.

An appeal on June 3, 1936, from an interlocutory judgment entered October 6, 1934, was not timely, though final judgment was not entered until December 18, 1935. Richter v. Standard Mfg. Co. 224 W 121, 271 NW 14, 914.

The legislative purpose, in enacting 270.54, authorizing an interlocutory judgment and in allowing an appeal therefrom by 274.09 (1), was not to authorize a mere tentative or proposed judgment but one which would finally dispose of a portion of the controversy. Kickapoo Dev. Corp. v. Kickapoo Orchard Co. 231 W 458, 285 NW 354.

An adjudication that money received by a predeceased legatee from the testator constituted advancements to be offset against distributive shares, thereby disposing on the merits of the controlling issues in the distribution of the estate and leaving an account to be taken on the hearing of the executor's final account, was an "interlocutory judgment" and hence appealable. Estate of Pardee, 240 W 19, 1 NW (2d) 803.

The legislative purpose, in providing for interlocutory judgments, and in allowing appeals therefrom under 274.09 (1), was to authorize a judgment which would finally dispose of a portion of the controversy. Winslow v. Winslow, 257 W 393, 43 NW (2d) 496.

In a judgment of divorce the trial court had power to provide that the matter of alimony be left to further determination and as to this provision the judgment was interlocutory, permitting the court to determine the amount and make an award of alimony more than a year after entry of divorce judgment. Schall v. Schall, 259 W 412, 49 NW (2d) 429.

Under 270.53 (1), to be effective as a judgment, the ruling must be a final determination of the rights of the parties. A proper interlocutory judgment must dispose of a portion of the controversy, not merely rule on a question of law. What the trial judge calls it is not controlling. Northland Greyhound Lines v. Blinco, 272 W 29, 74 NW (2d) 796.

See note to 274.09, on interlocutory judgments, citing Dehnart v. Waukesha Brewing Co. 21 W (2d) 583, 124 NW (2d) 664.

270.55 History: 1856 c. 120 s. 41; R. S. 1858 c. 124 s. 11; 1859 c. 91 s. 2; R. S. 1878 s. 2884; Stats. 1898 s. 2884; 1925 c. 4; Stats. 1925 s. 270.55; 1935 c. 541 s. 163.

Where some of the defendants jointly and severally liable were not served with process and a joint judgment against those served was taken, the judgment should strictly be several judgments and not a single judgment against them jointly; but under sec. 40, ch. 125, R. S. 1858, the error may be disregarded on appeal. Decker v. Trilling, 24 W 610.

The judgment should recite the joint liability, whom served, what property bound and what real estate subject thereto. One joint debtor has no authority to admit service for another. Blackburn v. Sweet, 38 W 578.

A determination of a point on appeal by one joint debtor is res adjudicata as to all. Bowen v. Hastings, 47 W 232, 2 NW 301.

Where action was brought to recover a firm debt and only one partner was served, judgment could be entered against the entire partnership, enforceable against the partner served and against any partnership property. Gessner v. Roeming, 135 W 535, 116 NW 171.

In an action against the partners upon a contract in which the summons was served on only one partner, judgment may go, if the plaintiff recovers, against all of the partners so far as necessary to affect the partnership property. And where in such an action a single defendant appeared and answered by way of counterclaim for all of his copartners, judgment should be rendered, if he recovers upon his counterclaim, in favor of all of his copartners. Progress B. R. Farms v. George, 167 W 228, 167 NW 253.

Where judgment was given in the civil court of Milwaukee county against the husband alone upon a note signed by himself and wife, and an appeal was taken, it was proper upon such appeal to bring the wife in as a party pursuant to sec. 2884. Mandelker v. Goldsmith, 177 W 245, 188 NW 74.

Entry of a personal judgment against one partner not served in a tort action is not authorized by sec. 2884. Stangarone v. Jacobs, 188 W 20, 205 NW 318.

270.56 History: 1863 c. 16 s. 1, 2; 1865 c. 25 s. 1; R. S. 1878 s. 2885; Stats. 1898 s. 2885; 1925 c. 4; Stats. 1925 s. 270.56.

Where a verdict was against one defendant and in favor of the other it was irregular to enter 2 several judgments; there should be but one judgment record. Hundhausen v. Bond, 36 W 29.

In an action for goods sold and delivered to 2 defendants if it appears that one, but not both, is liable the plaintiff may have judgment against the one liable in the same manner as if the action had been commenced against him alone. Smith v. Cassell, 70 W 567, 36 NW 386.

270.57 History: 1856 c. 120 s. 185; R. S. 1858 c. 132 s. 29; R. S. 1878 s. 2886; Stats. 1898 s. 2886; 1925 c. 4; Stats. 1925 s. 270.57.

Though a strict foreclosure be prayed the court may decree a foreclosure and sale if the facts show this to be the proper remedy. Sage v. McLaughlin, 34 W 550.

Sec. 2886, R. S. 1878, applies to equitable as well as legal actions, and limits the relief, where there is no answer, to the amount demanded in the complaint. Zwicky v. Haney, 63 W 464, 23 NW 577.

When the defendant answers the court may grant any relief consistent with the complaint and embraced within the issue. Edleman v. Kidd, 65 W 18, 26 NW 116.

Plaintiff is entitled to interest upon unliquidated amounts, although he does not demand it, from the commencement of the action, but not prior thereto. Whereatt v. Ellis, 68 W 61, 31 NW 762.

In an action in aid of attachment levied upon real estate, when a conveyance of such real estate is found to have been made in good faith, the court cannot retain jurisdiction in order to subject notes and a mortgage for the purchase money, taken by the grantor at the time of the purchase, to the claim of the plaintiff. Evans v. Virgin, 69 W 148, 33 NW 585.

There being no answer, a judgment for a mechanic's lien where the complaint asked only judgment for a balance due, but stated all the facts necessary to show a lien, is erroneous. McKenzie v. Peck, 74 W 208, 42 NW 247.

A defendant against whom no specific relief is demanded and who does not answer is not bound by a judgment. Whitehill v. Jacobs, 75 W 474, 44 NW 630.

If the complaint in a divorce action demands relief as to alimony and temporary allowances only, a default judgment for a division of the husband's property is erroneous. Hoh v. Hoh, 84 W 378, 54 NW 731.

A demurrer to the complaint is a sufficient answer to sustain relief not demanded in the complaint where the judgment was rendered on notice in defendant's presence and without objection or exception. Viles v. Green, 91 W 217, 64 NW 856.

Where defendant in a replevin suit appealed from justice's court withdrew his answer and left the courtroom it was error to permit a subsequent amendment of the complaint increasing the value of the property, since the case was as if no answer had been filed. Geer v. Holcomb, 92 W 661, 66 NW 793.

On a foreclosure where there is no specific demand for deficiency judgment, but only a prayer for general relief, a portion of the judgment ordering a deficiency judgment is erron-

eous. Such portion of the judgment is therefore ground of appeal and modification. Wisconsin N. L. Asso. v. Pride, 136 W 102, 116 NW 637.

Where husband brought an action for divorce and a division of property was made awarding a portion to the wife, this was not relief granted to the plaintiff within the meaning of this section. Lessig v. Lessig, 136 W 403, 117 NW 792.

A statement included in the complaint "in all to his damage $5,000" was a sufficient demand for judgment where the defendant did not appear. Phillips v. Portage T. Co. 137 W 189, 118 NW 539.

Where an action was brought to foreclose a mortgage and it appeared that the mortgage had been discharged but that the money had not been paid, the court may establish a purchase money lien, treating the complaint as amended. Latton v. McCarty, 142 W 190, 125 NW 430.

There can be no recovery on the ground that defendant was guilty of gross negligence where the complaint asks a recovery on the ground of ordinary negligence. Good v. Schiltz, 195 W 481, 218 NW 727.

On the distinction between an erroneous judgment and a judgment void for want of jurisdiction, see note to 261.01 (general), citing State ex rel. Hammer v. Williams, 209 W 541, 245 NW 663.

Sustaining a demurrer to the answer and defendant's election to stand upon sufficiency of the answer was not equivalent to withdrawal of the answer, as regards whether relief granted could exceed relief demanded by the complaint. Numbers v. Union M. L. Co. 211 W 30, 247 NW 442.

Judgment for an amount in excess of that demanded in the complaint did not violate 270.57 there being an answer interposed and the allegations and proof warranting the judgment rendered. Wauwatosa v. Union Free H. S. Dist. 214 W 35, 252 NW 351.

As a general rule judgments must conform to the pleadings, and the relief granted both as to character and amount is limited by that demanded in the complaint. Estate of Kehl, 215 W 353, 254 NW 639.

On recovering on a liquidated claim for the return of money paid to apply on the purchase price of 2 prefabricated houses which the defendant failed to deliver by a specified date, the plaintiff was entitled as a matter of law to interest from the time of the defendant's breach, and hence it was unnecessary to demand interest in the prayer of the complaint. Thayer v. Hyne, 259 W 284, 48 NW (2d) 498.

The plaintiff, respondent on appeal, may not ask for a modification of the judgment so as to enjoin any use of the easement by the defendants on the ground that it is difficult to distinguish the increased burden, which the judgment enjoined, from the lawful use of the easement to which the defendants are entitled, where the judgment granted all of the relief prayed for by the plaintiff in its complaint, and there was no abuse of judicial discretion in the failure of the trial court to enjoin the defendants from making any use of their easement. S. S. Kresge Co. v. Winkelman Realty Co. 260 W 372, 50 NW (2d) 920.

It is not the rule in this state that no relief can be granted in an independent equitable action for relief from a judgment of divorce unless the fraud is extrinsic, occurring outside the action, and affecting the question of jurisdiction. Fraud, such as the commission of perjury in an action, resulting in the wrongdoer obtaining a judgment, constitutes a wrong which equity may remedy under some circumstances. Weber v. Weber, 260 W 420, 51 NW (2d) 18.

Neither the trial court nor the jury may substitute a different measure of damages for the only one that is applicable in the case. Kimball v. Antigo Bldg. Supply Co. 261 W 619, 53 NW (2d) 701.

A judgment of divorce, even if erroneous as to division of property, as granting relief exceeding that demanded in the husband's complaint or as violating 247.35, relating to a wife's separate property, is not void. Reading v. Reading, 268 W 56, 66 NW (2d) 753.

In actions for fraudulent representations inducing a contract the measure of damages is the difference between the value of the property as it was when purchased and what it would have been as represented. The price paid by the purchaser is relevant evidence on the issue of the value of the property if it had been as represented. Anderson v. Tri-State Home Improvement Co. 268 W 455, 67 NW (2d) 853.

Although the complaint asked for $25,000 and the jury awarded $27,000, it was not error to permit judgment to be entered for the amount of the award where there was an answer to the complaint, the relief was consistent with the case made by the complaint, was embraced within the issue, and was supported by sufficient credible evidence so that the award was not excessive. (Certain language in McCartie v. Muth, 230 W 604, and Pietsch v. Groholski, 255 W 302, compared and reconciled.) Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756.

The relief granted to the plaintiff, if there is no answer, cannot exceed that which he has demanded in his complaint. Linker v. Batavian Nat. Bank, 271 W 484, 74 NW (2d) 179.

The rule as to damages being measured by the cost of repairs or the diminution in value of the injured structure, whichever is the smaller, applies where both factors are in evidence, but where the plaintiffs produced evidence only as to the cost of repairs it was sufficient to support a finding of damages in such amount; the burden is not on the plaintiffs to produce evidence of diminution in value, but is on the defendant, if dissatisfied with damages based on cost of repairs, to show that diminution in value was a smaller sum. Engel v. Dunn County, 273 W 218, 77 NW (2d) 408.

Where plaintiff settled her claim with one defendant, so that her recovery against the other was reduced by half, she could recover all her costs against the defendant who refused to settle. Petlock v. Kickhafer, 3 W (2d) 74, 87 NW (2d) 857, 89 NW (2d) 231.

In order to recover interest, there must be a fixed and determinate amount which could have been tendered and interest thereby stopped; the amount of the claim must be known and determined, or readily determinable. Smith v. Atco Co. 6 W (2d) 371, 94 NW (2d) 697.

In actions sounding in damages merely, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of jury. Sennott v. Seeber, 6 W (2d) 590, 95 NW (2d) 269.

Although Wisconsin is committed to the benefit-of-bargain rule, evidence relating to out-of-pocket damages should be admitted as relevant in fraud cases. Harweger v. Wilcox, 16 W (2d) 526, 114 NW (2d) 818.

See note to 269.44, citing Zelof v. Capital City Transfer, Inc. 29 W (2d) 384, 139 NW (2d) 1.

270.58 History: 1943 c. 377; Stats. 1943 s. 270.58; 1957 c. 576; 1959 c. 438; 1961 c. 499; 1965 c. 603.

Where the complaint stated a cause of action against the defendant village marshal in his official capacity, the village was properly made a party defendant, in view of 260.11 (1) and 270.58, the latter of which would make the village liable for the payment of a judgment as to damages entered against the defendant village marshal if found on the trial that he was, as alleged, a public officer of the village at the time of the assault, and that he was acting in his official capacity and in good faith. 270.58 was intended to protect, among others, police officers, marshals and constables, and as to acts involving the performance of a governmental function; but it does not include acts of a sheriff, since sec. 4, art. VI, provides that a county shall never be held responsible for the acts of the sheriff. Larson v. Lester, 259 W 440, 49 NW (2d) 414.

A patrolman on a police force of a city, who discharged a shotgun resulting in injuries to the plaintiff, was a "public officer" within the meaning of this section providing that where the defendant in any action, except in actions for false arrest, is a "public officer" proceeded against in his official capacity and found to have acted in good faith, the judgment as to damages entered against him shall be paid by the state or political subdivision of which he is an officer. Matczak v. Mathews, 265 W 1, 60 NW (2d) 352.

See note to 895.43, citing Strong v. Milwaukee, 38 W (2d) 564, 157 NW (2d) 619.

The legislative history of the 1965 amendment to 270.58, which included the state as a backstop for any judgment that might be taken against its tortiously culpable employes, makes it manifest that it was not contemplated to thereby authorize direct suit against the state without its consent or to expose it to any new substantive liability. Forseth v. Sweet, 38 W (2d) 676, 158 NW (2d) 370.

Pursuant to sec. 4, art. VI, the county cannot be made liable for the acts of the sheriff or his undersheriff or deputies. But the state, county, or other municipality is liable under 270.58 for damages caused by other officers in negligently setting up a roadblock, if done in good faith. Such officer cannot bind his governmental unit by promising that it will take care of any damages to commandeered property. 45 Atty. Gen. 152.

270.59 History: 1856 c. 120 s. 187; R. S. 1858 c. 132 s. 31; 1869 c. 124; R. S. 1878 s. 2888; Stats. 1898 s. 2888; 1925 c. 4; Stats. 1925 s. 270.59; Sup. Ct. Order, 212 W xvii; Sup. Ct. Order, 229 W vii.

On return of property to defendant see notes to 265.06.

Where the property has been delivered to the plaintiff and the defendant prevails and waives a return, and takes judgment for the value, execution cannot issue against the body of the plaintiff for satisfaction of such judgment. Pomeroy v. Crocker, 3 Pin. 378.

The right to take a personal judgment against the plaintiff if a return cannot be had is for the defendant's benefit and may be waived by him. A judgment without such alternative is valid as to the plaintiff. Morrison v. Austin, 14 W 601.

If judgment be taken only for a return, when it might have been for the value also, plaintiff not being prejudiced thereby, it is good. Morrison v. Austin, 14 W 601.

When a plaintiff in replevin is nonsuited on the ground that the property replevied had never been in the possession of the defendant, the latter is not entitled to judgment for a return of the property or for its value. Gallagher v. Bishop, 15 W 276.

Equitable conditions cannot be inserted in such judgment, as, that the plaintiff recover possession unless within a certain time a mortgage which he holds be satisfied. Rose v. Tolly, 15 W 443.

If defendant claim a return in his answer, judgment must be in the alternative, for a return or for the value if a return cannot be had. Smith v. Coolbaugh, 19 W 106.

The value of the interest of an officer under a writ is the amount of the execution, interest and costs. Booth v. Ableman, 20 W 21, 602.

Where the verdict finds the parties are tenants in common, possession may be awarded to one of them if there is an agreement to that effect between them. Newton v. Gardner, 24 W 232.

In replevin for property converted by mistake and its form changed by defendant's labor, the value to be fixed does not include the result of such labor. Single v. Schneider, 24 W 299; Hungerford v. Redford, 29 W 345 and 30 W 570.

After a party has become the purchaser on execution he is then the general owner and is entitled to judgment for the total value. Winslow v. Urquhart, 44 W 197.

If defendant does not claim a return of the property in the answer he is entitled to a judgment for its value if successful. Kloety v. Delles, 45 W 484.

To authorize plaintiff to have judgment for the value he need not have waived a return, but the option may be exercised at the time of taking judgment. Reiss v. Delles, 45 W 662.

A defect in the judgment for want of a direction to return the property is not prejudicial to the plaintiff, and he can take no advantage thereof. Wheeler & Wilson M. Co. v. Tietzlaff, 53 W 211, 10 NW 155.

It is necessary to a complete determination of an action of replevin, in case the property has been delivered to the plaintiff, and the defendant by his answer claims a return thereof, and the jury finds that a part of the property so replevied and delivered to the plaintiff belongs to the plaintiff and that another part belongs to the defendant, that the value of each part shall be found by the jury and that they shall assess the damages of the plaintiff

for the part found to belong to him, and assess the damages due to the defendant by the taking and withholding of that part found to belong to him, and the judgment must be entered in favor of each party in accordance with the verdict. Lanyon v. Woodward, 65 W 543, 27 NW 337.

If a nonsuit is granted on the trial of an appeal from a justice's court by defendant in replevin, an affirmative judgment may be rendered for the redelivery of the property or its value and damages for detention. Fugina v. Brownlie, 65 W 628, 27 NW 408.

If plaintiff, not having procured a delivery of the property, elects, upon the trial, to take judgment for its value without objection by defendant, he is entitled, if he recover, to an absolute judgment for such value. Tuckwood v. Hanthorn, 67 W 326, 30 NW 705.

A party obtaining judgment in replevin is not required to receive in satisfaction property other than that sued for. Irvin v. Smith, 68 W 227, 31 NW 912.

On granting a nonsuit because plaintiff's evidence shows that defendant is entitled to possession as plaintiff's bailee the court should assess and enter in the alternative judgment the value of the defendant's special interest only, and not the value of the whole property. Gaynor v. Blewitt, 69 W 582, 34 NW 725.

Where replevin is brought to recover possession of property mortgaged jointly to mortgagees to secure the separate indebtedness of the mortgagor to each of them, the mortgage is void only as to such of them who have been participants in the fraud of the mortgagor; and his creditors may proceed against such undivided interest in the property as did not pass by the mortgage; and the court may, the property having been disposed of, render a final judgment which will settle the rights of the parties as tenants in common. Farwell v. Warren, 76 W 527, 45 NW 217.

A plaintiff cannot waive recovery of the property and take an absolute money judgment unless the property has been delivered to the defendant under sec. 2722, R. S. 1878. Mayhew v. Mather, 82 W 355, 52 NW 436.

If the property is in the possession of the officer and the verdict finds that defendant was entitled to a return thereof and to damages, the judgment must be for such return and for its value and damages if a return thereof cannot be had. Baxter v. Berg, 88 W 399, 60 NW 711.

The value for which alternative judgment may be thus taken is the value of the special interest of the prevailing party if he have a special property. Bleiler v. Moore, 88 W 438, 60 NW 792.

Judgment against the defendant's surety cannot be taken under this section if such surety did not sign such an undertaking as that required by sec. 2722, Stats. 1913, but instead an undertaking to secure the sheriff on a seizure under an attachment. And in such case the judgment must be in the alternative and not absolutely for a recovery of the value of the property in suit. Hoeffler M. Co. v. Casualty Co. 163 W 184, 157 NW 702.

In a mortgagee's replevin action against a buyer claiming under an oral contract of sale which was invalid under the statute of frauds, where the amount due on the mortgage debt did not appear, the case was remanded to determine such amount and value of property when taken by buyer and for judgment for return of property or recovery of lesser of amount of mortgage debt or value of property. Mellen Produce Co. v. Fink, 225 W 90, 273 NW 538.

Where the defendant prevails, a money judgment in favor of a defendant and against a plaintiff is proper where at the time the judgment was entered the article sought to be replevied has been delivered to the plaintiff. Wald v. Mitten, 229 W 393, 282 NW 634.

A verdict in a replevin action should be so drawn that the jury may find whether the plaintiff has title or right to possession of the property involved; whether the defendant unlawfully took or detained the same; the value thereof; the damages sustained by the successful party from any unlawful taking or unjust detention of the property. 265.13 and 270.59 outline the practice to be followed. Laabs v. Heitzinger, 236 W 355, 294 NW 537.

Plaintiff in a replevin action was not precluded from securing a money judgment for the value of the automobile because its amended prayer for relief asked only for possession, where defendant filed a bond pursuant to 265.06 and retained possession thereof, for under 270.59 plaintiff was entitled to the option of a judgment for the recovery of the possession of the property or for the value thereof which could be first exercised when judgment was taken; hence the ad damnum clause did not constitute an election. Associates Discount Corp. v. Mohs Realty, 32 W (2d) 571, 146 NW (2d) 417.

Where defendant retained possession of property by giving a redelivery bond, he cannot bar plaintiff's election to take a money judgment rather than the return of the property by canceling the bond. Interest will run in such case from the time the defendant denies plaintiff's right to the property. Barclay Brass & Aluminum Foundry v. Resnick, 35 W (2d) 620, 151 NW (2d) 648.

270.60 History: 1856 c. 120 s. 328; R. S. 1858 c. 140 s. 51; R. S. 1878 s. 2889; Stats. 1898 s. 2889; 1925 c. 4; Stats. 1925 s. 270.60; 1935 c. 541 s. 164.

The surety, on signing the undertaking, becomes a quasi party to the suit and has legal notice of all the proceedings therein. Pratt v. Donovan, 10 W 378; Booth v. Ableman, 20 W 602; Kloety v. Delles, 45 W 484. See also State ex rel. McCaslin v. Smith, 65 W 93, 26 NW 258.

Where judgment was rendered in replevin against both the principal and the surety on the replevin bond, the cause of action on the bond was merged in the judgment and a subsequent action on the bond could not be maintained. Dykstra v. Hartford Accident & Indemnity Co. 228 W 269, 280 NW 324.

A judgment against a surety on an indemnity bond in replevin, which bond did not conform to the statute, was unauthorized, since the bond not being in compliance with the statute would be regarded as given in pursuance of a private arrangement between the parties. Wald v. Mitten, 229 W 393, 282 NW 634.

270.61 History: R. S. 1849 c. 105 s. 4 to 7;

R. S. 1858 c. 140 s. 19 to 22; R. S. 1878 s. 2890; Stats. 1898 s. 2890; 1919 c. 679 s. 95; 1925 c. 4; Stats. 1925 s. 270.61.

Revisers' Note, 1878: A substitute for sections 19, 20, 21 and 22, chapter 140, R. S. 1858. These sections were not a part of the code and ought to have been considered as repealed by it and omitted from the former revision. The practice is not convenient, and no useful purpose is subserved by entering a judgment which cannot be enforced, which concludes nothing but what was litigated between the parties, and leaves further breaches to further actions in effect the same as if it had not been entered. The proposed substitute is designed to express what it is thought would be the law if the sections of the Revised Statutes 1858, mentioned, were omitted; but the declaration is made, for certainty.

A judgment upon an undertaking in replevin, the answer alleging facts tending to show that the mortgage under which plaintiff claimed was void, is erroneous if rendered without a trial or an assessment of damages. Gage v. Allen, 84 W 323, 54 NW 627.

Formerly the practice was, on breach of the condition of a bond, to render judgment for the amount of the penalty, and to issue execution for the amount only which was due because of the breach of the condition; but sec. 2890, R. S. 1878, changes that practice, and requires that judgment for the amount due on account of the breach be rendered. Heidtke v. Krause, 97 W 118, 72 NW 351.

270.62 History: R. S. 1849 c. 102 s. 13; 1856 c. 120 s. 158; R. S. 1858 c. 132 s. 27; 1863 c. 174 s. 1; 1866 c. 70 s. 1; R. S. 1878 s. 2891; Stats. 1898 s. 2891; 1925 c. 4; Stats. 1925 s. 270.62; 1931 c. 119; Sup. Ct. Order, 258 W v.

Comment of Advisory Committee, 1951: Rewritten to state in (2) the standard basis for taking default judgments, and the variations in (3) and (4). Default judgments are common and they involve great property interests. Therefore, the utmost care should be exercised in stating the procedure clearly and completely. Five days' notice to defendant is changed to the usual 8 days. No other change in the law is intended. The difference between "proof of service" when application is made to the court, and "proof of personal service" when application is made to the clerk, embodies in the rule the decision in Moyer v. Cook, 12 W 335. [Re order effective July 1, 1951]

1. Nature of default.
2. General.
3. Actions on contract for money only.
4. In case of publication.

1. Nature of Default.

Where an order overruling a demurrer gave 10 days to answer, it is irregular to take judgment before time has expired. Sawyer v. Farmers & M. Bank, 7 W 386.

Where an answer has been put in after time has expired, it is irregular to take an order for judgment by default unless the answer is stricken out. Maxwell v. Jarvis, 14 W 506.

Judgment by default taken while an order staying proceedings is in force is irregular. Ackerman v. Horicon I. M. Co. 16 W 155.

Service of pleading or notice of retainer after time therefor has expired is ineffectual. Sayles v. Davis, 22 W 225.

A judgment rendered before there has been a default is irregular only, and not void. Salter v. Hilgen, 40 W 363.

The fact that a demurrer has been interposed and overruled without further order will not prevent the plaintiff taking judgment by default. Kirst v. Wells, 47 W 56, 1 NW 357.

Judgment as by default, taken after the action was at issue, should be set aside on defendant's motion without regard to the merits of the answer and without an affidavit of merits. Knowles v. Fritz, 58 W 216, 16 NW 621.

Generally, relief from irregularities in the entry of judgment should be first sought in the trial court; but an entry of judgment as for default, when there is no default in fact, is too grave an irregularity not to be taken notice of upon appeal from the judgment. Reichert v. Lonsberg, 87 W 543, 58 NW 1030.

Where leave is given to amend the answer on condition to be performed by the plaintiff, a default judgment rendered before performance of the condition should be set aside as a matter of right. Dufur v. Ashland County, 88 W 574, 60 NW 829.

A trial court may refuse to enter judgment on default and allow defendant to answer, where excusable neglect and a meritorious defense are shown. Willing v. Porter, 266 W 428, 63 NW (2d) 729.

See note to 270.57, citing Linker v. Batavian Nat. Bank, 271 W 484, 74 NW (2d) 179.

2. General.

Where the record does not contain a statement of such assessment judgment reversed. Gorman v. Ball, 18 W 24.

Where a judgment upon failure to answer was entered on the first day of the term it is presumed that it was entered while the court was in session. Bunker v. Rand, 19 W 253.

An answer confessing plaintiff's demand or some part thereof entitles defendant to notice. Wadsworth v. Willard, 22 W 238.

Examination on oath should be made where there are nonresident defendants; but a subsequent incumbrancer cannot raise the objection. Young v. Schenck, 22 W 556.

Where a general demurrer is overruled and defendant given leave to answer, judgment cannot be taken for specific damages in default of answer except on notice. Douville v. Merrick, 25 W 688.

Where the judgment recites the taking of proof it cannot be disputed by affidavit on motion to vacate the judgment. Mitchell v. Rolison, 52 W 155, 8 NW 886.

Where there is no appearance no evidence is necessary except to enable the court to give judgment; formal findings are unnecessary. Potter v. Brown County, 56 W 272, 14 NW 375.

Judgments may be entered under sec. 2891, R. S. 1878, in actions where the damages are not liquidated. Schobacher v. Germantown F. M. Ins. Co. 59 W 86, 17 NW 969.

A judgment entered where there was no sufficient verification of the complaint will

not be set aside. Frankfurth v. Anderson, 61 W 107, 20 NW 662.

It is not essential to the validity of a default judgment that the summons and complaint be filed before its rendition. Day v. Mertlock, 87 W 577, 58 NW 1037.

It is not essential to the validity of the judgment that the verified complaint be supported by evidence; but the court is not required to render judgment thereon without such evidence if the same is deemed wise or necessary. Sibley v. Weinburg, 116 W 1, 92 NW 427.

Where service of the summons is made on the defendants the court has jurisdiction to render a valid judgment, even though the evidence upon the record may fail in essential particulars to show that such service was in fact made; in such case the court may, after judgment, permit an amendment of the record to show that the service was so made. Schmidt v. Hoffman, 126 W 55, 105 NW 44.

It is not necessary that proof, where default is entered under sec. 2891, Stats. 1898, should be filed because such proof is made in court and sufficiency is determined by court. Schmidt v. Hoffman, 126 W 55, 105 NW 44.

Plaintiff took judgment by default after a general demurrer was overruled, without giving any notice of application for judgment. The court was equally divided on the question whether such omission was a fatal error, on appeal. Stark v. Huber M. Co. 130 W 432, 110 NW 231.

Where defendant does not appear and plaintiff offers evidence respecting his right to recover, he is not thereby compelled to make out a complete case, but may recover if the evidence does not negative his right of recovery. Phillips v. Portage T. Co. 137 W 189, 118 NW 539.

Proof of service of summons and complaint and of the 8 days' notice of application for judgment was waived by the appearance of the defendant by attorney and his cross-examination of the plaintiff's witnesses. Smithers v. Brunkhorst, 178 W 530, 190 NW 349.

A stipulation at the foot of the summons that defendant shall have until a designated time to appear is not an appearance under sec. 2891, Stats. 1923. Dauphin v. Landrigan, 187 W 633, 205 NW 557.

An action for breach of promise to marry is an action in tort, and sec. 2891 (2) applies if a default judgment is taken. Dauphin v. Landrigan, 187 W 633, 205 NW 557.

Where an action on contract defendant had appeared in person and by counsel at an adverse examination, but there was no notice of appearance served, the defendant was not entitled to notice of application for judgment. Velte v. Zeh, 188 W 401, 206 NW 197.

In a mortgage foreclosure action wherein certain defendants, holders of a junior mortgage, appeared by attorneys serving a notice of retainer but did not appear in any other way, and wherein judgment of foreclosure, providing that the premises should be sold as a whole, was entered without notice of application for judgment having been given to such defendants, as required, they were not entitled to have the judgment vacated for this mere irregularity in the absence of any showing that they were injured by the sale of the premises as a whole, rather than in parcels, or that they were prejudiced in any other way by the fact that notice of application for judgment was not given to them. Federal Land Bank v. Olson, 239 W 448, 1 NW (2d) 752.

3. Actions on Contract for Money Only.

An undertaking in attachment is an instrument for payment of money only. Coe v. Strauss, 11 W 72.

The "personal service" here mentioned refers only to a delivery of the summons to "the defendant personally," and not by leaving it at his residence. Moyer v. Cook, 12 W 335.

An appearance gives the clerk jurisdiction to enter judgment by default in the same manner as a personal service. Egan v. Sengpiel, 46 W 703, 1 NW 467.

An action for the value of medical supplies and services furnished and rendered at the defendant's request is upon contract for the recovery of money only. Egan v. Sengpiel, 46 W 703, 1 NW 467.

The required proof must be filed with the clerk. This is a condition precedent to his authority to enter judgment. Reed v. Catlin, 49 W 686, 6 NW 326.

If the summons is personally served and the complaint verified, upon affidavit of default the clerk may enter judgment for the sum demanded without proof, in actions arising on contract for the recovery of money only. Schobacher v. Germantown F. M. Ins. Co. 59 W 86, 17 NW 969.

Personal service in order to give jurisdiction must be made within the state and the proof of service must show that it was so made before judgment can be entered by default. Zimmerman v. Gerdes, 106 W 608, 82 NW 532.

The clerk has no authority to enter judgment under sec. 2891, Stats. 1911, in an action that is not one "arising on contract for the recovery of money only." Spencer v. Osberg, 152 W 399, 140 NW 67.

The procedure to be followed in entering a default judgment where the action is one on contract for money only is governed by 270.62 (3), and no notice of application for judgment is required to be served on the defendants as a condition for entering the default judgment. Even if 270.62 (2) were applicable and notice of application for judgment were required, failure to give notice would not render the judgment void. Glassner v. Medical Realty, Inc. 22 W (2d) 344, 126 NW (2d) 68.

4. In Case of Publication.

In an action against nonresident, nonappearing defendants to recover on a note, wherein the summons and complaint were served on the defendants outside the state, and the property which the defendants owned in the state was not levied on or seized prior to judgment, a money judgment entered on behalf of the plaintiff, reciting only that it appears from the pleadings and affidavits on file that the defendants own property in Wisconsin, and containing no description, either

direct or by reference to the description in the affidavit of the plaintiff's attorney, is deemed to be merely a judgment in personam, not one in rem, hence is invalid because no jurisdiction was obtained over the defendants. A judgment should clearly indicate on its face whether it is in personam or in rem. In actions of this type, the better practice would be to describe the property affected by the action in the complaint so that at the time of service the defendant is thereby given notice that his interest in such property is sought to be impressed. Schultz v. Schultz, 256 W 139, 40 NW (2d) 515.

270.63 History: 1856 c. 120 s. 156, 158; R. S. 1858 c. 129 s. 16; R. S. 1858 c. 132 s. 27 sub. 4; 1869 c. 24 s. 1; R. S. 1878 s. 2892; Stats. 1898 s. 2892; 1925 c. 4; Stats. 1925 s. 270.63; 1935 c. 541 s. 65.

See note to sec. 2, art. VII, on judicial power generally, citing Lathrop v. Snyder, 17 W 110.

When the plaintiff reserves the right to litigate some further part of the case a judgment is improper. The order that defendant satisfy the part admitted is not a judgment, though execution may doubtless issue thereon and it may be enforced by attachment. Sellers v. Union L. Co. 36 W 398.

When part of the claim is admitted plaintiff is entitled to judgment for such part; and his right is not affected by the traverse of the affidavit for an attachment in the action. Eureka Steam H. Co. v. Sloteman, 67 W 118, 30 NW 241.

A tender of an amount less than the amount claimed in full settlement of the claim is not sufficient, and in such case the plaintiff is entitled to the payment of the amount admitted with interest. Mann v. Roberts, 126 W 142, 105 NW 785.

Where in an action by a subcontractor against a principal contractor it was stipulated by the parties that the defendant had agreed to pay a specified sum as due and owing on the contract, but without prejudice to his defense against the claim for damages occasioned by alleged delay, the trial court should have immediately ordered the defendant to satisfy the agreed amount and enforced the order as it enforces a judgment or provisional remedy. Edward E. Gillen Co. v. John H. Parker Co. 170 W 264, 171 NW 61, 174 NW 546.

270.635 History: Sup. Ct. Order, 204 W viii; Stats. 1931 s. 270.635; Sup. Ct. Order, 214 W v; Sup. Ct. Order, 236 W vi; Sup. Ct. Order, 241 W v; Sup. Ct. Order, 11 W (2d) vi.

Comment of Advisory Committee: New subsection (5), promulgated Feb. 9, 1943, effective July 1, 1943, is modeled on Rule 56 (g), Federal Rules of Civil Procedure. [Re Order effective July 1, 1943]

1. Generally.
2. Scope and application.

1. Generally.

It appearing without contradiction that plaintiff was entitled to recover the full amount under bond, denying summary judgment was error. Plaintiff was entitled to summary judgment notwithstanding 270.61, since it appeared without contradiction that plaintiff was entitled to recover the full amount, and there was no occasion for assessing plaintiff's damages in any other manner than in any other action upon contract to recover damages which are liquidated and definite. Schlesinger v. Schroeder, 210 W 403, 245 NW 666.

An action to recover the amount due on account of double liability of a bank stockholder is within the summary judgment statute. Schafer v. Bellin Memorial Hospital, 219 W 495, 264 NW 177.

The denial of defendant's motion for summary judgment after issue joined did not become the "law of the case," and hence the trial judge in the subsequent trial was not bound by the alleged determination of the question at issue. On a motion for summary judgment, the court does not try the issues, but merely decides whether there is an issue for trial. Holzinger v. Prudential Ins. Co. 222 W 456, 269 NW 306.

The far reaching scope and great usefulness of the summary judgment rule is well illustrated in this case. First Wisconsin Nat. Bank v. Pierce, 227 W 581, 278 NW 451.

On the showing made on the motion of the defendant for a summary judgment, the trial court should have granted a summary judgment which would be final, not a summary judgment dismissing the complaint "without prejudice." Potts v. Farmers Mut. Auto. Ins. Co. 233 W 313, 289 NW 606.

The summary judgment procedure is not to supplant the demurrer or motion to make pleadings more definite, nor is it to be a trial on affidavits, but the procedure is aimed at a sham answer which is intended to secure a delay. McLoughlin v. Malnar, 237 W 492, 297 NW 370.

270.635 is purely procedural and does not enlarge the jurisdiction of the court but amplifies its procedure by allowing it to reach a final determination in another way, and hence, if the court proceeds by way of summary judgment in a case not presently within the statute, the error in so proceeding is not "jurisdictional." Prey v. Allard, 239 W 151, 300 NW 13.

The defendant's motion to dismiss pending actions against it as "moot" cannot be treated as a motion for summary judgment, so as to render an order denying such motion appealable under 274.33 (2). Duel v. State Farm Mut. Auto. Ins. Co. 243 W 172, 9 NW (2d) 593.

The summary judgment procedure is not literally applicable in an action to vacate an order of the registration board revoking an architect's certificate of registration, since the issues in such an action must be determined solely on the record of the proceedings on which the board acted, but a summary judgment granted in such an action will not be reversed where the judgment is otherwise correct. Kuehnel v. Registration Board of Architects, 243 W 188, 9 NW (2d) 630.

Where a complaint stating a cause of action was verified by an officer of the plaintiff corporation, and the answer stated no defense to the action, the plaintiff was entitled to judgment on the pleadings, independently of the

summary judgment statute. Monroe County Finance Co. v. Thomas, 243 W 568, 11 NW (2d) 190.

A summary judgment, although entered on a plea that the action is prematurely brought, is a "final judgment," which defeats the plaintiff's instant action. Binsfeld v. Home Mut. Ins. Co. 245 W 552, 15 NW (2d) 828.

The existing cause of action between the parties need not necessarily be fully determined before summary judgment can be entered, and it is proper to enter a summary judgment on a good plea that the action is prematurely brought. Binsfeld v. Home Mut. Ins. Co. 247 W 273, 19 NW (2d) 240.

Where there is no dispute as to the facts, except in an immaterial respect, and the material issues are legal rather than factual, the case falls within the purpose of the summary judgment statute. State ex rel. Salvesen v. Milwaukee, 249 W 351, 25 NW (2d) 630.

The purpose of the summary judgment statute was primarily to discourage dilatory practice, but the statute is drastic and should be applied only where it is perfectly plain that there is no substantial issue to be tried. Defenses in abatement of an action may be challenged by motion for summary judgment. The use of a motion for summary judgment before service of complaint is unauthorized. McKenzie v. Clear Lake Union F. H. S. Dist. 252 W 327, 31 NW (2d) 526.

270.635 does not change the procedure provided for in 111.07 (7) and summary judgment does not apply thereto. Wisconsin E. R. Board v. Cullen, 253 W 105, 32 NW (2d) 182.

If a complaint against several defendants for damages for injuries from an alleged conspiracy and assault did not state a cause of action, such defect should have been raised by demurrer, rather than by motion for summary judgment. Fredrickson v. Kabat, 260 W 201, 50 NW (2d) 381.

Where a summons and complaint served on December 27, 1950, which was within 2 years after the plaintiff's injuries, was a nullity as to the defendants herein, and a summons and complaint served on the defendants herein on May 22, 1953, which was more than 2 years after the injuries, was ineffectual as an amendment of the earlier summons and complaint, the motion of the defendants herein for summary judgment was a general appearance only as to the action commenced on May 22, 1953, and in effect had the force of a plea in bar, as against a contention that such motion for summary judgment constituted a general appearance effectuating a waiver of defect of the summons and complaint served on December 27, 1950. Ausen v. Moriarty, 268 W 167, 67 NW (2d) 358.

Summary-judgment procedure is not calculated to supplant the demurrer, and a summary judgment should be granted only when it is perfectly plain that there is no substantial issue to be tried. Where the effect of the failure either to serve a summons and complaint or a notice of claim within 2 years after the plaintiff's injuries was to bar any claim for the injuries thereafter, but the face of the complaint did not disclose such failure, a motion for summary judgment dismissing the complaint, grounded on such failure, was proper procedure as against a contention that the matter should have been raised by demurrer or answer. Ausen v. Moriarty, 268 W 167, 67 NW (2d) 358.

It is proper to apply the doctrine of equitable estoppel on a motion for summary judgment. Phillips Petroleum Co. v. Taggart, 271 W 261, 73 NW (2d) 482.

270.635 was not intended to be used after trial where it is claimed that newly discovered evidence would bar recovery. It is not a substitute for regular trial nor intended to replace any of the rules of practice or procedure except as provided. Modl v. National Farmers Union Prop. & Cas. Co. 272 W 650, 76 NW (2d) 599, 77 NW (2d) 607.

A motion for summary judgment is not a substitute for a demurrer and may not be used for such purpose since, where a demurrer is sustained, the plaintiff, except in certain exceptional situations, is given an opportunity to plead over, which right is denied when a summary judgment dismissing the complaint on the merits is entered. Hermann v. Lake Mills, 275 W 537, 82 NW (2d) 167.

Reversal of summary judgment on appeal will prevent the lower court's ruling that there was no violation of the safe-place statute from becoming the law of the case. Braun v. Jewett, 1 W (2d) 531, 85 NW (2d) 364.

A question of whether a certain counterclaim interposed in the instant action stated a cause of action could not be considered on summary judgment or a motion to strike, since the motion to strike sought only a ruling on the relevancy of matter challenged as irrelevant and the proper pleading was a demurrer, and summary judgment cannot be used in place of a demurrer. Stafford v. General Supply Co. 5 W (2d) 137, 92 NW (2d) 267.

Materiality of false statements made by the named insured in an auto liability policy as to who was operating a car at the time of an accident, cannot be determined on motion for summary judgment, but is to be determined by the court after trial of the negligence liability issue. Kurz v. Collins, 6 W (2d) 538, 95 NW (2d) 365.

The question of whether an employe was performing service for an employer growing out of or incidental to employment, the answer to which would determine whether the employer was liable in tort or only in workmen's compensation, presented a substantial issue for trial. Krause v. Western Casualty & Surety Co. 7 W (2d) 18, 95 NW (2d) 757.

Where a person, who cannot be adversely examined before trial and who possesses personal knowledge of a particular fact set forth in the affidavit in support of a motion for judgment, might refuse to execute an affidavit, then the party opposing the motion for summary judgment, or his attorney, should file an affidavit stating such facts, including the name of such person, and aver that he desires to subpoena and examine such person as a witness at the trial. McChain v. Fond du Lac, 7 W (2d) 286, 96 NW (2d) 607.

The summary-judgment statute was enacted to avoid unnecessary delay or protracted delay in cases where there can be no issue

of fact for trial; it is primarily to discourage dilatory pleading; but it is not meant to cut off the statutory right to plead. A motion for summary judgment is premature when the court has pending before it a demurrer and the party against whom the motion is made is not in default in serving his complaint or answer. Kennedy-Ingalls Corp. v. Meissner, 8 W (2d) 126, 98 NW (2d) 386.

In an action for damages against the seller and real estate broker for damages for misrepresenting the use to which a building sold could be put, a motion for summary judgment on behalf of the broker was properly dismissed since it was not clearly established that the broker's false statement was not a representation as to his own knowledge or negligently made, so as to relieve the broker of liability. Stevenson v. Barwineck, 8 W (2d) 557, 99 NW (2d) 690.

Although summary judgment generally goes to the merits, it does not do so when based on a plea in abatement. Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

The provision in 270.635 (1) that notice of motion for summary judgment shall be served within 40 days after joinder of issue, requires the movant to serve such notice within 40 days from the joinder of issue as created by the original pleadings and not from the time of service of an amended pleading raising a different issue. Snowberry v. Zellmer, 22 W (2d) 356, 126 NW (2d) 26.

Summary judgment in an action based on a written option to buy land should be denied where fraud is alleged to have made the option invalid. State v. Conway, 26 W (2d) 410, 132 NW (2d) 539.

Where plaintiff made a motion for summary judgment within 40 days and defendant made a similar motion after the 40 days without obtaining an extension of time, but caused no delay in the case, the court could grant defendant's motion. Bornemann v. New Berlin, 27 W (2d) 102, 133 NW (2d) 328.

Summary judgment is proper where the only issue is the effect to be given a written document; this is a legal rather than a factual issue. Pattermann v. Whitewater, 32 W (2d) 350, 145 NW (2d) 705.

On motion for summary judgment, whether evidence by affidavit or deposition preponderates on one side or another is of no importance, for trial on affidavits and adverse examinations is not the objective contemplated by summary judgment procedure. Frew v. Dupons Construction Co. 37 W (2d) 676, 155 NW (2d) 595.

A prima facie case is established only when evidentiary facts are stated which, if they remain uncontradicted by the opposing party's affidavits resolve all factual issues in the moving party's favor. Walter Kassuba, Inc. v. Bauch, 38 W (2d) 648, 158 NW (2d) 387.

On a motion for summary judgment the only facts that may be considered by the court are those that are undisputed; hence it would do violence to the very purpose of the procedure to arrive at a hypothetical legal conclusion on the basis of facts which the pleadings show to be at issue. Balcom v. Royal Ins. Co. 40 W (2d) 351, 161 NW (2d) 918.

If the party opposing a motion for summary judgment submits sufficient facts which show there is a real controversy and takes the matter challenged by the motion out of the category of being a sham and unmeritorious suit or defense, that party is normally entitled to a trial on the merits. Schuster v. Germantown Mut. Ins. Co. 40 W (2d) 447, 162 NW (2d) 129.

270.635 does not confer a right to summary judgment, but rather confers on the trial court a discretionary power to grant such relief when it believes summary disposition of a case is called for. A trial court need not decide a question of law on a motion for summary judgment under 270.635, even though no conflict of material facts exists. Zimmer v. Daun, 40 W (2d) 627, 162 NW (2d) 626. See also Cadden v. Milwaukee County, 44 W (2d) 341, 171 NW (2d) 360.

Summary judgment is a drastic remedy designed to prevent sham pleadings and delay and to terminate the case on its merits, and is not to take the place of a demurrer, judgment on the pleadings, trial, motion to make a pleading more definite, or other temporary relief. 270.635, Stats. 1967, does not confer a right on a party but vests a discretionary power in the trial court to grant summary judgment when it believes a summary disposition of the case is warranted. Seventeen Seventy-Six Peachtree Corp. v. Miller, 41 W (2d) 410, 164 NW (2d) 278.

270.635, Stats. 1967, vests discretion in the trial court as to whether the case should be tried, from which it follows that an order denying a motion for summary judgment will not be reversed until it appears that the trial court has abused its legal discretion or has not exercised it. Hardscrabble Ski Area v. First Nat. Bank, 42 W (2d) 334, 166 NW (2d) 191.

A defendant moving for summary judgment runs a risk greater than that of the plaintiff in moving for summary judgment because under 270.635 (3), Stats. 1967, if it appears upon the defendant's motion that the plaintiff is entitled to summary judgment, he may be granted it even though he has not moved therefore. Cranston v. Bluhm, 42 W (2d) 425, 167 NW (2d) 236.

Rules governing inquiry on summary judgment are restated in the following cases (among others): Hyland Hall & Co. v. Madison G. & E. Co. 11 W (2d) 238, 105 NW (2d) 305; Dottai v. Altenbach, 19 W (2d) 373, 120 NW (2d) 41; McWhorter v. Employes Mut. Cas. Co. 28 W (2d) 275, 137 NW (2d) 49; Leszcynski v. Surges, 30 W (2d) 534, 141 NW (2d) 261; Skyline Construction, Inc. v. Sentry Realty, Inc. 31 W (2d) 1, 141 NW (2d) 909; Jahns v. Milwaukee Mut. Ins. Co. 37 W (2d) 524, 155 NW (2d) 674; Schandelmeier v. Brown, 37 W (2d) 656, 155 NW (2d) 659; and McConnell v. L. C. L. Transit Co. 42 W (2d) 429, 167 NW (2d) 226.

To determine a question as a matter of law on a motion for summary judgment, the facts or reasonable inferences to be drawn therefrom must lead only to one conclusion as to each necessary ultimate fact. Urban v. Badger State Mut. Cas. Co. 44 W (2d) 354, 171 NW (2d) 422.

Federal courts have power to recognize a

state summary judgment statute. A motion to dismiss an answer under summary judgment statute includes counterclaims. Atkinson v. Bank of Manhattan T. Co. 69 F (2d) 735.

2. Scope and Application.

The search of the record on a motion for summary judgment should include the affidavits in support of the complaint, and where such affidavits disclose no cause of action the complaint should be dismissed even though, without the affidavits and solely upon the pleadings, a demurrer would have to be overruled. Sullivan v. State, 213 W 185, 251 NW 251.

Under the summary judgment rule (adopted from New York) the allegations of a plaintiff's affidavit in support of his motion for summary judgment are taken as true, where the defendant does not deny the allegations. A vendor under a land contract may sue at law for the recovery of money due thereunder, and in such an action the summary judgment rule may be invoked. Jefferson Gardens, Inc. v. Terzan, 216 W 230, 257 NW 154.

In an action to forclose a land contract wherein the complaint was amended to foreclose the instrument as a mortgage, a cross complainant's motion for summary judgment was properly denied where the motion asked for judgment determining that title to property was in cross complainant, that other parties to litigation had no right, title or interest in property, that cross complainant was entitled to quiet and peaceful possession of real estate and to such other relief as might be equitable and just in the proceedings. Loehr v. Stenz, 219 W 361, 263 NW 373.

In an action brought by a high school district treasurer against a town treasurer to recover nonresident tuition for pupils residing in the town and attending high school, where plaintiff, in support of his motion for summary judgment, produced affidavits that verified claims in full conformity with statutory requirements had been filed with the town clerk, and no counteraffidavits were filed, and it appeared from pleadings that amounts for such claims had been entered upon tax roll and collected by the town treasurer, plaintiff is entitled to summary judgment. Chalupnik v. Savall, 219 W 442, 263 NW 352.

Where it appears that an action is without merit and is being maliciously prosecuted for the purpose of harassing the defendants or to use the court as an instrument of blackmail, the court should of its own motion dismiss the action. Independent R. Co. v. Independent Milwaukee Brewery, 220 W 605, 265 NW 564.

On denial of motion for summary judgment for insufficiency of the affidavit submitted, leave should be granted to renew the motion upon affidavits that comply with the statute. An affidavit of defendant's attorney that he was familiar with the facts set forth in the answer and that all allegations of fact therein were true was not a sufficient affidavit, on motion for summary judgment under the statute requiring affidavit of person having knowledge thereof setting forth such "evidentiary facts," as shall show that denials or defenses are sufficient to defeat plaintiff, together with affidavit of moving party that action has no merit. Fuller v. General Accident F. & L. A. Corp. 224 W 603, 272 NW 839.

A complaint and affidavit, stating that the plaintiff had rendered legal services to the defendant as executor, that the defendant had executed an agreement for payment of the fee to be allowed the plaintiff by the court, that the court had allowed a certain fee, and that the defendant had paid only a portion thereof, and the answer and defendant's affidavit, setting forth an oral agreement, allegedly made when the plaintiff was retained, that the plaintiff would not hold the defendant personally, authorized a summary judgment since evidence of the oral agreement would be inadmissible as varying the terms of the written contract. Juergens v. Ritter, 227 W 480, 279 NW 51.

In an action by an assignee on a foreign judgment, where he set forth in his affidavit for a summary judgment the evidentiary facts relative to his assignment with a photostatic copy thereof showing that the assignment was unconditional, was duly executed for a specified consideration, was under seal and in compliance with the other requirements of the statutes and there was no issue on the record respecting whether the judgment was assigned, the assignee was entitled to summary judgment. Ehrlich v. Frank Holton & Co. 228 W 676, 280 NW 297, 281 NW 696.

Unless it appears that an answer presents no defense or presents a false or frivolous one, the plaintiff's motion for summary judgment must be denied. The power of courts under the summary judgment statute is drastic and should be applied only when it is perfectly plain that there is no substantial issue to be tried. Prime Mfg. Co. v. A. F. Gallun & Sons Corp. 229 W 348, 281 NW 697.

The plaintiff's objection that the basis for granting the defendant's motion for summary judgment was insufficient because of the absence of an affidavit by the defendant stating his belief that the plaintiff's action had no merit, as required, was properly overruled where such a statement, although absent in the first instance, was made in affidavits by the defendant's attorneys, and in an affidavit by the defendant filed before the hearing on the motion, and where the fact that the plaintiff's action had no merit conclusively appeared. Strelow v. Bohr, 234 W 170, 290 NW 603.

The action of the trial court, on a motion for summary judgment for the holder of bonds against the guarantors, in asking for additional information which was supplied in due season and which completed the showing that entitled the plaintiff to a summary judgment, was not improper where the defendants were accorded a full opportunity to supply any facts they deemed material and the motion papers contained all that was necessary to advise the defendants of the claim of the plaintiff. Winter v. Trepte, 234 W 193, 290 NW 599.

In an action to have a deed and agreement construed to be a mortgage with a usurious rate of interest, wherein the defendants claimed that the amount which the plaintiffs

claimed was usurious interest was an indemnity to secure the defendants from an advance, during the period of the loan, in the market value of securities sold to obtain the money for the loan, and alleged in their counterclaim that they had lost a specified sum on the securities sold in order to loan the plaintiffs the money, the court properly denied the plaintiffs' motion for summary judgment. McLoughlin v. Malnar, 237 W 492, 297 NW 370.

The summary judgment statute is to be availed of only when it is apparent that there is no substantial issue to be tried. The summary judgment procedure is not a substitute for a trial nor does it authorize the trial of controlling issues on affidavits. Atlas Investment Co. v. Christ, 240 W 114, 2 NW (2d) 714.

Affidavits on a motion for summary judgment must state evidentiary facts. On the defendant hospital's motion for summary judgment dismissing the complaint, a statement in the plaintiff's counteraffidavit that the defendant was not a charitable institution was a conclusion of law which did not create an issue as opposed to the defendant's affidavit containing copies of material documents, articles of incorporation, constitution and bylaws of the defendant, and constituting evidentiary facts showing the charitable character of the defendant. Schau v. Morgan, 241 W 334, 6 NW (2d) 212. See also Duncan v. Steeper, 17 W (2d) 226, 116 NW (2d) 154.

In the action for malicious prosecution, the undisputed facts, as disclosed by affidavits and other papers on the defendant's motion for summary judgment dismissing the complaint, and showing independent investigation by the district attorney's office and by the state department of securities, as a result of which the defendant was advised by them and by his private attorney that the plaintiff herein had violated criminal laws of the state and should be prosecuted, established as a matter of law that there was probable cause which justified the defendant in signing a complaint charging the offenses of obtaining money by false pretenses and of violating the securities law, and hence that defendant's motion for summary judgment should have been granted. Petrie v. Roberts, 242 W 539, 8 NW (2d) 355.

In an action by an insurer to recover from the managing and controlling stockholder of a bankrupt corporation for defrauding the insurer of earned premiums by submitting false reports as to the pay rolls on which the premiums were to be based, wherein the defendant set up as a defense a settlement agreement between the insurer and the insured corporation, the pleadings and affidavits presented such substantial issues of fact as to the defendant's fraud in inducing the settlement agreement, as well as to his fraud in connection with the pay roll reports, as to warrant denying his motion for summary judgment. Employers Mut. Liability Ins. Co. v. Starkweather, 244 W 531, 12 NW (2d) 904.

When thorough consideration is made of the uncontroverted facts brought forth and it appears that such facts, if established on a trial, would impel a direction of a verdict no issue exists and an entry of summary judgment is proper. Marco v. Whiting, 244 W 621, 12 NW (2d) 926.

The defendant is not required to show facts sufficient to defeat the action on the merits, but is required only to show a defense sufficient to defeat the plaintiff in the instant action, such as a good plea in abatement. Binsfeld v. Home Mut. Ins. Co. 245 W 552, 15 NW (2d) 828.

In an action by minority holders of defaulted bonds to foreclose the mortgaged property under a trust deed, and to enjoin the defendants, successor trustees and mortgagor corporation, from carrying out a plan of reorganization, allegedly part of a conspiracy to deprive the minority bondholders of the value of their bonds and the security for the payment thereof, the pleadings, exhibits and moving papers are deemed to present genuine and substantial issues of fact, requiring the denial of the defendants' motion for summary judgment dismissing the complaint. First Wisconsin Nat. Bank v. Brynwood Land Co. 245 W 610, 15 NW (2d) 840.

270.635 (2) does not require a motion for summary judgment to be supported by the affidavit of more than one person. In an action against an automobile liability insurer for injuries sustained in an automobile accident, the defendant's affidavit in support of its motion for summary judgment, reciting that the insured driver was the wife of the plaintiff, although the same fact was alleged in the answer, and reciting that the action had no merit, was sufficient. (Fuller v. General A. F. & L. Assur. Corp. 224 W 603, distinguished.) Fehr v. General A. F. & L. Assur. Corp. 246 W 228, 16 NW (2d) 787.

The summary judgment is not a substitute for a regular trial nor does it authorize the trial of controlling issues on affidavits; and if there is any substantial issue of fact, which entitles the plaintiff to a determination thereof by a jury or the court, the defendant's motion for summary judgment must be denied. Parish v. Awschu Properties, Inc. 247 W 166, 19 NW (2d) 276.

If the pleadings make a case for trial by a jury, a summary judgment will be denied unless it appears from the affidavits that different conclusions of essential ultimate fact cannot reasonably be drawn. Hanson v. Halvorson, 247 W 434, 19 NW (2d) 882.

Where the answer stated no defense, the plaintiff was entitled to judgment on the pleadings. The summary judgment statute implies that, when the relief demanded by the complaint is grounded on a written instrument, that instrument must be attached to or set forth by copy in the complaint or the affidavit in support of the motion for summary judgment. Werner Transportation Co. v. Shimon, 249 W 87, 23 NW (2d) 519.

When undisputed documents submitted in support of a motion for summary judgment show that the movant is entitled to the judgment demanded, the court must grant the motion. Londo v. Integrity Mut. Ins. Co. 249 W 281, 24 NW (2d) 628.

In an action by a city to recover from a railroad company an amount expended for repairs to a viaduct, where the affidavits of the railroad company on motions for summary

judgment were accompanied by documents which showed that the viaduct was built pursuant to a council resolution and certain subsequent negotiations, and the verity of such documents was not questioned, they controlled so far as they conflict with statements in the affidavits of the city that the viaduct was constructed under ch. 376, Laws 1901. Milwaukee v. Chicago, M. St. P. & R. Co. 250 W 451, 27 NW (2d) 356.

In an action for an accounting, an allegation that the defendant corporation had collected on behalf of its customers $6,825.16, but had not remitted it to them and had on deposit in the bank only $263.62 with which to pay it, raised a question of fact as to whether there had been an abuse of their trust by the defendant officers and directors and such wilful abuse of discretion on their part as to warrant judicial interference, and precluded summary judgment for the defendants. Mitchell v. Lewensohn, 251 W 424, 29 NW (2d) 748.

Summary judgment is to be granted to a defendant where it appears without contradiction that his right thereto is not opposed by any just or legal claim and that there is no substantial issue to be tried. Nickel v. Salen, 252 W 491, 32 NW (2d) 226.

Where the allegations of a complaint and affidavits charging breach of contract were made on information and belief, and were positively denied by the defendants' answer and affidavits, the defendants' motion for summary judgment was properly granted. Wisconsin Liquor Co. v. Peckarsky, 252 W 503, 32 NW (2d) 249.

A hearsay statement in the plaintiff's affidavit, which would not be admissible on the trial of the case, created no issue of fact between the parties which would preclude the entry of a summary judgment dismissing the complaint. Todorovich v. Kinnickinnic Federal S. & L. Asso. 253 W 44, 32 NW (2d) 171.

On a motion for summary judgment, the court does not try the issues but only decides whether there is an issue for trial; and if, after giving the pleadings the benefit of reasonable and liberal construction, there is a genuine and substantial issue of fact, the motion for summary judgment is properly denied. The record made on the defendant's motion for summary judgment, in an action by a telephone company against a contractor to recover for damages resulting to the plaintiff's underground conduit and cable facilities from the defendant's alleged negligence, showed that there was a substantial issue of fact to be tried, and hence summary judgment was properly denied. Wisconsin Tel. Co. v. Central Contracting Co. 254 W 480, 37 NW (2d) 24.

As in fraud cases, caution is called for in entering summary judgment in cases involving questions of the legality of a contract sued on and of the effect on the rights of the parties if the contract is legal. Stevens v. Berger, 255 W 55, 37 NW (2d) 841.

In an action for injuries sustained by an experienced farm laborer who was operating a spraying machine and caught his pant leg in an open revolving shaft of a power take-off attachment running from a farm tractor to the spraying machine, the pleadings raised issues of fact for a jury as to whether the defendant owner had advised the plantiff that there was a guard for the machine, whether the defendant had instructed the plaintiff in the use of the guard, and whether the circumstances were such as to relieve the defendant of a duty to warn of the danger, so that a summary judgment in favor of the defendant was improper. Welch v. Corrigan, 255 W 58, 38 NW (2d) 148.

On the plaintiffs' motion for summary judgment on the complaint granting recovery of money deposited by them in escrow, an affidavit of the plaintiffs' attorney, to which was attached a letter addressed by such attorney to the escrow agent, was insufficient to establish the terms of the escrow, since such affidavit rose no higher as proof than the same allegations when made by the plaintiff's attorney on oath in the verified complaint (which allegations the defendants had on oath denied), and since, the escrow agent being out of the case by stipulation, an objection to the competency of the letter would have to be overcome before it could even be received as evidence. Under 270.635 (7), it was not error for the trial court to deny the plaintiffs' motion for summary judgment dismissing the defendants' counterclaim. Ryan v. Berger, 256 W 281, 40 NW (2d) 501.

In the plaintiff's affidavit in support of his motion for summary judgment enjoining the use of a certain newspaper as the official newspaper of a city, a statement that the plaintiff's own newspaper was legally qualified to be the official newspaper, without stating any facts to prove he had the required paid circulation to actual subscribers of not less than 300 copies at each publication, was a mere conclusion of law, inadequate to support a summary judgment. Madigan v. Onalaska, 256 W 398, 41 NW (2d) 206.

Where the defendant's affidavits on motion for summary judgment did not contain the words "that the action has no merit" but, on the undisputed facts in the record, leave could have been granted to renew the motion on affidavits containing the statutory language if the question had been raised in the trial court, no harm was done to the plaintiff. Townsend v. LaCrosse Trailer Corp. 256 W 609, 42 NW (2d) 164.

In an action by a former director against a corporation for damages for alleged wrongful termination of an employment contract, facts evidenced by undisputed corporate records controlled on the defendant's motion for summary judgment over contrary statements in the plaintiff's affidavits in opposition to such motion. Stoiber v. Miller Brewing Co. 257 W 13, 42 NW (2d) 144.

When undisputed documents submitted in support of a motion for summary judgment show that the movant is entitled to the judgment demanded, the court must grant the motion, whatever other facts may be in dispute under the record. Joannes v. Rahr Green Bay Brewing Corp. 257 W 139, 42 NW (2d) 479.

A substantial issue of fact precludes the entry of summary judgment. Under the provision that the moving party shall make an affidavit that he believes that there is no de-

fense to the action or that the action has no merit, as the case may be, neither such averment is required of the opposition. Heimbecher v. Johnson, 258 W 200, 45 NW (2d) 610.

It is not for the court, on a motion for summary judgment, to pass on the veracity of opposing affiants and by so doing dispose of the action. Batson v. Nichols, 258 W 356, 46 NW (2d) 192.

Where the defendant's counterclaims and the plaintiff's reply thereto presented issues of fact, the plaintiff's motion for summary judgment on his complaint should have been denied, even though the granting thereof would not prevent the defendant from pursuing the remedy which he sought to enforce by the counterclaims, since the general and recommended practice in the courts of this state is to dispose at one trial of all of the issues made by the pleadings. Borg v. Fain, 260 W 190, 50 NW (2d) 387.

Summary-judgment procedure searches the whole record, including the pleadings, to discover whether a valid cause of action or defense exists; if one is found and a substantial issue of fact connected therewith appears, the motion for summary judgment must be denied. When the defendants did not demur or move to make the complaint more definite and certain but proceeded to answer to the merits, their motions for summary judgment bring the court to the merits also. Fredrickson v. Kabat, 260 W 201, 50 NW (2d) 381.

The pleadings and affidavits on the plaintiff's motion for summary judgment in an action to recover on a promissory note presented issues of fact which could not be determined on such a motion. The sufficiency of a pleading is not determined on a motion for summary judgment where it appears that issues of fact are presented. Schneeberger v. Dugan, 261 W 177, 52 NW (2d) 150.

In proceedings on the defendant's motion for summary judgment, there was no necessity for the plaintiff to file a counter-affidavit, where the verified pleadings, together with the facts set forth in the affidavits that were filed, raised a clear question of law. The entry of summary judgment is proper where the issues presented on the motion for such judgment are legal rather than factual. Des Jardin v. Greenfield, 262 W 43, 53 NW (2d) 784.

In shifting from ordinary negligence in the first complaint, served within the 2-year period for the service of notice of claim for injury, to gross negligence in the amended complaint after the 2-year period, whether there was intent to mislead or actual misleading of the defendant is a question of fact to be resolved on a trial, not on demurrer or motion for summary judgment. Nelson v. American Employers' Ins. Co. 262 W 271, 55 NW (2d) 13.

See note to 180.12, citing Lawrence Inv. Co. v. Wenzel & Henoch Co. 263 W 13, 56 NW (2d) 507.

Disputed questions of fact, where they are immaterial to the questions of law presented, do not afford a basis for denying an application for summary judgment. In proceedings on the defendant's motion for summary judgment, the plaintiff was bound by allegations of fact in its own pleadings. Carney-Rutter Agency v. Central Office Buildings, 263 W 244, 57 NW (2d) 348. See also: Hafeman v. Korinek, 266 W 450, 453, 63 NW (2d) 835, 837; and Maroney v. Allstate Ins. Co. 12 W (2d) 197, 202, 107 NW (2d) 261, 264.

Where the facts appear from the affidavit of the plaintiff's attorney opposing the defendant's motion for summary judgment, and are undisputed, it is unnecessary, on appeal, to consider whether the affidavit of the defendant's attorney is based solely on hearsay and therefore inadequate to support the motion. Ylen v. Mutual Service Cas. Ins. Co. 263 W 270, 57 NW (2d) 391.

Questions of law are proper to be decided on motions for summary judgment where only such questions are presented by the motions. Fredrickson v. Kabat, 264 W 545, 59 NW (2d) 484.

In an action by a guest against an owner and his insurer for injuries sustained when an auto overturned on a curve, substantial issues raised by the answer and affidavits as to the owner's negligence and assumption of risk by the guest precluded summary judgment for the plaintiff on the question of liability, though no evidence in support of allegations was produced at adverse examination of the owner and guest before trial or by affidavits of witnesses. Beskidniak v. Masny, 265 W 74, 60 NW (2d) 723.

Summary judgment will not be granted where an examination of the proper documents in connection with the motion shows that any issue of fact remains to be tried. Kinzfogl v. Greiner, 265 W 105, 60 NW (2d) 741.

On motion by a liability insurer for summary judgment on the ground that it had canceled the policy before the accident and mailed insured notice to that effect, where the insured denied receiving notice and questioned the mailing, a substantial question of fact is presented, warranting denial of the motion. Putman v. Deinhamer, 265 W 307, 61 NW (2d) 319.

Where pleadings raised issues of material fact for trial, the denial of motions for summary judgment was warranted. Grady v. Hartford Steam Boiler Insp. & Ins. Co. 265 W 610, 62 NW (2d) 399.

As to costs on allowance of summary judgment, see Al Shallock, Inc. v. Zurich General A. & L. Ins. Co. 266 W 265, 63 NW (2d) 89.

Where the issue is as to the ownership of a car involved in a collision, and reasonable inferences could be drawn in support of either party, a motion for summary judgment will be denied. Udovc v. Ross, 267 W 182, 64 NW (2d) 747, 66 NW (2d) 200.

In an action to recover a down payment on the ground that the written offer to purchase was materially altered after plaintiff signed it, without his knowledge or consent, where defendant did not contradict the allegation as to the time of alteration, the plaintiff was entitled to summary judgment. Leuchtenberg v. Hoeschler, 271 W 151, 72 NW (2d) 758.

Depositions taken on adverse examination are not a part of the record on the trial until they are offered. A deposition taken on adverse examination, or parts of such deposition, may be effectively used by a party for

the purpose of setting forth evidentiary facts in connection with motions for summary judgment, provided that the evidentiary matters from the deposition are stated in an affidavit such as is specified in the statute, or are incorporated in such affidavit in whole or relevant part by proper reference. Commerce Ins. Co. v. Merrill Gas Co. 271 W 159, 72 NW (2d) 771.

In proceedings on motion for summary judgment the knowledge by an attorney of matters set forth in his affidavit in behalf of the plaintiff, and based on statements of witnesses at adverse examinations, admissions contained in the answer, and the content of instruments of record, was sufficient to satisfy the requirements of personal knowledge as provided in 270.635 (2). Phillips Pet. Co. v. Taggart, 271 W 261, 73 NW (2d) 482.

Where a policy separately valued a barn, barn basement and silo, but the silo was in fact attached, and all were destroyed by windstorm, the insurer was not entitled to summary judgment on its offer to replace the barn and basement and pay only the insured value of the silo. Gowan v. Homestead Mut. Ins. Co. 272 W 127, 74 NW (2d) 634.

In proceedings on the defendants' motion for summary judgment in a taxpayers' action to have declared void a sale of no-longer-needed municipally owned real estate to a manufacturing corporation on the ground of inadequacy of consideration, the pleadings and affidavits presented a material issue of fact to be litigated as to the fair market value of the parcel being sold, thereby making it error to enter summary judgment. Hermann v. Lake Mills, 275 W 537, 82 NW (2d) 167.

Where the defendant's answer raised a fundamental issue of fact, and the plaintiff's affidavits on its motion for summary judgment did nothing to eliminate such issue, the plaintiff's motion for summary judgment was properly denied. Wisconsin P. & L. Co. v. Berlin Tanning & Mfg. Co. 275 W 554, 83 NW (2d) 147.

Under 270.635 (2), even though the allegations of the complaint are sufficient to make out a cause of action against a defendant, nevertheless, if the latter has filed an affidavit complying with the statute and setting forth evidentiary facts clearly establishing that the plaintiff has no cause of action against him, such defendant is entitled to summary judgment unless the plaintiff "shall, by affidavit or other proof, show facts which the court shall deem sufficient to entitle him to a trial." The words "or other proof" necessarily refer to something beyond the mere allegations of the complaint. Laughnan v. Griffiths, 271 W 247, 73 NW (2d) 587. See also: Home Savings Bank v. Bentley, 5 W (2d) 19, 23, 92 NW (2d) 377, 379-380; and McCluskey v. Thranow, 31 W (2d) 245, 253, 142 NW (2d) 787, 791.

Summary judgment is not to be granted in a situation where the evidentiary facts set forth in the affidavit or affidavits filed in support of the motion for summary judgment fail to touch upon a material issue raised by the pleadings. Hermann v. Lake Mills, 275 W 537, 82 NW (2d) 167. See also Home Savings Bank v. Bentley, 5 W (2d) 19, 23, 92 NW (2d) 377, 379-380.

Where the complaint alleged agency and joint enterprise between the defendant owner of the car involved and the bailee and operator of the car, but the affidavits in opposition to the affidavit of the defendant for summary judgment averred no facts to sustain such allegations, whereas the facts stated in the affidavits in support of such motion completely negatived any relationship of agency or joint enterprise, the allegations of the complaint on this issue were not to be considered in disposing of such motion for summary judgment. Behringer v. State Farm Mut. Auto. Ins. Co. 275 W 586, 82 NW (2d) 915.

Where it appeared from the pleadings and affidavits on the defendant's motion for summary judgment that there was an issue for trial, the defendant's motion was properly denied. Sachse v. Mayer, 1 W (2d) 506, 85 NW (2d) 485.

The receiver was not entitled to summary judgment merely because the claimant filed no counteraffidavits in opposition to the receiver's motion, the case being one where resort to the pleadings showed contested material issues of fact to be litigated, thereby making it error to enter summary judgment. In re Liquidation of La Crosse S. & G. Co. 3 W (2d) 51, 87 NW (2d) 792.

A statement that an employe at a particular time was in the course of his employment for his employer, although constituting a statement of ultimate fact which would be proper in a pleading, does not comply with 270.635 (2), which requires that the affidavit to be filed by the party moving for summary judgment shall state "evidentiary facts." Krause v. Western Casualty & Surety Co. 3 W (2d) 61, 87 NW (2d) 875.

Where the affidavits filed by the defendant in support of a motion for summary judgment are defective in failing to state evidentiary facts and to aver that the action has no merit, such defendant should be granted leave to renew the motion on affidavits which do comply with the statute. Krause v. Western Casualty & Surety Co. 3 W (2d) 61, 87 NW (2d) 875.

A complaint against a husband alleging agency by his wife in driving his car should have been dismissed on a motion for summary judgment where the complaint did not allege agency and plaintiff's affidavit alleged it only on information and belief, and where defendant's affidavit denied the agency. Edwards v. Gross, 4 W (2d) 90, 90 NW (2d) 142.

On a motion for summary judgment the evidentiary facts set forth in an affidavit completely supplant any allegations or denials in the pleadings to the contrary. Summary judgment is not to be granted in a situation where the evidentiary facts set forth in the affidavits filed in support of the motion for summary judgment fail to touch on a material issue raised by the pleadings. Home Savings Bank v. Bentley, 5 W (2d) 19, 92 NW (2d) 377.

The trial court may enter summary judgment in behalf of the plaintiff as to defendants against whom the plaintiff is found to be entitled to such judgment, even though

the plaintiff is found not to be entitled to such judgment against all of the defendants and must go to trial as against some of them. Summary judgment should have been granted as against a defendant individually whose answer made it plain that he considered himself the only person liable as drawer of the cashed check in question, without awaiting a determination of whether another defendant was a partner of such defendant and hence also liable individually. Home Savings Bank v. Bentley, 5 W (2d) 19, 92 NW (2d) 377.

A court, in deciding a motion for summary judgment, does not determine the credibility of the affiants. Olson v. Northwestern Furniture Co. 6 W (2d) 178, 94 NW (2d) 179.

A mere assertion of a desire to cross-examine a material witness a second time on the same matter cannot defeat summary judgment in the absence of special circumstances, and particularly where prior adverse examinations had been had and gave rise to no inconsistent or ambiguous testimony on any material matter which needed to be straightened out by further cross-examination. Sadler v. Western Moulding Co. 6 W (2d) 278, 94 NW (2d) 602.

Ownership of a motor vehicle by someone other than the driver raises a presumption that the driver was the agent or servant of the owner and was driving it within the scope of his employment, but such presumption disappears when met by opposing evidence. The affidavits and papers, in defendant employer's motion for summary judgment, sufficiently established that the employe-driver was on a purely personal mission and not within the course or scope of his employment. The mere fact that the employer paid for repairing the car would not support jury inference that the employe was driving the car in the course or scope of employment. Sadler v. Western Moulding Co. 6 W (2d) 278, 94 NW (2d) 602.

Power of courts under summary-judgment statute is drastic and should be applied only where it is perfectly plain that there is no substantial issue to be tried. Krause v. Western Casualty & Surety Co. 7 W (2d) 18, 95 NW (2d) 757.

Mandate of the supreme court, affirming denial of motion for summary judgment, but remanding the cause with permission to renew motion on filing proper affidavits, did not foreclose amendments to pleadings and affidavits. Krause v. Western Casualty & Surety Co. 7 W (2d) 18, 95 NW (2d) 757.

Disputed issues of fact which are immaterial to the questions of law presented do not afford a basis for denying an application for summary judgment. De Bonville v. Travelers Ins. Co. 7 W (2d) 255, 96 NW (2d) 509, 97 NW (2d) 392.

An affidavit on summary judgment must state evidentiary facts, and a statement expressing the conclusion of the affiant drawn from his examination of records, neither identified nor quoted, does not satisfy such requirement. Becker v. La Crosse, 9 W (2d) 540, 101 NW (2d) 677.

When it is shown that there is a substantial issue of fact, or when the evidence on a material issue is in conflict, or if the inferences to be drawn from credible evidence are doubtful and uncertain, a motion for summary judgment under 270.635 should be denied. Voysey v. Labisky, 10 W (2d) 274, 103 NW (2d) 9. See also Fischer v. Mahlke, 18 W (2d) 429, 435, 118 NW (2d) 935, 939.

It is not the duty of one opposing summary judgment to prove his case or to put in all his evidence on summary judgment, and he defeats the motion if he shows by affidavit or other proof that there are substantial issues of fact or reasonable inferences which can be drawn from the evidence. Voysey v. Labisky, 10 W (2d) 274, 103 NW (2d) 9.

Procedure for considering depositions on motion for summary judgment and for including in the record on appeal are discussed in Kanios v. Frederick, 10 W (2d) 358, 103 NW (2d) 114.

Summary judgment should be denied where facts are in dispute and where there is a jury question whether an uneven sinking of a sidewalk below the bottom of a step leading into a tavern was a sidewalk defect and caused plaintiff's injuries. Goelz v. Milwaukee, 10 W (2d) 491, 103 NW (2d) 551.

It is proper to incorporate parts of an adverse examination into a motion for or against summary judgment, but counsel should specify the parts on which he relies where the deposition is voluminous. Hyland Hall & Co. v. Madison G. & E. Co. 11 W (2d) 238, 105 NW (2d) 305.

Summary judgment should be granted dismissing an action against an employer whose employe, involved in an accident, was using his own car for his own convenience and not in performing his work, although on the job at the time. Strack v. Strack, 12 W (2d) 537, 107 NW (2d) 632.

In an action for breach of warranty, an affidavit by the supplier of the alleged defective tire that there was no agency relationship between the seller and supplier was a statement of ultimate fact, not an evidentiary fact, and not sufficient, if undisputed, to establish a defense as a matter of law. Wojciuk v. United States Rubber Co. 13 W (2d) 173, 108 NW (2d) 149.

Issue must be joined before a defendant's motion for summary judgment will be permitted, since 270.635 (2) also requires that the defendant furnish an affidavit showing that his "denials or defenses" are sufficient to defeat the plaintiff, and the quoted statutory words must be construed as necessarily referring to the denials or defenses of the answer. Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699.

Where the question was whether a particular car was covered by a fleet policy, an affidavit to the effect that it was not would not be sufficient, since the policy would be the best evidence. Kubiak v. General A. F. & L. Assur. Corp. 15 W (2d) 344, 113 NW (2d) 46.

Where the insured knew of the accident but made no report to his insurer, and the insurer had no notice until served with a summons nearly 3 years later, and the affidavits of insured were silent as to lack of prejudice of the insurer, a summary judgment of dismissal as to the insurer should have been granted.

Buss v. Clements, 18 W (2d) 407, 118 NW (2d) 928.

An affidavit in support of a motion for summary judgment for the defendant, stating that the affiant "believes that there is no cause of action," was a sufficient compliance with the requirement of 270.635 (2), but the substitution of other than the statutory language is disapproved. American Cas. Co. v. Western Cas. & Surety Co. 19 W (2d) 176, 120 NW (2d) 86.

Sufficiency of moving papers and documents is discussed in Dottai v. Altenbach, 19 W (2d) 373, 120 NW (2d) 41.

The requirement of 270.635 (2) that, where a defendant moves for summary judgment, there must be filed an affidavit "of the moving party" that he believes that the action has no merit, is satisfied, in the case of a corporation defendant, by an affidavit by the defendant's counsel alleging no merit. An affidavit of "no merit" by the defendant's counsel on motion for summary judgment, so far as stating that the affiant "has personal knowledge of some of the facts involved in this litigation and that he has received information with respect to other facts pertinent thereto," was not insufficient under 270.635 (2), for not stating that the affiant had personal knowledge of all the pertinent facts. Clark v. London & Lancashire Ind. Co. 21 W (2d) 268, 124 NW (2d) 29.

A statement made in the defendant's motion for summary judgment, that the defendant was grounding the same on the pleadings as well as an affidavit and other papers of record, gave no greater legal effect to the role accorded pleadings on a motion for summary judgment than would be the case if the pleadings had not been mentioned, and such reference to the pleadings was not an admission of the truth of the allegations in the pleadings. Clark v. London & Lancashire Ind. Co. 21 W (2d) 268, 124 NW (2d) 29.

The purpose of the requirement of 270.635 (2), that, where "documents or copies thereof" are to be used on a motion for summary judgment, they are to be set forth in an affidavit of a "person who has knowledge thereof," is to establish by affidavit the authenticity of the document, or copy thereof, but this is not necessary in the case of the deposition of an adverse examination, since the authenticity is established by the certificate of the officer before whom taken. Clark v. London & Lancashire Ind. Co. 21 W (2d) 268, 124 NW (2d) 29.

A party who voluntarily participates in a trial of the action after denial of his motion for summary judgment, without having appealed from the order of denial and without requesting a stay until determination of such appeal, waives his right to appeal from such order, and the same will be dismissed. Richie v. Badger State Mut. Cas. Co. 22 W (2d) 133, 125 NW (2d) 381.

Defendant's motion for summary judgment must be granted where plaintiff's complaint is based on a void oral lease and defendant's affidavits alleging impossibility of performance are not contradicted. Borkin v. Alexander, 26 W (2d) 432, 132 NW (2d) 587.

Where a material issue of fact in an affidavit is impeached by an opposing affidavit establishing an inconsistent or conflicting statement by the first affiant, the motion for summary judgment should be denied if the fact at issue is material. Foryan v. Firemen's Fund Ins. Co. 27 W (2d) 133, 133 NW (2d) 724.

The procedure for a summary judgment is statutory, and the only acceptable method of raising a factual question entitling a party to trial is the filing of the affidavits or other proof as provided in 270.635 (2). There is no authority permitting a party opposing a motion for summary judgment to raise a triable issue by motion to strike. Breitenbach v. Gerlach, 27 W (2d) 358, 134 NW (2d) 400.

When an adverse party offers no counter-affidavits in opposition to a motion for summary judgment, the evidentiary matters stated by the movant must be deemed uncontroverted. Bextel v. Franks, 252 W 567, 32 NW (2d) 230; Hein v. State Farm Mut. Ins. Co. 29 W (2d) 702, 139 NW (2d) 611.

A party opposing a motion for summary judgment contending that he possesses information from others which raises a triable issue and would defeat the motion, cannot rely on a hearsay affidavit based on information and belief, but must either take the deposition of his informants if they refuse to give affidavits, or set forth in his opposing papers the names of his informants, that these informants refuse to give affidavits, the reason for not taking depositions, and the statements the informants had given, and that it was expected they would give such testimony at the trial. Ranous v. Hughes, 30 W (2d) 452, 141 NW (2d) 251.

Under 270.635 (2) an affidavit in summary judgment proceedings must set forth evidentiary facts and must be made by persons who have knowledge thereof, and hence an affidavit on information and belief is not alone sufficient to prevent summary judgment. McNally v. Goodenough, 5 W (2d) 293, 92 NW (2d) 890; McChain v. Fond du Lac, 7 W (2d) 286, 96 NW (2d) 607; Townsend v. Milwaukee Ins. Co. 15 W (2d) 464, 113 NW (2d) 126; McCluskey v. Thranow, 31 W (2d) 245, 142 NW (2d) 787.

On motion for summary judgment a court can take judicial notice of any matter which could be judicially noticed at the trial, such as other judicial proceedings. The court should not grant a judgment requiring an illegal act such as ordering a conveyance in violation of a zoning ordinance. Venisek v. Draski, 35 W (2d) 38, 150 NW (2d) 347.

The principle that on a motion for summary judgment pleadings containing allegations inconsistent with factual averments in affidavits are ineffectual as proof has no application where no such inconsistency arises; hence recourse to the provisions of the policy (to ascertain the protection afforded the insured) which were set forth in the insurer's answer but not contained in its moving affidavits was not error. Moutry v. American Mut. Liability Ins. Co. 35 W (2d) 652, 151 NW (2d) 630.

Where a defendant in a malicious prosecution action moved for summary judgment and did not file supporting affidavits but relied solely on the verified pleadings, the trial court

properly denied the motion. Hale v. Lee's Clothiers and Jewelers, Inc. 37 W (2d) 269, 155 NW (2d) 51.

Where, on a motion by defendant (a dealer) for summary judgment, it was undisputed that defendant's vehicle was driven unaccompanied by any of the defendant's representatives the trial court properly granted the motion, for only a matter of law was presented and the facts conclusively established that the presumption of agency had been rebutted. Ruby v. Ohio Cas. Ins. Co. 37 W (2d) 352, 155 NW (2d) 121.

In an action by parents for breach of contract by a so-called modeling school in which their daughter was enrolled as a student, based on misrepresentation as to the duration of the course, the trial court properly denied defendant's motion for summary judgment where the motion papers revealed that there was in fact a triable issue as to whether the misrepresentation had actually been made. Lilley v. Par-Wis., Inc. 38 W (2d) 13, 155 NW (2d) 565.

Plaintiff's motion for summary judgment on a second cause of action was properly denied where the moving affidavit of its counsel was substantially a restatement of the contents of the amended complaint and thus amounted to nothing more than a second verification by the attorney. Milwaukee County v. Schmidt, 38 W (2d) 131, 156 NW (2d) 493.

On motion for summary judgment in an action by a wife for trespass in removing fill material from a farm and for the alleged depreciation in value of the farm, the trial court correctly ruled that the wife's complaint be dismissed because she was estopped as a matter of law. Dunn v. Pertzsch Construction Co. 38 W (2d) 433, 167 NW (2d) 652.

Where a bank of deposit honored a check (although payment thereof had been stopped) and then sought recovery against the makers, its status as holder in due course, put in issue by the pleadings, became a material issue of fact which could not be resolved on motion for summary judgment in which the moving papers in no way established such status. Bank of Commerce v. Paine, Webber, Jackson and Curtis, 39 W (2d) 30, 158 NW (2d) 350.

In a suit by a minor against his grandparents for injuries sustained on the latter's farm, attributed to the negligence of his father (the accident having occurred prior to the abrogation of the parent-child immunity doctrine), the issue of the father's status as his parent's employe was properly resolved on motion for summary judgment, where that was the only material issue presented and constituted solely one of law. Bolen v. Bolen, 39 W (2d) 91, 158 NW (2d) 316.

In a safe-place and common-law negligence action by an employe of a carrier who stepped and fell on ice at a loading dock, where the owner cross-complained for indemnification against the carrier and its liability insurer, the questions whether the undisputed facts surrounding the injury fell within (a) an indemnity agreement between the owner and carrier and (b) the coverage of the carriers liability policy were questions of law properly resolved on motions for summary judgment. Saunders v. National Dairy Prod. Corp. 39 W (2d) 575, 159 NW (2d) 603.

In an action by a supplier against a partnership to recover the price of cement, defended on the ground of payment, plaintiff was not entitled to summary judgment where triable factual issues were raised in the moving affidavits of plaintiff and opposing affidavits of defendants. Manitowoc Portland Cement Co. v. Schuette, 39 W (2d) 593, 159 NW (2d) 699.

In a negligence action against a farmer charged with causing mud dragged from his field to accumulate on a highway by failing to remove the same from wheels of his vehicles (used to transport silage along and across the road), thereby causing plaintiff's tractor-trailer to overturn, summary judgment was a proper remedy to invoke to determine whether the farmer under the circumstances owed a duty to users of the highway, for a question of law was thereby presented, negative determination of which would terminate the suit. Schicker v. Leick, 40 W (2d) 295, 162 NW (2d) 66.

Since, in evaluating the evidentiary facts presented by both sides in an action to recover payments claimed to be due under a group disability policy, only one inference could be drawn and only one conclusion could possibly be reached, the defendant (insurance carrier) was entitled to favorable disposition of its motion for summary judgment. Spitz v. Continental Cas. Co. 40 W (2d) 439, 162 NW (2d) 1.

Where material factual issues were in dispute as to whether (a) certain policies (which were not part of the record) did in fact indemnify insured against the loss claimed, and (b) whether the insurers, with knowledge of the object and pendency of a third-party action, elected not to join in its prosecution or to contribute to the payment of the cost thereof, it was proper for the trial court to deny their motion for summary judgment. Cedarburg L. & W. Comm. v. Glens Falls Ins. Co. 42 W (2d) 120, 166 NW (2d) 165.

In a safe-place, common-law negligence, and nuisance action against a county which maintained a zoo, and a contractor which had surfaced a walkway leading thereto, for personal injuries caused by a fall attributed to a depression allegedly the result of the contractor's faulty and unworkmanlike construction, denial of the contractor's motion for summary judgment was proper, for aside from the discretion lodged in the trial court there existed a triable issue as to whether the contractor's claim of exoneration from liability and acceptance of the work fell within one of the recognized exceptions to the rule. Cadden v. Milwaukee County, 44 W (2d) 341, 171 NW (2d) 360.

In an action to recover for personal injuries arising out of electrical burns suffered by a child, injured when a model airplane he was flying (controlled by metal hand cables) contacted one of defendant's high-voltage uninsulated wires, where defendant sought summary judgment based on its compliance with applicable statutes and regulations dealing with the maintenance of its power lines and equipment, prima facie proof of such compliance was not dispelled by opposing allega-

tions of statutory noncompliance based on information and belief. Kemp v. Wisconsin E. P. Co. 44 W (2d) 571, 172 NW (2d) 161.

Where majority stockholder-directors and officers charged with mismanagement of their corporation by a minority stockholder on adverse examination to frame a complaint refused to answer questions on the ground of self-incrimination, whereupon the minority stockholder sought dissolution of the corporation, claiming that defendants' invocation of the Fifth Amendment constituted an "illegal and fraudulent" act under 180.771, Stats. 1965, denial of summary judgment to dissolve the corporation did not constitute abuse of discretion, where the trial court considered there were issues of fact to be resolved and too many conclusions of law were pleaded in the complaint and in the affidavits. Grognot v. Fox Valley Trucking Service, 45 W (2d) 235, 172 NW (2d) 812.

The motion for summary judgment. Ritter and Magnuson, 21 MLR 33.

Summary judgment procedure. Boesel, 6 WLR 5.

Summary judgment and judgment on the pleadings. 1947 WLR 422.

270.64 History: 1856 c. 120 s. 179; R. S. 1858 c. 132 s. 21; R. S. 1878 s. 2893; Stats. 1898 s. 2893; 1925 c. 4; Stats. 1925 s. 270.64; 1935 c. 541 s. 166.

In all cases where defendant has defaulted and has the right to appear and participate in the assessment of damages he may offer proof pertinent to the question, or, in actions of tort, in mitigation of damages. Bartlett v. Braunsdorf, 57 W 1, 14 NW 869.

270.65 History: 1856 c. 120 s. 188; R. S. 1858 c. 132 s. 32; R. S. 1878 s. 2894; Stats. 1898 s. 2894; 1925 c. 4; Stats. 1925 s. 270.65; Sup. Ct. Order, 239 W vii.

Comment of Advisory Committee: This revision of 270.65 and the creation of 270.70, promulgated Feb. 13, 1942, effective July 1, 1942, are intended as a solution to the vexed questions of "Who can or should sign the judgment?" and "What constitutes entry of judgment?" They afford a clear rule by which to measure the time for appeal. [Re Order effective July 1, 1942]

In an equitable action, improperly tried by jury, resulting in a general verdict for the plaintiff the clerk entered judgment without any express direction. There was no authority for entering judgment and the entry was erroneous, the verdict being irregular and the court not having in any way passed upon the issues. Stahl v. Gotzenberger, 45 W 121.

An alleged judgment entered by the clerk under a mistaken idea that the findings have been signed by the judge is a nullity. Sackett v. Price County, 130 W 637, 110 NW 821.

Where the court filed findings and ordered the entry of the judgment in accordance therewith, the judicial act was then performed. There only remained the purely clerical duty of reducing it to writing and entering it of record. If mistake was made in the entry, so that the judgment entered did not accord with the judgment ordered, such mistake might be corrected even at a subsequent term. Comstock v. Boyle, 134 W 613, 114 NW 1110.

A judgment of the circuit court need not be signed by the judge. Will of Burghardt, 165 W 312, 162 NW 317.

While sec. 2894, Stats. 1923, provides that the clerk must enter judgment on the direction of the court, it acts as a limitation on the authority of the clerk only, and does not deprive the court of the power to enter its own judgments. Dauphin v. Landrigan, 187 W 633, 205 NW 557.

270.66 History: 1882 c. 202; Ann. Stats. 1889 s. 2894a; 1891 c. 155; 1897 c. 153; Stats. 1898 s. 2894a; 1925 c. 4; Stats. 1925 s. 270.66; 1935 c. 541 s. 167; Sup. Ct. Order, 254 W vi; 1953 c. 511.

Ch. 202, Laws 1882, contemplates a case in which the clerk, without specific direction of the court, would be authorized to enter judgment under a verdict. It does not apply to special proceedings, such as those for the condemnation of land for a railroad. Cornish v. Milwaukee & L. W. R. Co. 60 W 476, 19 NW 443.

On failure of the prevailing party to perfect his judgment by inserting costs within 60 days the judgment becomes perfected without costs, and the time within which an appeal may be taken begins to run thereafter. Kelly v. Owen, 63 W 351, 23 NW 583.

If, before expiration of 60 days, the losing party or the clerk attempts to perfect the judgment by inserting costs not taxed at the instance of the prevailing party or to debar the latter from his right to perfect judgment for costs such act is a nullity. Hoye v. Chicago & Northwestern R. Co. 65 W 243, 27 NW 310.

Findings by a referee upon confirmation become the findings of the court and, if judgment be not perfected within 60 days after confirmation, the right to costs is waived. Crocker v. Currier, 65 W 662, 27 NW 825.

Where costs are taxed and inserted in the judgment contrary to ch. 202, Laws 1882, the opposite party should move to correct the judgment before appealing. Blomberg v. Stewart, 67 W 455, 30 NW 617.

An appeal taken less than 60 days after finding, and before taxation of costs, is premature and must be dismissed. Joint School Dist. v. Kemen, 68 W 246, 32 NW 42.

When the court grants a nonsuit the case is brought within ch. 202, Laws 1882, and the parties are governed by it. McDonough v. Milwaukee & N. R. Co. 69 W 358, 34 NW 120.

If the defendant neglected to tax his costs, he would forfeit them by ch. 202, Laws 1882. Neeves v. Eron, 73 W 542, 41 NW 725.

A taxation of costs will not be vacated because not made within 60 days after the decision of the supreme court. Williams v. Giblin, 86 W 648, 57 NW 1111.

Before this section was amended in 1897 a motion for a new trial operated as a stay of proceedings. A taxation made pursuant to an erroneous order entered while such stay was in force, after the 30 days had expired, and without a new notice, was sustained. Steinhofel v. Chicago, M. & St. P. R. Co. 92 W 123, 131, 65 NW 852.

The pendency of a motion for a new trial does not operate as a stay unless it is so ordered; it is the intent of the statute that

the party who has obtained a verdict shall deliver to the clerk the judgment to be entered, and the clerk shall tax costs on the party's application and insert them in the judgment upon 3 days' notice; if this is done judgment is perfected; if this is not done within 60 days after verdict, in the absence of any direction by the court, the party loses his right to costs. Milwaukee M. & B. Asso. v. Niezerowski, 95 W 129, 70 NW 166.

Where a bill of costs and notice for taxation is served on time the limit of 60 days does not apply to a bill made to secure a retaxation of the costs and upon such retaxation full costs may be taxed. Hart v. Godkin, 122 W 646, 100 NW 1057.

An order denying costs is not appealable. Mash v. Bloom, 133 W 662, 114 NW 99.

Where the trial court orally ordered the action to be dismissed but findings were not prepared or filed until some months thereafter, taxation of costs within 60 days after the actual filing was permissible. Jenks v. Allen, 151 W 625, 139 NW 433.

Where, after a verdict in plaintiff's favor, defendant moved for judgment, the 60 days mentioned in sec. 2894a, Stats. 1913, did not begin to run until such motion was determined; and if the record did not show when the motion was determined and the trial court refused to disallow costs, it will be presumed that the costs were taxed in time. Breen v. Arnold, 157 W 528, 147 NW 997.

Where a court signed and filed a written order for judgment on a special verdict, the date of such order, not that of the entry thereof by the clerk, fixed the beginning of the 60 days within which costs might be taxed. Banaszek v. F. Mayer B. & S. Co. 161 W 404, 154 NW 637.

Sec. 2894a, Stats. 1915, does not apply where a special verdict finds the facts only, because no one can tell from such a verdict which party is successful until the court decides that question. Stryk v. Mnichowicz, 167 W 265, 167 NW 246.

Where the court orally directed judgment in favor of defendant, notwithstanding the verdict, and had made a mistake, later entered a formal order denying plaintiff's motions after verdict and directing judgment for defendant, the formal order for judgment must govern and the defendant might tax its costs within 60 days thereafter. Karshian v. Milwaukee E. R. & L. Co. 192 W 269, 212 NW 643.

After failing to have a judgment entered within 60 days of an order for judgment awarding him a specified sum, the plaintiff was not entitled to costs, but he was still entitled to a judgment for the sum awarded, and hence the trial court erred in entering a judgment dismissing the complaint. Brunner v. Cauley, 248 W 530, 22 NW (2d) 481.

Where the trial court's memorandum decision in favor of the plaintiff required that formal findings be prepared and submitted, the 60-day period allowed by 270.66 for entering judgment began on the date of filing of the formal findings and not on the date of filing of the memorandum decision. (McDonough v. Milwaukee & Northern R. Co. 69 W 358, and Milwaukee M. & B. Asso. v. Niezerowski, 95 W 129, distinguished.) Schrank v. Philibeck, 251 W 546, 30 NW (2d) 233.

A verdict was entered on October 26th, and motions were made and argued after verdict, and the trial court signed orders on December 2d giving the plaintiffs an option to enter judgment for reduced amounts of damages or stand a new trial. The plaintiffs were not required to tax costs within 60 days from the date of the verdict. Matosian v. Milwaukee Auto. Ins. Co. 257 W 599, 44 NW (2d) 555.

Where a verdict against the plaintiff was returned on November 16th and the plaintiff made a motion for a new trial on November 27th, such motion operated as a stay of proceedings until disposed of, and the stay operated to extend the 60-day period within which the defendant was entitled to tax costs, so that, where the plaintiff's motion for a new trial was denied and an order for judgment was made on January 29th, and the defendant applied for costs on January 29th, they should have been allowed. Throm v. Koepke S. & G. Co. 260 W 479, 51 NW (2d) 49.

Where the decision on motions after verdict was filed on December 11, 1953, the fact that exceptions were taken to certain items on the defendant's original bill of costs did not justify the defendant's failure to file a judgment in its favor signed by the trial court on December 10, 1953, and such judgment not having been filed, it was proper for the clerk of court, at the instance of counsel for the plaintiffs, to enter judgment on February 26, 1954, without costs. Fonferek v. Wisconsin Rapids G. & E. Co. 268 W 278, 67 NW (2d) 268.

The plaintiff's objection to the taxation of costs by both defendants, not raised below, cannot be considered on appeal. Bank of Ashippun v. Ellis, 274 W 530, 80 NW (2d) 357.

A memorandum decision on motions after verdict, stating that the plaintiff's motion for judgment on the verdict was to be granted and that the defendant's motion was to be denied, and not specifically directing the entry of judgment, was not an order to enter judgment for the purpose of starting the running of the 60-day period for the taxation of costs. (Any implication to the contrary in Fonferek v. Wisconsin Rapids G. & E. Co. 268 W 278, withdrawn.) Dwyer v. Jackson Co. 20 W (2d) 318, 121 NW (2d) 881.

Plaintiff was not precluded from taxing costs within 60 days following entry of the final judgment because more than 60 days had expired from the date of the trial court's prior determination of the issue of entitlement to the chattel, and since resolution of his subsequent motion for judgment for the value of the property rather than its return and for damages required further judicial action, the time for taxation of costs did not commence to run until the judge's decision of the remaining issues. Barclay Brass & Aluminum Foundry v. Resnick, 35 W (2d) 620, 151 NW (2d) 648.

Sec. 2894a does not apply when the party's right to judgment is denied and he is driven to a federal court for its establishment. Metcalf v. Watertown, 68 F 859.

270.67 History: 1905 c. 132 s. 1; Supl. 1906 s. 2894b; 1925 c. 4; Stats. 1925 s. 270.67; 1935 c. 541 s. 168.

270.68 History: 1905 c. 132 s. 2; Supl. 1906 s. 2894c; 1925 c. 4; Stats. 1925 s. 270.68.

270.69 History: 1844 p. 105; R. S. 1849 c. 102 s. 12 to 15; R. S. 1858 c. 140 s. 12 to 15; 1863 c. 216; R. S. 1878 s. 2895, 2896; Stats. 1898 s. 2895, 2896; 1925 c. 4; Stats. 1925 s. 270.69, 270.70; 1935 c. 541 s. 169, 170; Stats. 1935 s. 270.69; Sup. Ct. Order, 275 W vii; 1967 c. 36; 1969 c. 127.

Where the warrant authorizes confession for the amount due, judgment cannot be entered while such amount is subject to the adjustment of equities. Davis v. Van Wie, 6 W 209.

The statement of the confession of the judgment must be definite and particular. A statement containing the date and amount of demand, the amount due and generally the articles purchased is insufficient. Thompson v. Hintgen, 11 W 112.

A misnomer of defendants, by describing them as partners, when the warrant was executed by them in their individual names and contained a release of errors, is immaterial. McIndoe v. Hazelton, 19 W 567.

The rule that the court cannot vacate its judgment for error after the term has ended (except under sec. 38, ch. 125, R. S. 1858) does not apply to judgments on cognovit. Aetna Life Ins. Co. v. McCormick, 20 W 265.

The sworn confession of the defendant indorsed on the complaint will not authorize entry of judgment. This must be done under sec. 27, ch. 132, or sec. 15, ch. 140, R. S. 1858. Wadsworth v. Willard, 22 W 238.

Between the parties a defective affidavit will not alone authorize the vacation of a judgment by confession. Nor will this be done when the existence of such affidavit is stated by defendant only on information and belief. Reiley v. Johnston, 22 W 279.

A judgment by warrant of attorney on a note barred by the statute of limitations is void. Walrod v. Manson, 23 W 393.

Equity will relieve against judgment by confession on the ground of fraud, accident or mistake. Brown v. Parker, 28 W 21.

Mere irregularities not of a substantial nature will be disregarded, though courts will look closely into the proceeding to see that no substantial wrong has been done defendant. McCabe v. Sumner, 40 W 386.

A judgment is not void because the affidavit fails to state deponent's means of knowledge; nor will it be vacated for such irregularity, especially when it contains a release of errors, unless the judgment is unjust. Pirie v. Hughes, 43 W 531.

The jurisdiction over judgments on cognovit, being equitable, will not be exercised when no meritorious defense is disclosed. Herfurth v. Biederstaedt, 43 W 633.

The proceedings here authorized by secs. 13 and 14, ch. 140, R. S. 1858, may be taken in a federal court. Jewett v. Fink, 47 W 446, 2 NW 1124.

Where plaintiff does not make the affidavit it must distinctly appear in the body of it that it was made on his behalf, show why it was not made by him and also the affiant's means of knowledge. Sloane v. Anderson, 57 W 123, 13 NW 684, 15 NW 21.

The affidavit must state the amount due or to become due and that plaintiff is the holder thereof. An allegation that a sum is "justly owing" is not sufficient. When affidavit is made out of the state it must be authenticated as prescribed by sec. 4203, R. S. 1878. Sloane v. Anderson, 57 W 123, 13 NW 684, 15 NW 21.

A warrant to confess judgment upon a note for such amount as may appear to be unpaid thereon authorizes a confession only for the amount actually due. Reid v. Southworth, 71 W 288, 36 NW 866.

Though the affidavit is silent as to the amount due, if the complaint states the sum and the affidavit states that the facts contained in the complaint are true to the knowledge of the affiant, it is sufficient as between the parties to the action, especially if the warrant of attorney authorizes the release of errors and they have been released. Rogers v. Cherrier, 75 W 54, 43 NW 838.

An affidavit which recites that it is made by the affiant as the attorney of the plaintiff, and is made by him because the plaintiff is not a resident of the county where the action is commenced, shows that it was made on plaintiff's behalf. Rogers v. Cherrier, 75 W 54, 43 NW 838.

A judgment will not be vacated at the instance of a creditor because the affidavit of plaintiff's attorney annexed to the complaint does not show why the plaintiff did not make it or the affiant's means of knowledge, unless the judgment is shown to be unjust or inequitable. Horning v. E. Griesbach B. Co. 84 W 71, 54 NW 105.

A judgment is not void, but only voidable, though the affidavit is defective; and in the absence of equities on the part of the debtor it will not be set aside on motion; creditors are in no better position to take advantage of error than is the debtor himself. F. Mayer B. & S. Co. v. Falk, 89 W 216, 61 NW 562.

The determination by a court commissioner who signs a judgment by confession that the affidavit was sufficient cannot be attacked collaterally. F. Mayer B. & S. Co. v. Falk, 89 W 216, 61 NW 562.

Creditors at large cannot attack the validity of judgments confessed by their debtors on the ground that they were procured by collusion and fraud. Weber v. Weber, 90 W 467, 63 NW 751, 757.

The answer of confession upon which judgment was entered was not signed by the defendant's attorney but his name was signed by the attorney for the plaintiff, who entered the judgment at the request of defendant's attorney, which signing was ratified by the latter. The judgment was not void. John V. Farwell Co. v. Hilbert, 91 W 437, 65 NW 172.

Where a president is authorized to represent the corporation "in matters of more than ordinary importance," and has practically exercised, with the knowledge and assent of the directors, all the power of the corporation, his appointment of an attorney to confess judgment against the corporation upon its note given at the same time for money borrowed for the corporation will bind it as against a person who acted in good faith. Ford v. Hill, 92 W 188, 66 NW 115.

A warrant authorizing the confession and execution of judgment on a judgment note "in any court of record" authorizes such con-

fession in this state of a note made in another state. Pirie v. Conrad, 97 W 150, 72 NW 370.

Judgment cannot be entered against one of the makers alone, under a joint warrant of attorney. Kahn v. Lesser, 97 W 217, 72 NW 739.

This statute is strictly construed. Kahn v. Lesser, 97 W 217, 72 NW 739.

Where the stipulation was for "judgment with costs," and these were reasonable in amount, there was no equity in the motion to vacate the judgment on that ground. Second Ward S. Bank v. Schranck, 97 W 250, 73 NW 31, 37.

The portion of sec. 2896, Stats. 1898, authorizing entry of judgment before the debt is due, when so authorized by the power of attorney, must be read in connection with sec. 2969 (7) so as to authorize only a judgment for the part actually due, in order that execution may be issued for such part. Reeves & Co. v. Kroll, 133 W 196, 113 NW 440.

Sec. 2896, Stats. 1898, does not apply to a judgment confessed in another state where suit is brought upon such judgment in this state. Halfhill v. Malick, 145 W 200, 129 NW 1086.

Judgment upon a judgment note executed by the secretary and manager of a corporation is prima facie valid, and in an equitable action to collect the same from stockholders who received all the corporate assets, it will be enforced unless the defendants show that the secretary was not authorized to execute the note and that it would be unjust and inequitable to enforce payment. Smith v. Dixon, 150 W 110, 135 NW 841.

The supreme court can give no relief upon an appeal from a judgment by confession on a judgment note if no irregularity or error appears in the record. Such a judgment is supported by the same presumption of regularity, of sufficiency of the pleadings and evidence, and of other essentials, as a judgment in a contested action. Wessling v. Hieb, 180 W 160, 192 NW 458.

Statutes relating to cognovit supersede the common law, and only such judgments are permitted on cognovit as come within the statutes; such a judgment cannot be entered on a lease of real estate. Park H. Co. v. Eckstein-Miller A. Co. 181 W 72, 193 NW 998.

Fraud which would have prevented recovery of judgment cannot be pleaded as a defense in an action at law on a foreign judgment, but a court of equity will enjoin the enforcement of a foreign judgment on cognovit, where such judgment was obtained through fraud and gives the judgment creditor an unconscionable advantage. (Smith v. Willing, 123 W 377, 380, 101 NW 692, overruled.) Ellis v. Gordon, 202 W 134, 231 NW 585.

Whether the original attachment to a conditional sales contract, of an instrument otherwise qualifying as a note and containing a provision for judgment by cognovit, takes it out of the definition of a note and the operation of 270.69, Stats. 1931, providing for cognovit judgments, depends upon the intention of the parties as manifested by the entire written record. Shawano F. Corp. v. Julius, 214 W 637, 254 NW 355.

A power of attorney to confess judgment contained in a note was not terminated by the subsequent incompetency of the maker, and hence judgment by confession could properly be entered on the note subsequent to such incompetency. Guardianship of Kohl, 221 W 385, 266 NW 800.

An instrument, although signed by a buyer alone, on which was indorsed, "Conditional Sales Note," with printed matter thereunder for insertion of the date of filing appropriate to conditional sales contracts, and which contained provisions relating to defaults, repossession, sale of repossessed property, etc., and recited the obligation of the payee to hold for the buyer the residue remaining on sale of the repossessed property, is not a "note or bond" authorizing entry of judgment on cognovit. (United Finance Corp. v. Peterson, 208 W 104, applied.) Wisconsin Sales Corp. v. McDougal, 223 W 485, 271 NW 25.

The judgment on warrant of attorney can be entered only on a bond or a promissory note. Chippewa Valley Securities Co. v. Herbst, 227 W 422, 278 NW 872.

Where jurisdictional defects are apparent on the face of the record, a judgment on confession will be vacated without a showing of equities on the part of the debtor. Husman v. Miller, 250 W 620, 27 NW (2d) 731.

A defect or irregularity in content in the affidavit attached to the complaint on which judgment is confessed is not jurisdictional, and does not make the judgment void, but only voidable, and in the absence of equities on the part of the debtor it will not be set aside. (Any inference to the contrary in Sloane v. Anderson, 57 W 123, disapproved.) Husman v. Miller, 250 W 620, 27 NW (2d) 731.

Where a complaint was filed, setting out that the named defendants, designated as "Melvin Miller and William Miller, doing business under the firm name of Miller Brothers," executed a judgment note, and the note was filed, executed "Miller Bros. By M. Miller," the jurisdictional requirement of 271.69 as to the filing of the note and complaint was met and, in relation to a cognovit judgment entered against both named defendants, the presumption attached that the named defendant William Miller, whose name was not signed on the note, was a member of a partnership doing business as Miller Brothers and that as a partner he was bound by the execution in the firm name. Husman v. Miller, 250 W 620, 27 NW (2d) 731. Compare Remington v. Cummings, 5 W 138.

In a proceeding by the administrators of the estate of a deceased accommodation maker of judgment notes, wherein judgment was entered in favor of the administrators, without process, on the warrants of attorney contained in the notes, it appeared on the face of the record that the notes had been paid by the administrators, and that the warrant of attorney in each note only authorized the confession of judgment for such amount as might appear to be "due and unpaid thereon," the judgment so entered was void for want of jurisdiction of the court to enter it, and it should have been vacated on motion made therefor. Halbach v. Halbach, 259 W 329, 48 NW (2d) 617.

See note to 269.46, on relief from judgments,

orders and stipulations, citing Uebele v. Rosen, 2 W (2d) 339, 86 NW (2d) 439.

270.70 History: Sup. Ct. Order, 239 W viii; Stats. 1943 s. 270.70; 1961 c. 495.

Editor's Note: For background information see comment of Advisory Committee under 270.65.

270.71 History: 1856 c. 120 s. 190; R. S. 1858 c. 132 s. 34; R. S. 1878 s. 2897; Stats. 1898 s. 2897; 1925 c. 4; Stats. 1925 s. 270.71; Sup. Ct. Order, 214 W vi; 1955 c. 553.

Where only a portion of a judgment was reversed and a new judgment was entered by the trial court, such new judgment being in substance merely a modifying or additional one, the new judgment is not erroneous because it contains no order as to that part of the prior judgment which is undisturbed. Jones v. Jones, 71 W 513, 38 NW 88.

270.72 History: 1856 c. 120 s. 191; R. S. 1858 c. 132 s. 35; R. S. 1878 s. 2898; Stats. 1898 s. 2898; 1925 c. 4; Stats. 1925 s. 270.72; Sup. Ct. Order, 275 W vii.

A motion for execution on a judgment is no part of the record. Thomas v. Savage, 8 W 160.

Proof of filing a lis pendens is no part of the record. Manning v. McClurg, 14 W 351.

The statute declares that the roll shall contain all orders and papers in any way involving the merits and necessarily affecting the judgment; and this includes a stipulation between the parties, the order for attorney's fees, and the taxation of costs. Cord v. Southwell, 15 W 211.

Orders (and affidavits used on hearing same) which involve merely practice regulations, and not the merits, are not part of the record. Cornell v. Davis, 16 W 686.

The fact that no judgment roll has been made up is no ground for setting aside the judgment. Lathrop v. Snyder, 17 W 110.

On appeal from arbitrators all affidavits relating to any application concerning the award are part of the record. Dundon v. Starin, 19 W 261.

After a pleading has been amended the original pleading drops out. Folger v. Boynton, 67 W 447, 30 NW 715.

An appeal from a judgment brings up all the proceedings in the action subsequent to the judgment and prior to making the return to the appeal which affects the judgment in any manner. Such proceedings are not brought up for reversal or affirmance or review, but that the court may know whether anything has transpired in the case after judgment which will affect the determination of the appeal. German M. F. Ins. Co. v. Decker, 74 W 556, 43 NW 500.

Unless a file satisfying the requirements of sec. 2898, Stats. 1898, is transmitted to the supreme court, the appeal will be dismissed. Sutton v. Chicago, St. P., M. & O. R. Co. 106 W 225, 82 NW 137.

An order before judgment requiring money to be paid into court to abide the result of the action is included. Maahs v. Antigo L. Co. 156 W 1, 145 NW 222.

270.73 History: 1899 c. 14 s. 1 to 3; Supl. 1906 s. 2898a; 1911 c. 663 s. 432; 1925 c. 4; Stats. 1925 s. 270.73; 1935 c. 541 s. 171; Sup. Ct. Order, 275 W vii.

270.74 History: R. S. 1849 c. 102 s. 16; R. S. 1858 c. 132 s. 37; R. S. 1878 s. 2899; Stats. 1898 s. 2899; 1925 c. 4; Sup. Ct. Order, 221 W v; Sup. Ct. Order, 275 W viii.

Immaterial inaccuracies in docketing a judgment do not affect its lien. The docket is constructive notice to the extent to which information could be gained by actually examining it. Hesse v. Mann, 40 W 560.

Where a judgment was docketed out of its chronological order in docket "B," which was not then used, instead of in docket "C," then in use, such docket was constructive notice of the judgment. Hesse v. Mann, 40 W 560.

It is only by a sufficient and legal docketing of the judgment that it can become a lien on the real estate of the debtor. The docket entry of a judgment against Edward Davis was not constructive notice of a lien on the real estate of E. A. Davis or Edward A. Davis, so as to affect the title of a subsequent purchaser. Davis v. Steeps, 87 W 472, 58 NW 769.

It is necessary to enter judgments in a book required by sec. 2899, R. S. 1878, and where a mortgage was executed and recorded before the judgment was docketed, it will be prior in lien to that judgment. McKenna v. Van Blarcom, 109 W 271, 85 NW 322.

A judgment in a paternity proceeding, not adjudging present payment, cannot be docketed so as to be a lien. Barry v. Niessen, 114 W 256, 90 NW 166.

In case a judgment is not indexed it does not become a lien upon the debtor's real estate as against those in the meantime taking security thereon without actual notice. Wisconsin M. & S. Co. v. Kriesel, 191 W 602, 211 NW 795.

270.745 History: 1935 c. 519; Stats. 1935 s. 270.745.

270.75 History: R. S. 1849 c. 88 s. 184, 185; 1855 c. 31 s. 2; 1858 c. 141; R. S. 1858 c. 120 s. 170, 171, 174; 1871 c. 62; R. S. 1878 s. 2900; Stats. 1898 s. 2900; 1925 c. 4; Stats. 1925 s. 270.75; 1967 c. 276 ss. 39, 40.

An appeal from the judgment of a justice does not prevent the filing of a transcript. Steckmesser v. Graham, 10 W 37.

The circuit court cannot, on motion showing irregularity or even want of jurisdiction before the justice, set aside such judgment. It seems that the extent of its power is to strike the transcript from its files and records. Mabbett v. Vick, 53 W 158, 10 NW 84.

Where a void judgment has been docketed the circuit court may vacate docket entries and strike the transcript from the files. But a court of equity will not interfere if the judgment is not inequitable. Thomas v. West, 59 W 103, 17 NW 684.

Sec. 2900, R. S. 1878, must be followed in every material particular in order to give validity to the transcript of the justice's judgment. Duecker v. Goeres, 104 W 29, 80 NW 91.

Sec. 2900, Stats. 1898, is not in conflict with sec. 2968, and both should be enforced. McCormick v. Ryan, 106 W 209, 82 NW 137.

The statute limiting action upon a judgment to 6 years does not apply where a transcript has been filed under sec. 2900, Stats. 1898. Sullivan v. Miles, 117 W 576, 94 NW 298.

Upon the nonappearance of garnishees in a justice court judgment was entered against them, and after the expiration of the time for appeal a transcript of this judgment was filed in the circuit court and an execution issued thereon. On motion of the garnishees, the circuit court struck the transcript from the records and stayed execution. The circuit court did not have the power to strike the transcript of this judgment from its files and dockets, since it acquires power to review the judgment of an inferior court only by appeal, by common-law writ or by an equitable action. Wernick v. Roth, 195 W 519, 218 NW 812.

The act of a clerk in filing the docket transcript of a judgment is ministerial and not void though done on a nonjuridical day; and the judgment creditors acquired the same lien as if the act was done on any other day. In re Worthington, 7 Biss. 455.

270.76 History: 1855 c. 31 s. 1; R. S. 1858 c. 120 s. 173; R. S. 1858 c. 132 s. 36; R. S. 1878 s. 2901; Stats. 1898 s. 2901; 1925 c. 4; Stats. 1925 s. 270.76; 1935 c. 519; 1935 c. 541 s. 172; 1939 c. 513 s. 52; 1955 c. 553.

270.78 History: 1889 c. 380; Ann. Stats. 1889 s. 2901a; Stats. 1898 s. 2901b; 1925 c. 4; Stats. 1925 s. 270.78; 1935 c. 541 s. 174; Sup. Ct. Order, 275 W viii.

270.79 History: 1856 c. 120 s. 192; R. S. 1858 c. 132 s. 36; 1866 c. 136; R. S. 1878 s. 2902; 1883 c. 25; 1885 c. 200; Ann. Stats. 1889 s. 2902, 2905a, 2969a; Stats. 1898 s. 2902; 1925 c. 4; Stats. 1925 s. 270.79; 1935 c. 541 s. 175; Sup. Ct. Order, 229 W vii; 1955 c. 553; 1957 c. 572.

Revisers' Note, 1878: Residue of section 36, chapter 132, R. S. 1858, as amended by section 1, chapter 136, Laws 1866, amended. It is provided that the lien of the judgment shall be for ten years from its rendition instead of its first docketing because a uniform rule can thus be applied to all, including justices judgments, and the rule is the same as now in circuit courts if the judgment be docketed, as the law directs, immediately on its rendition. When a judgment is stayed, the provision now is that the period of stay is not to be counted. This may operate hardly on searchers for title and incumbrances, and work injustice. It tends greatly to render the docket unreliable, and to necessitate a perhaps difficult inquiry. To relieve this, and at the same time afford the relief due the judgment creditor, it is provided he may cause to be entered on the docket a notice of the interruption, and that only the time after such a notice is entered will be deducted from the time. It is also provided that when a judgment appealed from shall be affirmed or appeal dismissed and the record come back, the clerk shall so enter it and thus restore the lien. Also amended to permit a similar relief by transcript to another county. The time lost during the pendency of the appeal when there is no lien is not credited to the judgment debtor, but remains a part of the ten years because the security is substituted therefor, and the extension of liens indefinitely is of doubtful policy.

Editor's Note: On the background of sec. 2902, R. S. 1878, see Gilbert v. Stockman, 81 W 602, 606-607, 51 NW 1076, 1077-1078.

A judgment is a lien on land of a debtor conveyed in fraud of creditors. Eastman v. Schettler, 13 W 325. See also Van Camp v. Peerenboom, 14 W 65.

Land subject to a judgment lien is not discumbered by its afterwards becoming a homestead. Upham v. Second Ward Bank, 15 W 449.

A judgment against a nonresident served by publication is good only against property specified in an affidavit for publication. Jarvis v. Barrett, 14 W 591; Jones v. Spencer, 15 W 583.

After ch. 137, Laws 1858, took effect a judgment lien did not attach to a homestead. Smith v. Omans, 17 W 395.

Ch. 137, Laws 1858, exempting the homestead from judgment liens, did not apply to judgments previously rendered. Baltimore Annual Conference v. Schell, 17 W 308; Dopp v. Albee, 17 W 590.

A judgment void for want of service of summons is not a lien. Anderson v. Coburn, 27 W 558.

A judgment docketed after sale and payment of consideration but before conveyance by a debtor is not a lien. Goodell v. Bloomer, 41 W 436.

Upon the sale of lands occupied as a homestead the lien of a judgment against the vendor will not attach to such lands unless it appears that the sale was merely colorable and made for the purpose of enabling the judgment debtor to have the advantage of another homestead while his former homestead was held for his use and benefit by the grantee. Carver v. Lassallette, 57 W 232, 15 NW 162.

A judgment ceases to be a lien on real property after the expiration of 10 years from its rendition. Collins v. Smith, 75 W 392, 44 NW 510.

The lien of a judgment attaches to the real property of the judgment debtor in the county in which the judgment is docketed, not to such property therein the title to which appears by the records to be in the debtor. Hence, a judgment creditor who purchases land sold on an execution in his favor acquires only such an interest therein as the debtor actually had. Main v. Bosworth, 77 W 660, 46 NW 1043; Stanhilber v. Graves, 97 W 515, 73 NW 48.

Where a transcript of a judgment from a justice court is filed in the circuit court, it is essential that the date of its rendition be shown. Duecker v. Goeres, 104 W 29, 80 NW 91.

A judgment docketed under sec. 2902, Stats. 1898, does not become a specific lien upon land fraudulently conveyed within the meaning of sec. 2320. French L. Co. v. Theriault, 107 W 627, 83 NW 927.

Where a mortgage was executed and recorded before a judgment was docketed it is a prior lien to the judgment. McKenna v. Van Blarcom, 109 W 271, 85 NW 322.

Where a judgment is rendered in bastardy

proceedings for future payments to the plaintiff it cannot be docketed so as to be a lien upon real estate of defendant, but judgment for sums already due can be so docketed. Barry v. Niessen, 114 W 256, 90 NW 166.

Unless an entry is made on the docket, as provided by sec. 2902, of the fact that the enforcement of a judgment has been suspended by the death of the judgment debtor as provided by sec. 2978, there is no interruption of the running of the 10-year period during which the judgment remains a lien. Delle v. Boss, 164 W 392, 160 NW 179.

A lien arising from the docketing of a judgment does not constitute or create an estate, interest, or right of property, but merely gives a right to levy to exclusion of adverse interests subsequent to judgment. Musa v. Segelke & Kohlhaus Co. 224 W 432, 272 NW 657.

The lien of a judgment on real estate attaches only to the interest of the judgment debtor in the property, and is inferior to the equitable lien of a vendee under a prior land contract for payments made prior to the judgment, even though the land contract was not recorded and the judgment was duly docketed. Wenzel v. Roberts, 236 W 315, 294 NW 871.

Although the docketing of a judgment is not notice to persons subsequently dealing with the judgment debtor, nevertheless, under 270.79 (1), the lien of a judgment attaches to the real property of the debtor at the time of the docketing, and, since a subsequent conveyance by the judgment debtor does not defeat the lien, purchasers of lands must search the record for judgments against the debtor at their peril. R.F. Gehrke Sheet Metal Works v. Mahl, 237 W 414, 297 NW 373.

See note to 269.46, on relief from judgments, orders and stipulations, citing State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

A judgment does not become a lien against property of the debtor which he has contracted to sell by valid contract. As to such property the debtor has only a security title. Mueller v. Novelty Dye Works, 273 W 501, 78 NW (2d) 881.

With reference to an issue of priority, a judgment did not become a valid lien until the date when it was properly docketed by the clerk of court in the manner required by 270.79 in order to become a lien. Builder's Lumber Co. v. Stuart, 6 W (2d) 356, 94 NW (2d) 630.

270.795 History: 1963 c. 459; Stats. 1963 s. 270.795.

270.80 History: 1880 c. 93; Ann. Stats. 1889 s. 2902a; Stats. 1898 s. 2902a; 1925 c. 4; Stats. 1925 s. 270.80; 1935 c. 541 s. 176.

Where the supreme court modified a judgment of the lower court in favor of the plaintiff and remitted its judgment for costs in favor of the defendant to the lower court, it was within the power and discretion of the lower court to offset the amount of such supreme court judgment against the amount of the lower court judgment. Hyman-Michaels Co. v. Ashmus Equip. Sales Corp. 274 W 527, 80 NW (2d) 446.

270.81 History: 1889 c. 146; Ann. Stats. 1889 s. 2902b; Stats. 1898 s. 2902b; 1925 c. 4; Stats. 1925 s. 270.81; 1935 c. 68.

Editor's Note: Prior to August 1, 1888, it was not necessary to docket a judgment of the federal court in any county; the lien thereof extended throughout the district of such federal court without being docketed in the state court. Massingill v. Downs, 7 How. 760; Shrew v. Jones, 2 McLean 78, Fed. Cas. 12.818; Manhattan Co. v. Evertson, 6 Paige 457. On August 1, 1888, congress enacted the first clause of the statute, and on March 2, 1895, congress added the provision that docketing in any state office within the same county should not be required. The current statute is 62 US Stats. at L 958 (28 U.S.C. 1962).

270.82 History: R. S. 1878 s. 2903; Stats. 1898 s. 2903; 1925 c. 4; Stats. 1925 s. 270.82; 1935 c. 541 s. 177.

270.84 History: R. S. 1849 c. 102 s. 18; R. S. 1858 c. 132 s. 39; R. S. 1878 s. 2905; 1885 c. 200 s. 2; Ann. Stats. 1889 s. 2905a; Stats. 1898 s. 2905; 1925 c. 4; Stats. 1925 s. 270.84.

There is no liability under 270.84 for the failure of the clerk to docket a judgment at the proper time unless the person asserting the liability has sustained actual loss or damage. Wisconsin M. & S. Co. v. Kriesel, 191 W 602, 211 NW 795.

270.85 History: 1860 c. 284; R. S. 1878 s. 2906; Stats. 1898 s. 2906; 1899 c. 351 s. 34; 1925 c. 4; Stats. 1925 s. 270.85; 1935 c. 541 s. 179.

The method of assigning a judgment provided in sec. 2906, Stats. 1898, is not exclusive and the assignment which does not comply with it is good as between the parties. Cowie v. National Ex. Bank, 147 W 124, 132 NW 900.

270.86 History: R. S. 1849 c. 102 s. 24; R. S. 1858 c. 132 s. 47; R. S. 1878 s. 2907; Stats. 1898 s. 2907; 1925 c. 4; Stats. 1925 s. 270.86; 1935 c. 541 s. 180.

270.87 History: R. S. 1849 c. 102 s. 20 to 22; 1853 c. 82 s. 1; R. S. 1858 c. 132 s. 41 to 43, 45; 1869 c. 82 s. 1, 2; R. S. 1878 s. 2908; Stats. 1898 s. 2908; 1925 c. 4; Stats. 1925 s. 270.87; 1935 c. 541 s. 181.

Where a judgment is discharged wrongfully, a subsequent judgment creditor or mortgagee is not prejudiced by having the discharge set aside; and delay to enforce a mortgage on faith of discharge does not change the rule. Downer v. Miller, 15 W 612.

An attorney may receive the amount of a judgment and discharge same, and the judgment creditor is bound, except as to those having notice of revocation of his authority. Flanders v. Sherman, 18 W 575.

As to the rights of a judgment debtor who has procured from one of his 2 joint judgment creditors a discharge of the whole judgment, see Gaynor v. Blewett, 85 W 155, 55 NW 169.

270.88 History: R. S. 1849 c. 102 s. 22; R. S. 1858 c. 132 s. 43; R. S. 1878 s. 2909; Stats. 1898 s. 2909; 1925 c. 4; Stats. 1925 s. 270.88.

270.89 History: 1853 c. 82 s. 1; R. S. 1858 c. 132 s. 45; R. S. 1878 s. 2910; Stats. 1898

s. 2910; 1925 c. 4; Stats. 1925 s. 270.89; 1935 c. 541 s. 182.

270.90 History: 1869 c. 63 s. 1; R. S. 1878 s. 2911; Stats. 1898 s. 2911; 1925 c. 4; Stats. 1925 s. 270.90; 1935 c. 541 s. 183.

Where defendant in replevin had judgment for a return of the property, or if return could not be had for the value, and an execution had been issued the plaintiff cannot have the judgment satisfied under the practice authorized by sec. 2911, R. S. 1878, except upon satisfactory proof that the judgment has been fully satisfied by a return of all the property in suit or by a tender of such return, and if such tender was made before execution issued, that such tender was kept good. The return of the sheriff that a return could not be had cannot be contradicted by the parties. Irvin v. Smith, 66 W 113, 27 NW 28, 28 NW 351.

If a judgment has been paid the debtor has a remedy by motion in the court which rendered it. One circuit court has no jurisdiction to restrain the enforcement of a judgment rendered in another. Cardinal v. Eau Claire L. Co. 75 W 404, 44 NW 761.

270.91 History: 1853 c. 82 s. 1, 2; R. S. 1858 c. 132 s. 45, 46; R. S. 1878 s. 2912; Stats. 1898 s. 2912; 1925 c. 4; Stats. 1925 s. 270.91; 1935 c. 541 s. 184; 1943 c. 355.

Revisor's Note, 1935: The face of the execution should state who is liable and for how much. [Bill 50-S, s. 184]

A judgment against an administrator of an estate based upon his failure to withdraw estate funds from a bank of which he was an officer and director before it failed in 1935 was discharged in bankruptcy since he was guilty of no more than negligence, despite the conclusion in the judgment that he was guilty of a defalcation. Aetna Casualty & Surety Co. v. Lauerman, 12 W (2d) 387, 107 NW (2d) 605.

Where a bankrupt, pursuant to 270.91 (2), filed a petition praying that a certain outstanding judgment be satisfied, and placed in evidence the order of discharge in bankruptcy, the objecting judgment creditor then had the burden of producing evidence in avoidance of the discharge. In determining whether the liability of a judgment debtor is dischargeable in bankruptcy under 17 (a) of the Bankruptcy Act (11 USCA, sec. 35), Wisconsin follows the liberal practice of permitting a court to look behind a judgment and to consider the entire record, and the actual fact disclosed thereby as the basis for the adjudged liability will govern. Bastian v. LeRoy, 20 W (2d) 470, 122 NW (2d) 386.

270.91 (2) does not apply where a cognovit note was listed and discharged in bankruptcy but where the judgment was taken after the discharge and plaintiff took no action for more than one year after knowledge of its entry; nevertheless the judgment will be vacated as being a constructive fraud on the court which entered it. State Central Credit Union v. Bayley, 33 W (2d) 367, 147 NW (2d) 265.

270.92 History: 1870 c. 10 s. 1; R. S. 1878 s. 2913; Stats. 1898 s. 2913; 1925 c. 4; Stats. 1925 s. 270.92; 1935 c. 541 s. 185.

270.93 History: Sup. Ct. Order, 229 W vii; Stats. 1939 s. 270.93.

270.94 History: R. S. 1849 c. 102 s. 23; R. S. 1858 c. 132 s. 44; R. S. 1878 s. 2915; Stats. 1898 s. 2915; 1925 c. 4; Stats. 1925 s. 270.94; 1935 c. 541 s. 187.

A penalty is not recoverable where there was no intentional wrong in refusing but a reliance in good faith upon some supposed legal right. Johnson v. Huber, 117 W 58, 93 NW 826.

270.95 History: 1856 c. 120 s. 13; R. S. 1858 c. 122 s. 10; R. S. 1878 s. 2916; Stats. 1898 s. 2916; 1925 c. 4; Stats. 1925 s. 270.95; 1967 c. 276 s. 39; 1969 c. 87.

Legislative Council Note, 1969: Since this bill adopts the execution procedure in courts of record, this section is amended to make this procedure uniform in all courts. (Bill 9-A)

An order granting leave to bring an action upon a judgment is not void for want of jurisdiction because less than 8 days intervened between the notice of the motion and the granting of the order. Cole v. Mitchell, 77 W 131, 65 NW 948.

Sec. 2916, R. S. 1878, does not authorize an order which directs that an existing judgment be renewed and revived. The effect of such order was a new judgment on the former one. That could only be obtained by an action. Ingraham v. Champion, 84 W 235, 54 NW 398.

The assignee of the judgment is the same party as the assignor in the contemplation of the statute so that the assignee must obtain leave to bring an action. Gould v. Jackson, 257 W 110, 42 NW (2d) 489.

A judgment creditor was properly granted leave to bring an action on his judgment on a showing that the 20-year period of limitations subsequent to the rendition of the judgment was about to expire, and that the plaintiff thereafter would be barred from obtaining execution or bringing an action on the judgment. First Wisconsin Nat. Bank v. Rische, 15 W (2d) 564, 113 NW (2d) 416.

270.96 History: 1949 c. 257; Stats. 1949 s. 270.96; 1951 c. 247; 1965 c. 379.

Editor's Note: For foreign decisions construing the "Uniform Enforcement of Foreign Judgments Act" consult Uniform Laws, Annotated.

CHAPTER 271.

Costs and Fees in Courts of Record.

271.01 History: 1856 c. 120 s. 215; R. S. 1858 c. 133 s. 38; 1859 c. 35; 1862 c. 60; R. S. 1878 s. 2918; 1881 c. 52; Ann. Stats. 1889 s. 2918; Stats. 1898 s. 2918; 1925 c. 4; Stats. 1925 s. 271.01; 1935 c. 541 s. 188; 1949 c. 301; 1967 c. 276 s. 40; 1969 c. 87.

Comment of Advisory Committee, 1949: Section 271.01 is very complex. It had 7 subsections which overlap. It has caused much litigation. The proposed amendment simplifies 271.01. The necessity for some action is illustrated by the following cases: Field v. Elroy, 99 W 412; Olson v. U. S. Sugar Co., 140 W 309; Rusch v. Noack, 205 W 660. Old subsection (7) covers "an action believed to be