CHAPTER 270.

ISSUES, TRIALS AND JUDGMENTS.

270.01 Kinds of issue. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other; they are of two kinds:

(1) Of law.

(2) Of fact.

Note: It is presumed that when a statute has been construed by the supreme court, and the statute is substantially reenacted, the legislature adopts such construction, unless the contrary is clearly shown by the language of the reenactment. When an amount is specified to be paid for one or more breaches of a contract, and some breaches may be but minor and others of greater consequence, and the damages are uncertain and cannot be measured by any fixed rule, the amount specified will be held to be a penalty and not liquidated damages. State v. Hackbarth, 228 W 108, 279 NW 687.

270.02 Issue of law. An issue of law arises upon a demurrer to the complaint, answer or reply or to some part thereof.

270.03 Issue of fact defined. An issue of fact arises:

(1) Upon a material allegation in the complaint, controverted by the answer; or

(2) Upon a material allegation of any counterclaim in the answer, controverted by the reply; or

(3) Upon a material allegation of new matter in the answer, not requiring a reply, unless an issue of law is joined thereon; or

(4) Upon a material allegation of new matter in the reply, unless an issue of law is joined thereon.

270.04 Issues of law; trial. When issues both of law and of fact arise upon the pleadings, the issue of law must be first tried unless the court otherwise direct. [*1935 c. 541 s. 149*]

270.05 Feigned and special issues. Feigned issues are abolished, and instead thereof, when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for trial may be made, stating distinctly and plainly the question of fact to be tried. [*1935 c. 541 s. 150*]

270.06 Trial defined. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Note: A default is where there is no trial of the issues. Kelm v. Kelm, 204 W 301, 235 NW 787.

Under the definition of "trial" in this section, that word does not necessarily mean the judicial examination of issues of fact, as well as of issues of law. Kuehnel v. Registration Board of Architects, 243 W 188, 9 NW (2d) 630.

270.07 Issues, by whom tried, when tried. (1) An issue of fact in an action for the recovery of money only, or of real or personal property or for divorce on the ground of adultery, must be tried by a jury except as otherwise provided in this chapter and except that equitable defenses or counterclaims are triable by the court. Every other issue must be tried by the court, but the court may order the whole issue or any specific question of fact involved therein to be tried by a jury; or may refer an issue as provided in section 270.34.

(2) When any matter in abatement of any action triable by jury is set up, which involves the finding of any fact, the same shall be found by a special verdict of a jury, unless a trial by jury be waived; and when there is any other issue of fact in the action, the same may be submitted to the same jury at the same time; otherwise the issue in abatement shall first be tried. When the issues of fact are triable by the court, any issue in abatement may be tried at the same time as the other issues of fact. [*Court Rule XIII s. 2, 3; Court Rule XIV; Supreme Court Order, effective Jan. 1, 1934*]

Note: Claim against corporation based on allegations of corporation's fraud, filed in proceedings for winding up of corporation's affairs, is treated as in equity and is triable to court without a jury. In re Acme Brass & Metal Works, 225 W 74, 272 NW 356.

The trial 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, wherein 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 sound discretion of the trial court. Reynolds v. Wargus, 240 W 94, 2 NW (2d) 842.

A dissolved corporation continued to be a body corporate for the purpose of prosecuting and defending actions, etc., for 3 years after the filing and recording of the resolution of dissolution, but on the expiration of such 3-year period the corporation ceased to exist, so that an action then pending against it, and not yet tried, was abated. West Milwaukee v. Bergstrom Mfg. Co., 242 W 137, 7 NW (2d) 587.

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

270.08 Order of trial; separate trials. When issues arise triable by a jury and other issues triable by the court, the court shall, in its discretion, direct the trial of the one or the other to be first had, according to the nature of the issues and the interests of justice, and judgment shall be given upon both the verdict and the finding of the court, when both shall be found. But no issue need be tried, the disposition of which is not necessary to enable the court to render the appropriate judgment. A separate trial between the plaintiff and any of the several defendants may be allowed by the court whenever in its opinion justice will be thereby promoted. [*Supreme Court Order, effective July 1, 1945*]

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

Note: 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 course of 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.

270.09 [*Second and third sentences renumbered section 252.09; balance repealed by Supreme Court Order, effective Jan. 1, 1934*]

270.10 [*Renumbered section 263.40 by Supreme Court Order, effective Jan. 1, 1934*]

270.11 Hearing on demurrer. The issue raised by a demurrer may be brought on for trial before the court at any time upon five days' notice. [*1935 c. 541 s. 151*]

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 No. 50 S, s. 151)

270.12 Calendar. (1) CLERK TO PREPARE. The clerk shall prepare a calendar for each term of the circuit court of all actions which are for trial as shown by the notices filed including those covered by section 252.10, containing the title of each action, the names of the attorneys, and the date of the issue, and arranged according to the dates of issues as follows: (a) Criminal cases; (b) civil jury issues; (c) issues of fact for court; (d) issues of law. In which order the calendar shall be disposed of unless for convenience of parties, the dispatch of business, or the prevention of injustice, the court shall otherwise direct.

(2) LARGE CALENDARS. In circuit courts having one thousand or more causes on the term calendar, the clerk may, with the approval of the court, arrange the causes according to the date of filing the complaint, petition or other pleading necessary to commence the action or special proceeding or of the return on appeal and the serial record number of every cause shall be its calendar number.

(3) CONDITIONS PRECEDENT. The clerk shall not place any cause upon the calendar unless the state tax and two dollars clerk's fees shall have been paid and summons and complaint or copies thereof, shall have been filed in his office.

(4) CORRECTION OF CALENDAR. All motions to correct the calendar or to strike causes therefrom shall be made immediately after the calling of the calendar. Any cause in which notice of trial shall have been served at least ten days before the term but which was omitted from the calendar for want of a note of issue may be placed on the calendar at the foot of the proper class.

(5) CALENDARS DISTRIBUTED. When the calendar for any term is printed, a copy thereof shall be mailed or delivered to the presiding judge and to the reporter and to each attorney appearing thereon in any cause, at least four days before the term. [*Court Rule III; Supreme Court Order, effective Jan. 1, 1934*]

Note: A writ of prohibition will issue to enjoin a lower court from improperly setting a case down for trial against a defendant, where the order setting the case for trial is not appealable. State ex rel. Central Surety & Ins. Corp. v. Belden, 222 W 631, 269 NW 315.

270.125 Order of business. (1) MOTIONS, DEMURRERS. At the beginning of each term, after calling the calendar, the court shall hear motions and demurrers in causes to be tried on the merits at that term giving precedence to such as relate to actions for trial by jury.

(2) JURY TRIALS FIRST. On the first day of the term, unless otherwise ordered, the jury shall be called, and the trial of jury causes shall proceed.

(3) DAY CALENDAR. The criminal cases and the first six civil cases on the calendar shall be subject to call for trial upon the first day of the term. The clerk shall each day make up the following day's calendar, upon which he shall place such cases as the presiding judge shall direct.

(4) NOTICE TO PRISONERS. The district attorney shall, at least ten days before each general term of the court, inform prisoners awaiting trial of their right to counsel and to compulsory process to procure the attendance of witnesses.

(5) APPLICATIONS PUBLICLY ANNOUNCED. All applications to the court for orders or judgments, whether ex parte or otherwise, shall be publicly announced by the attorney making the application, and the clerk shall enter a brief statement thereof, with the action of the court thereon, in his minute book; and no court order shall be operative unless and until such entry is made, or unless the order shall be reduced to writing and signed. [*Court Rule IV; Supreme Court Order, effective Jan. 1, 1934; 1935 c. 541 s. 152; 43.08(2)*]

Note: The purpose of this section, providing that all applications to the court for orders shall be publicly announced by the attorney making the application and that the clerk shall enter a brief statement thereof, with the action of the court thereon, in his minute book, and that no court order shall be operative unless and until such entry be made, or unless the order is "reduced to writing and signed," 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 Power Co., 241 W 27, 4 NW (2d) 130.

270.13 Who may bring cause to trial. Either party may bring all the issues in an action to trial at any term at which the same are triable when a notice of trial has been duly served by either, and unless the court, for good cause, otherwise direct may, in the absence of the adverse party, proceed with his case and take a dismissal of the action or a verdict or judgment, as the case may require. No inquest shall hereafter be taken in any action.

270.14 Demurrers and motions, when heard. When, in any action noticed for trial, there shall be pending a demurrer to any pleading or a motion to strike out a pleading or any part thereof, or to make it more definite and certain, and the court shall think any

such proceeding by either party may have been taken for delay or that for any reason justice requires a more speedy disposition of the action the demurrer or motion may be disposed of at the commencement of the term and the action be tried at the same term, short leave to amend or plead over being given when necessary; and a continuance be granted only upon good cause shown, which the court may in discretion require to be such as is usually required to obtain a second continuance in other actions.

270.145 Continuances. (1) Motions for continuances (except from day to day or to some day during the term) shall be made on the first day of the term unless the cause alleged therefor occur or be discovered thereafter. No cause noticed for trial shall be continued without the consent of the parties or cause shown.

(2) An affidavit for a continuance shall state that the moving party has a valid cause of action or a defense, in whole or in part, and if in part it shall specify what part; that the case has been fully and fairly stated to his counsel, giving the name and place of residence of such counsel, and that upon the statement thus made he is advised by his counsel that he has a cause of action or defense to the cause in whole or in part; and that he has used due diligence to prepare for trial, and the nature and kind of diligence used. If the application is based on the absence of a witness or document the affidavit shall state the name of the absent witness and his residence, if known, or the nature of any document wanted, and where the same can be found; that no other evidence is at hand or witness is in attendance or known to him whose testimony could have been procured in time, that the party can safely rely upon to prove the facts which he expects and believes can be proved by such absent witness or document; that the party is advised by his counsel, and believes, that he cannot safely go to trial without such evidence, that such witness is not absent by his consent, connivance or procurement, and the endeavors that have been used for the purpose of procuring such evidence; and particularly the facts which the absent document or witness is expected to prove, with the ground of such expectation.

(3) If the adverse party admits in writing or in open court that the witness, if present, would testify as stated in the affidavit for continuance, the application for a continuance may be denied, and the statement of facts aforesaid may be read as evidence, but the adverse party may controvert such statements, and such statements shall be subject to objection the same as a deposition.

(4) Where an application for a continuance is made by a party whose affidavit states that he has a valid defense to some part only of the other party's cause of action or demand, which he desires time to obtain testimony to establish, the application shall be denied if the other party withdraws or abandons that part of his cause of action or demand.

(5) When it shall appear to the court that the absent witness or desired evidence with reasonable diligence may be procured before the close of the term, the court may grant a continuance of the action from day to day or to some certain day in the term, upon the payment of such costs as it may deem just and proper.

(6) No continuance by the court or referee shall be granted unless by consent of parties except upon immediate payment of the fees of witnesses in actual attendance and reasonable attorney's fees. Costs of continuance shall be taxed by the clerk immediately and without notice. [*Court Rule XIX; Supreme Court Order, effective Jan. 1, 1934; 1935 c. 541 s. 153; 43.08(2)*]

Note: An application for a continuance is always addressed to the sound 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.

270.15 Drawing of petit jury. (1) At every term of the circuit court the clerk shall place in a box having one compartment only the names of all petit jurors in attendance who have been drawn and summoned according to law for service at such term, each name being written upon a separate ballot. The ballots shall be of the same size, as nearly as may be, of the same kind and color of paper, and be so folded that the name on each shall not be visible.

(2) When a jury issue is to be tried the clerk, under the direction of the court, shall openly draw out of said box, one at a time, as many ballots as may be necessary to secure a jury. Before drawing each ballot he shall close and shake the box so as to thoroughly mix the ballots and then draw out one without seeing the name written thereon, through an aperture in the box large enough only to conveniently admit his hand.

(3) The jury may consist of any number of persons less than twelve that the parties may agree upon. If there be no such agreement it shall consist of twelve persons so drawn who are not lawfully challenged, who are approved as indifferent between the parties and who are not discharged or excused.

(4) During a jury trial the ballots containing the names of the jurors must be kept in another box apart from the other ballots until the jury is discharged, and then they must

be again folded as above directed and returned to the box from which one by one they were drawn, and the same course must be taken as often as a jury is required.

(5) The ballot containing the name of a juror who is set aside or excused for any cause must be again folded in the same manner as before and returned to the box containing the undrawn ballots as soon as the jury is sworn.

(6) If an issue is brought to trial by jury while a jury is impaneled in another cause and not then discharged the court may order a jury for the trial of that issue to be drawn out of the box containing the ballots then undrawn; but in any other case the ballots containing the names of the petit jurors, returned at and attending the term, must be placed together in the same box before a jury is drawn therefrom.

270.16 Qualifications of jurors; examination. The court shall, on request of either party, examine on oath any person who is called as a juror therein to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection, and if it shall appear to the court that the juror does not stand indifferent in the cause another shall be called and placed in his stead for trial of that cause; provided, that nothing contained in this section shall be construed as abridging in any manner the right of either party in person or through his attorneys to examine any person so called in regard to his qualifications as fully as if this section did not exist. Every person summoned as a juror for any term shall be paid and discharged whenever it appears that he is a party to any action triable by jury at such term.

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

270.17 Newspaper information does not disqualify. It shall be no cause of challenge to a juror that he may have obtained information of the matters at issue through newspapers or public journals, if he shall have received no bias or prejudice thereby; or that he is an inhabitant of or liable to pay taxes in a county interested in the action.

270.18 Number of jurors drawn; peremptory challenges. A sufficient number of jurors shall be called in the action so that twelve shall remain after the exercise of all peremptory challenges to which the parties are entitled as hereinafter provided. Each party shall be entitled to three such challenges which shall be exercised alternately, the plaintiff beginning; and when any party shall decline to challenge in his turn, such challenge shall be made by the clerk by lot. The parties to the action shall be deemed two, all plaintiffs being one party and all defendants being the other party, except that in case where two or more defendants have adverse interests, the court, if satisfied that the due protection of their interests so requires, in its discretion, may allow to the defendant or defendants on each side of said adverse interests, not to exceed three such challenges.

270.19 Jurors; special panel. If any jury issue shall require trial at a time when the panel of jurors for the then current term is not in attendance, a jury may, in the discretion of the trial judge, be obtained in the following manner: At least three days before the day fixed by the presiding judge for such trial, the clerk of the court shall, in the presence of the presiding judge, and the attorneys for the respective parties, who shall be first given reasonable notice in time to attend, draw from the panel of jurors for the current term a number of jurors such as the court may specify so that not less than fourteen nor more than eighteen will remain after the exercise of all the peremptory challenges to which the parties are entitled under section 270.18; said challenges shall be then and there exercised as provided in said section; the remaining jurors shall be summoned to attend at the time fixed for the trial, and if after examination and all excuses for cause there shall remain more than twelve jurors, the first twelve on the list shall constitute the trial jury; if less than twelve remain the court may require the return of bystanders to fill the vacancy, unless the parties stipulate to try the case with a jury of less than twelve.

270.20 Jury may view premises, etc. The jury may, in any case, at the request of either party, be taken to view the premises or place in question or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision; provided, the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view; which expenses shall afterwards be taxed like other legal costs if the party who advanced them shall prevail in the action.

270.205 Examination of witnesses; arguments. On the trial not more than one attorney on each side shall examine or cross-examine a witness and not more than two attor-

neys on each side shall sum up to the jury, unless the judge shall otherwise order. The party having the affirmative shall be entitled to the opening and closing argument, and in the opening the points relied on shall be stated. The waiver of argument by either party shall not preclude the adverse party from making any argument which he would otherwise have been entitled to make. The court may before the argument is begun, limit the time of argument. [*Court Rule XXII; Supreme Court Order, effective Jan. 1, 1934*]

Note: 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 two 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.

270.21 Charge to jury; how given. The judge shall charge the jury and all such and subsequent instructions shall, unless a written charge be waived by counsel at the commencement of the trial be reduced to writing before being delivered or the same shall be taken down by the official reporter of the court. Each instruction asked by counsel to be given the jury shall be given without change or refused in full. If any judge shall violate any of the foregoing provisions or make any comments to the jury upon the law or facts without the same being so reduced to writing or taken down, the verdict shall be set aside or the judgment rendered thereon reversed unless at the time of submission to the jury there was no jury issue upon the evidence. The reporter shall take down all that the judge says during the trial to the jury or in their presence of or concerning such cause. Requests for instructions to the jury must be submitted in writing before the argument to the jury is begun, unless in the opinion of the trial judge, special circumstances excuse failure to so submit such requests. [*Court Rule XXIII s. 2; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective July 1, 1945*]

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

Note: The court is authorized to instruct the jury on the law of libel notwithstanding the provision of sec. 3, art. I, Const., and an instruction informing jury that they were judges of the law, but that they should follow the judge's instructions thereon unless convinced that he was wrong, was advisory rather than directory and not erroneous. Branigan v. State, 209 W 249, 244 NW 767.

A defendant cannot complain of errors which are favorable to him. State v. Galle, 214 W 46, 252 NW 277.

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 case presented the simple question whether the relation of cause and effect existed between the negligence of the defendants and the damages sustained by the plaintiffs is held insufficient as not impressing upon the jury that the cause must be the efficient cause and as not limiting the remoteness thereof. Walker v. Kroger G. & B. Co., 214 W 519, 252 NW 721.

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

Instructions to jury examined and sustained. Koss v. State, 217 W 325, 258 NW 860.

An instruction in substance 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 such instruction without qualification was not error. Balzer v. Caldwell, 220 W 270, 263 NW 705.

A jury should not be instructed as to effect of their answers to questions submitted, and erroneous instructions in such respect are generally prejudicial. De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

An instruction, given in connection with a question on control submitted as to each driver, that it is the duty of a driver to keep a proper lookout for other persons who may be using the same highway, and that it is the duty of a driver to have his vehicle under such control that he may be able to take such precautions, if any be necessary, to avoid the accident, was erroneous, since the duty of a driver is not to have his car under such control as to enable him to avoid accident, but to use ordinary care to that end. Such erroneous instruction, since it covered lookout by inference as well as control, and since neither driver had such control of his car or kept such lookout as enabled him to avoid accident, compelled the jury to find both drivers guilty as to both control and lookout, and the error of the trial court in giving such instruction and the error of the jury in applying it as to one driver but not as to the other were prejudicial. Schulz v. General Casualty Co. 233 W 118, 288 NW 803.

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 Casualty Co. 233 W 118, 288 NW 803.

In instructions on damages stating the amounts demanded for various items by the plaintiff in his complaint in a death case, including a demand for the statutory limit of $2,500 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.

It is reversible error for either the trial 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 Indemnity Co., 234 W 407, 291 NW 313.

An instruction that it was for the jury to determine the facts from the evidence "and the law from either the court or the arguments of counsel" was error with respect to the quoted portion. Stockman v. State, 236 W 27, 293 NW 923.

An instruction to the effect that a defendant would be guilty of a violation of 340.45, if she obtained money from another by threatening to accuse him of a crime or to injure him in his trade, profession, or

business "or" with intent to extort money from him constituted prejudicial error, in that, by reason of the insertion of the word "or" between the words "business" and "with," the element "with intent to extort money" was stated, not as an essential accompaniment to the acts preceding it, but as an independent and separate substantive offense. Stockman v. State, 236 W 27, 293 NW 923.

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, although the defendant was found negligent as to control, there were also 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 Telephone Co., 240 W 215, 2 NW (2d) 242.

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, and cannot consider alleged error relating to instructions or failure to instruct. 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, resulting in a finding fatal to the defendant insurers' defense. Perkie v. Carolina Ins. Co., 241 W 378, 6 NW (2d) 195.

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. O'Donnell v. Kraut, 242 W 268, 7 NW (2d) 889.

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.

The trial court's failure to instruct more specifically on the subject of intent to defraud, as the defendant requested, was not reversible error, where the defendant's request in that respect was but part of an entire requested instruction which included requests that were erroneous and inapplicable, which entire requested instruction the trial court was required, either to give without change or to refuse in full. State v. Legg, 243 W 449, 10 NW (2d) 187.

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.

A colloquy whereby the attorney for the plaintiff, at the conclusion of the charge and after the jury had retired, asked whether the court instructs the jury as to the burden of proof in respect to the question of comparative negligence, and the court answered in the negative, did not amount to a request for such an instruction and, if it did, it came too late. Derge v. Carter, 248 W 500, 22 NW (2d) 505.

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.

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 an abuse of discretion. Levandowski v. Studey, 249 W 421, 25 NW (2d) 59.

The refusal of the trial 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, and the additional questions requested were inconsistent questions going to matters of defense and would have constituted cross-examination of the jury, which is not permissible. Levandowski v. Studey, 249 W 421, 25 NW (2d) 59.

In determining whether prejudicial error was committed by the trial court in its instructions, the charge must be considered as a whole. Fischer v. Harmony Town Ins. Co. 249 W 438, 24 NW (2d) 887.

Failure of the trial 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, nor any request for such an instruction on that subject. Jorgenson v. Hillestad, 250 W 592, 27 NW (2d) 709.

The complaint alleged that the defendant had agreed with the plaintiff who was his mother-in-law 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.

270.22 Charge to jury filed. As soon as any charge has been given to the jury it shall be placed and remain on file among the papers of the case. When delivered orally the reporter shall immediately transcribe the same in longhand and file it, without special compensation therefor. [*1935 c. 541 s. 154*]

270.23 Jury may be reinstructed. When a jury, after due and thorough deliberation upon any cause, shall return into court without having agreed on a verdict the court may state anew the evidence or any part of it and may explain to them anew the law applicable

to the case, and may send them out again for further deliberation; but if they shall return a second time, without having agreed on a verdict, they shall not be sent out again without their own consent unless they shall ask from the court some further explanation of the law.

Note: 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 of at least ten jurors, 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.

270.24 No nonsuit after argument. The plaintiff shall have no right to submit to a nonsuit after the argument of the cause to the jury shall have been concluded or waived.

Note: The amendment made to this section by section 48, chapter 473, Laws 1927, did not change the law as to the right of a plaintiff to a voluntary nonsuit. Baker Fentress & Co. v. Young, 55 F (2d) 53.

For a case of misdirected verdict see annotation to 270.205, citing United States F. & G. Co. v. Waukesha L. & S. Co., 226 W 502, 277 NW 121.

Refusal to grant a voluntary dismissal of an action for injury sustained in a Wisconsin automobile collision 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 especially where defendants and the majority of the witnesses resided in Wisconsin. Nelson v. Devney, 102 F (2d) 487.

270.25 Verdicts; five-sixths; directed. (1) A verdict or answer agreed to by five-sixths of the jurors shall be the verdict or answer of the jury.

(2) When the court directs a verdict, it shall not be necessary for the jury to give their assent to the verdict but the clerk shall enter it as directed by the court as the verdict of the jury. [*Court Rule XXXIII s. 1; Supreme Court Order, effective Jan. 1, 1934; 1935 c. 541 s. 155, 156*]

Note: It was error to instruct "that if five-sixths of the jury, that is, all but two of you agree upon the answer of any question that is the verdict of the jury." Waters v. Markham, 204 W 332, 235 NW 797.

Where the jury's answer to one of several questions supported a judgment, it is immaterial whether the same ten jurors agreed upon all other questions submitted. Lefebvre v. Autoist M. Ins. Co., 205 W 115, 236 NW 684.

The verdict is fatally defective, where one juror disagreed on all answers concerning negligence of the defendants, the same juror and another disagreed on the answer relating to contributory negligence of the plaintiff, and the same juror and a third disagreed on the answer as to damages. Biersach v. Wechselberg, 206 W 113, 238 NW 905.

For control of courts over verdicts, see note to sec. 8, art. I, Const., citing State v. Kuenzli, 208 W 340, 242 NW 147.

A verdict may properly be directed only when the evidence gives rise to no dispute as to the material issues, or only when the evidence is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion. Rusch v. Sentinel-News Co., 212 W 530, 250 NW 405.

Where a jury with equal particularity finds two 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.

Verdicts of guilty of assault and of murder of the lowest degrees submitted, accompanied by a recommendation of clemency, were not subject to attack on the ground that the verdict must have resulted from the consent of the jury or of some of the jurors to convict providing clemency were granted. State v. Galle, 214 W 46, 252 NW 277.

Where an action for the death of the driver of an automobile in a collision was tried separately from actions by injured guests in the other automobile, 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 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 held for the jury. Whether the driver of the automobile in this case, who failed to see the truck parked on the highway at night in time to avoid a collision therewith, was negligent, is held for the jury, where, among other things, 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 was not warranted in setting aside a verdict in favor of the driver. Brothers v. Berg, 214 W 661, 254 NW 384.

Error in instructing that at least the same ten 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 ten of the jurors. Fraundorf v. Schmidt, 216 W 158, 256 NW 699.

In determining whether the trial court erred in directing a verdict, the supreme court must take that view of the evidence which is most favorable to the party against whom the verdict was directed. Whether a boy seven years and ten months of age, struck by an automobile as he was crossing a street, was contributorily negligent is held for the jury in this case, although the boy, who saw the car only one hundred seventy feet away when he started to cross the street, did not make a second observation of the car and was unable to judge its rate of speed. Mueller v. O'Leary, 216 W 585, 257 NW 161.

See note to 270.49, citing Juneau Store Co. v. Badger M. F. Ins. Co., 216 W 342, 257 NW 144.

Where jury answered question of causal connection between motorist's negligence

and collision in negative but also found that motorist's negligence contributed 10 per cent to produce collision, and gave motorist verdict for full damages, verdict was corrected by changing answer to affirmative and reducing judgment 10 per cent. Bodden v. John H. Detter Coffee Co., 218 W 451, 261 NW 209.

Where a passenger after alighting from the front exit of a street car on an open street with at least five or six seconds to reach a place of safety, which he could have done by taking two or three short steps, was struck by the rear end of the car which swung outward as the car rounded a curve, the evidence as to whether the motorman, who was in sole charge of the car, was negligent in moving the car forward before the passenger was beyond the maximum overhang of the car is held insufficient for the jury. Steinburg v. Milwaukee E. R. & L. Co., 222 W 37, 266 NW 793.

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.

If on the whole case the evidence was subject to 2 inferences, either that the insured's death was accidental or that he committed suicide, and the jury was in doubt as to which inference should be drawn, the defendant insurer had not met the burden of proof and the jury correctly answered the question in finding that the insured did not commit suicide. Tully v. Prudential Ins. Co. 234 W 549, 291 NW 804.

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.

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 two 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.

Where the jurors were unanimous on answers finding the defendant causally negligent, but two 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, requiring a new trial, since, there being evidence to go to the jury, the same 10 jurors must agree on all questions necessary to sustain the judgment, and the same 10 must not only agree that the defendant was causally negligent, and as to the amount of damages, but the same 10 must agree in exonerating the plaintiff from contributory negligence. Stylow v. Milwaukee E. R. & T. Co., 241 W 211, 5 NW (2d) 750.

As used in the provision in sec. 5, art I, Const., authorizing the legislature to provide that a valid verdict, in "civil cases," may be based on the votes of a specified number of the jury, not less than five-sixths thereof, the term "civil cases" includes civil proceedings as distinguished from criminal actions, and includes special proceedings, such as condemnation proceedings, as well as civil actions. Lamasco Realty Co. v. Milwaukee, 242 W 357, 8 NW (2d) 372.

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.

270.251 [*Renumbered section 270.25 (2) by 1935 c. 541 s. 156*]

270.26 Motion for directed verdict waives jury trial. Whenever in a jury trial all the parties, without reservation, move the court to direct a verdict, such motions, unless otherwise directed by the court before discharge of the jury, constitute a stipulation waiving a jury trial and submitting the entire case to the court for decision. [*Supreme Court Order, effective July 1, 1945*]

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

Note: 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 this section. 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. It is not strictly correct to enter a judgment notwithstanding the verdict when the real ground of the court's judgment is that the verdict is not supported by the evidence, since a motion for judgment notwithstanding the verdict admits the findings of the verdict to be true and the court on such motion grants judgment on grounds other than those decided by the jury, but the strictly proper practice would be to move to set aside the verdict because not supported by the evidence, and grant judgment on the ground that a motion for a directed verdict should have been granted or, if no such motion was made, on the ground that the evidence failed to support a cause of action. Shumway v. Milwaukee Athletic Club, 247 W 393, 20 NW (2d) 123.

270.27 Special verdicts. The court may, and when requested by either party, before the introduction of any testimony in his behalf, shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of written questions, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find upon particular questions of fact. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: The question as to an automobile 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 three divisions there should have been like subdivisions of proximate cause and reasonable anticipation. 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 three specific respects. The jury should have been called upon to answer whether each element of negligence consti-

tuted 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.

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 F. Ins. Co., 206 W 639, 238 NW 399.

No inquiry can be permitted as to reasonable anticipation or foreseeability of injury on the question of whether violation of a safety statute constitutes actionable negligence; hence a question in the verdict involving such inquiry was immaterial and unnecessary. 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, did not warrant reversal. Edwards v. Kohn, 207 W 381, 241 NW 331.

Jury's answers to court's questions, limited to material fact issues, constitute sufficient verdict. Honore v. Ludwig, 210 W 682, 247 NW 335, 211 W 354, 247 NW 335.

Trial court erred in changing answers to questions in special verdict, though evidence may have preponderated against verdict, where there was credible evidence to sustain findings that store employes' failure to exercise ordinary care in piling boxes proximately caused customer's injuries when pile fell over and box struck customer. Bohner v. Great A. & P. T. Co., 211 W 501, 248 NW 421.

Questions in the special verdict, as to whether the defendant was negligent in respect to his lookout and control of his automobile, and as to whether the plaintiff was negligent in respect to lookout and control of his automobile, 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 the issue of control of the automobile in one question was not prejudicial to the defendant under the facts. Guth v. Fisher, 213 W 323, 251 NW 223.

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.

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 proximately causing the collision. The jury's findings of the percentages of causal negligence as between the various plaintiffs and the defendants are held erroneous because the jury was erroneously permitted to consider the defendants' negligent failure to have a clearance signal on the truck a proximate 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.

Trial court's discretion in granting new trial in interest of justice would not be interfered with where plaintiffs were not entitled to directed verdict. Verdict should be as short and simple in form as it is possible to make it. Submission of defendant's negligence by series of questions headed by preface containing omnibus statement of law of case and evidentiary facts applicable to each question held prejudicial error, where it was not likely that jury could determine from study of preface precise point involved in each question. Hoffman v. Regling, 217 W 66, 258 NW 347.

The same presumptions follow special findings which attach to a general verdict. Specific findings, therefore, to overcome the more comprehensive findings, must exclude every theory which will sustain the broader and more complete finding. 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.

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 proximate 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 (sec. 101.06) is held misleading and constituted prejudicial error. Fries v. Lallier, 219 W 388, 263 NW 178.

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

The trial court did not commit error in failing to advise the jury that he had found a codefendant guilty of negligence as a matter of law, since 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.

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.

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, since there is no difference in this respect between an agreed case and an agreed state of facts, and hence the defendant was not entitled to question the plaintiff's right to make a collateral attack on certain judgments. Riley v. State Bank of De Pere, 223 W 16, 269 NW 722.

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

In an action for breach of 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 trial 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. The questions which should have been submitted are discussed. O'Brien v. Dane County, 235 W 59, 292 NW 440.

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

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.

Where the defendant, appealing from a judgment, made no objection to the form in which the question on damages was worded at the time the trial court submitted the verdict to the jury, and made no request for an instruction to the jury on the subject, no basis was laid on which to predicate reversible error. Schmidtke v. Great Atlantic & Pacific Tea Co. 236 W 283, 294 NW 828.

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

Reasonable inferences from the evidence, rather than absolute exactness, is all that can be required of juries in justification of their findings. The supreme court, in reviewing the jury's findings as to comparative negligence of the parties, 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.

Although 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, probably should not have been included since it constituted a splitting of the issue of negligence of the defendant in the maintenance and operation of his dam or a cross examination of the jury as to that issue, an instruction assigning to the plaintiff town the burden of proving to the contrary was not error, and the inclusion of such question was not prejudicial to the plaintiff. Wausaukee v. Lauerman, 240 W 320, 3 NW (2d) 362.

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 note to 85.44, citing Smith v. Superior & Duluth Transfer Co., 243 W 292, 10 NW (2d) 153.

Automobile host-guest cases should be so submitted to the jury as to produce findings bearing on that relationship. Culver v. Webb, 244 W 478, 12 NW (2d) 731.

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.

Under the evidence, grounded entirely on the presumption of death from absence of 7 years, there should have been submitted to the jury 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, if alive. 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 trial 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 trial court in other cases. Clark v. Guy Drews Post, 247 W 48, 18 NW (2d) 322.

The function of a special verdict is to secure a finding by the jury on each question litigated. 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 particular ground of alleged negligence; and this cannot be accomplished by the submission of an omnibus question in which the jury is required to find generally on the question of negligence. Schumacher v. Wolf, 247 W 607, 20 NW (2d) 579.

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 in a duplicitous question 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 and the formal defect is waived by failure to object; but if the answer of the jury is such as to make it impossible to know what they have found, the defect is one of substance and the verdict is fatally defective. Vlasak v. Gifford, 248 W 328, 21 NW (2d) 648.

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.

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.

270.28 Submission to jury; omitted essential fact. When some controverted matter of fact not brought to the attention of the trial court but essential to sustain the judgment is omitted from the verdict, such matter of fact shall be deemed determined by the court

in conformity with its judgment and the failure to request a finding by the jury on such matter shall be deemed a waiver of jury trial pro tanto. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: If no finding is made or requested on an issue, it will ordinarily be deemed to have been determined by the court in conformity with the judgment. However, such is not the rule where the assumed determination by the court would leave out of the consideration erroneously excluded testimony. Brauer v. Arenz, 202 W 453, 233 NW 76.

In a negligence action the erroneous instruction of the jury regarding rule of emergencies was reversible error. Scharine v. Huebsch, 203 W 261, 234 NW 358.

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 M. 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.

Rule that issues not submitted to jury must be deemed to have been determined by trial court in conformity with judgment rendered held inapplicable to issues raised by insurer's amended answer, alleging additional defense after court prepared special verdict for plaintiff, where record admitted of no finding for plaintiff on such issues. Kline v. Washington N. Ins. Co., 217 W 21, 258 NW 370.

In the instant 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 co-operation 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 for the insured. Lanferman v. Maryland C. 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 of the court. Laurent v. Plain, 229 W 75, 281 NW 660.

The presumption that an issue not submitted to the jury had been decided by the court in conformity with the judgment 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 "accidentally 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, under 270.28, 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.

Where 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 under 270.28, this section being operative only when the question unsubmitted is essential to support the theory on which the pleadings were drawn and considered at the trial. 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 this section, 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, and the cause remanded with directions to grant a new trial. 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.

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, 23 NW (2d) 460.

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.

This section, providing that a controverted matter of fact not brought to the attention of the trial court but essential to sustain the judgment, and omitted from the verdict, shall be deemed determined by the court in conformity with its judgment, cannot 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.

270.29 Jury to assess damages, judgment on the pleadings. When a verdict is for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim is established beyond the amount of the plaintiff's claim as established, the jury

must assess the amount of the recovery. The jury may also, under direction of the court, assess the amount of the damages where the court orders judgment on the pleadings. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: An award of $2,250 for permanent injury and future pain and suffering to a man whose sternum was fractured, and who claimed that as a result of his injuries he had become permanently short of breath and unable to do such heavy work as he had been accustomed to do before being injured, was not excessive under conflicting evidence of physicians as to the permanent nature of his injuries, the credibility of the several witnesses being for the jury. Wendt v. Fintch, 235 W 220, 292 NW 890.

Malice on the part of the defendant bank cashier in wrongfully instituting a criminal prosecution against the plaintiff being expressly found by the jury, and authorization and ratification by the defendant bank sufficiently appearing, punitory damages against the bank as well as against the cashier were properly allowed. Lechner v. Ebenreiter, 235 W 244, 292 NW 913.

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.

270.30 Verdict, entry of; special finding governs. Every verdict and special finding of facts shall be entered on the minutes and when in writing be filed with the clerk. When a special finding of facts shall be inconsistent with the general verdict the former shall control the latter, and the court shall give judgment accordingly.

270.31 Entry by clerk as to trial and judgment. Upon receiving a verdict the clerk shall make an entry on his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court the clerk must enter judgment in conformity with the verdict. If a counterclaim, established at the trial, exceed the plaintiff's demand so established judgment for the defendant must be given for the excess; or if it appears that defendant is entitled to any other affirmative relief judgment must be given accordingly.

Note: A court may grant judgment notwithstanding the verdict without changing any of the answers or without a motion to set aside the verdict because it is not supported by the evidence, though the strictly 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 under conflicting evidence, 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 proximate 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 per cent of the total causal negligence was attributable to him, the trial court, even though of the opinion that the jury's findings should have been such as to entitle the plaintiff to recover, could not properly set aside and change the findings and enter a judgment for the plaintiff's recovery. Leisch v. Tigerton Lumber Co. 250 W 463, 27 NW (2d) 367.

270.32 Jury trial, how waived. Trial by jury may be waived by the several parties to an issue of fact by failing to appear at the trial; or by written consent filed with the clerk; or by consent in open court, entered in the minutes. [*Supreme Court Order, effective Jan. 1, 1936; Supreme Court Order, effective July 1, 1945; Supreme Court Order, effective Dec. 4, 1945*]

Revisor's Note, 1945: The supreme court, by an order dated Nov. 14, 1944, effective July 1, 1945, revised sec. 270.32 of the statutes to provide that a jury trial in civil actions is waived unless a jury is demanded (245 W viii, ix). On Dec. 4, 1945 the court made the following order: "For the foregoing reasons the order of this court dated November 14, 1944 is vacated and set at naught so far as it abrogates rule 270.32 as promulgated July 1, 1936, and promulgates the present rule 270.32 Stats. The effect of this is to leave in force sec. 270.32 Stats. as promulgated July 1, 1936."

Note: 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 held 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., (Stats. 1935) 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. (Stats. 1935) Gifford v. Thur, 226 W 630, 276 NW 348.

270.33 Trial by court; findings, judgment. Upon a trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk within sixty days after submission of the cause, and shall state separately the facts found and the conclusions of law thereon; and judgment shall be entered accordingly. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: If there is irreconcilable conflict in competent and relevant evidence of facts in issue, 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.

It is the established rule that in case of conflict between a trial court's opinion and findings the findings must control. Coolidge v. Rueth, 209 W 458, 245 NW 186.

Evidence disclosing that a deceased opened joint bank accounts in the names of himself and his wife, but that he kept the passbooks, which were required to be pre-

sented at the bank in order to make withdrawals, locked in a dresser to which only he had access, and that he made no voluntary delivery of the passbooks to his wife, is held to sustain findings that the accounts were carried in the joint names of the deceased and his wife solely for his own convenience to enable his wife to make withdrawals on his behalf by his permission without his written authority, and that there was no completed gift of such bank deposits by the deceased to his wife. Marshall & Ilsley Bank v. Voigt, 214 W 27, 252 NW 355.

Where the trial court sitting 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.

A finding that the man threatening the truck driver was the spokesman of the delegation of farm strikers was against the great weight and clear preponderance of the evidence. Portage C. C. Ass'n v. Sauk County, 216 W 501, 257 NW 614.

Plaintiff could not complain of court's failure to make more specific fact findings or to separately state facts found, where plaintiff 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 controversies concerning the administration of a trust estate, are accorded the same effect that findings of fact are accorded in other controversies, and hence will not be disturbed on appeal 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 trial court, in cases tried to the court is to draw such inferences from the established facts as it deems proper, and the supreme court cannot disturb the same unless they are against the great weight and clear preponderance of the evidence. Hull v. Pfister & Vogel Leather Co., 235 W 653, 294 NW 18.

The failure of the trial court to satisfy the requirement of this section, as to filing proper findings of fact and conclusions of law on a trial of an issue of fact by the court, 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 a perusal of 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.

This section applies only to an action, and not to a special proceeding. In re Henry S. Cooper, Inc., 240 W 377, 2 NW (2d) 866.

Failure of the trial court to make findings does not require, on appeal, 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, and the trial court having forcibly expressed its views on the essential questions. United Parcel Service v. Public Service Comm., 240 W 603, 4 NW (2d) 138.

Findings of the trial court will not be disturbed on appeal unless against the great weight and clear preponderance of the evidence. Only the ultimate facts in issue need be found by the trial court in making findings of fact. Angers v. Sabatinelli, 246 W 374, 17 NW (2d) 282.

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-operative 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.

270.34 Trial by referee. (1) Except in actions for divorce or annulment of marriages all or any of the issues in the action may be referred, upon the written consent of the parties. The court may upon application of either party or of its own motion, direct a reference of all or any of the issues in the following cases:

(a) When the trial of an issue of fact shall require the examination of a long account; in which case the referee may be directed to hear and decide the whole issue or to report upon any specific question of fact involved therein; or

(b) When the taking of an account shall be necessary for the information of the court before judgment or for carrying a judgment or order into effect.

(2) When a reference has been ordered, either party may deliver to the referee a certified copy of the order of reference, and the referee shall thereupon appoint a time and place for the trial, and give notice thereof to the parties; such time to be not less than ten nor more than thirty days after the delivery of the copy of such order, unless the proceeding before the referee be ex parte or some other time be appointed by written stipulation of the parties, with the assent of the referee, or unless the court shall otherwise order.

(3) All action upon a referee's report shall be upon notice. [*Court Rule XXI s. 1, 2, 4; Supreme Court Order, effective Jan. 1, 1934*]

Note: The denial of an application for a reference unless amounting to an abuse of discretion, does not generally constitute reversible error. Volk v. Flatz, 206 W 270, 239 NW 424.

Mere items of damage do not constitute an "account," within (1) authorizing a compulsory reference where the trial requires examination of a "long account;" an "account," within the meaning of the statute, being a computation or statement of debits and credits arising out of personal property bought or sold, services rendered, material furnished, and the use of property hired and returned. To warrant a compulsory reference, mutuality in accounts is not a prerequisite nor need action be one on account; but there must be some sort of memorandum containing items of work, materials, or payments. Memoranda containing charges and credits are construed as constituting a "long account," such memoranda implying dealings between the parties arising out of the sale of, and payment for, electrical energy, and not being mere items of damage, nor lacking in mutuality, but constituting regularly kept memoranda of account. State ex rel. Hustisford L. P. & M. Co. v. Grimm, 208 W 366, 243 NW 763.

270.35 Powers of referee. The trial by referee shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments and allow amendments to any pleadings as the court upon such trial, upon the same terms and with the like effect. They shall also have the same power to preserve order and punish all

violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for a contempt for nonattendance or refusal to be sworn or testify, as is possessed by the court; and they shall give to the parties or their attorneys at least eight days' notice of the time and place of trial; they must state the facts found and conclusions of law separately and report their findings, together with all the evidence taken by them and all exceptions taken on the hearing, to the court; and the court may review such report and on motion enter judgment thereon or set aside, alter or modify the same and enter judgment upon the same so altered or modified, and may require the referees to amend their report when necessary. The judgment so entered by the court may be appealed from to the appellate court in like manner as from judgments in other cases, and the report of the referees may be incorporated with the bill of exceptions. When the reference is to report the facts the report shall have the effect of a special verdict.

270.36 Referee, how selected. In all cases of reference the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly, and if the parties do not agree the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

270.37 Proceedings if referee's report not filed. If neither party move for a judgment within one year from the date of the referee's report the action shall be dismissed or a new trial ordered, on motion of any party, provided, such motion shall not be made until two terms of court shall have been held subsequent to the date of such report. [*1935 c. 541 s. 157*]

270.38 [*Repealed by 1935 c. 541 s. 158*]

270.39 Exceptions. In any trial before the court, with or without a jury, or before a referee, exceptions are deemed taken to all adverse ruling and orders made in the course of the trial. No express exceptions need be entered in any bill of exceptions. It shall not be necessary to file exceptions to the judge's charge to the jury or to his refusal to instruct the jury as requested, or to any orders, or to the findings of fact and conclusions of law made by the court, and the same may be reviewed by the appellate court without exceptions; but any party who expressly requests any finding of fact, conclusion of law, instruction to the jury or ruling or order shall not be heard to question its correctness on appeal. This shall not, however, limit the power of the supreme court under section 251.09, Stats. [*Stats. 1929 s. 270.39 to 270.42; Supreme Court Order, effective Sept. 1, 1931*]

Note: The defendant's contention, raised for the first time on appeal, that she was entitled to a setoff for disbursements claimed to have been made for the benefit of the deceased out of funds of his which she had converted, will not be considered where the trial court followed the findings and declarations of law proposed by the defendant. Marshall & Ilsley Bank v. Voigt, 214 W 27, 252 NW 355.

270.40 to 270.42 [*Repealed by Supreme Court Order, effective Sept. 1, 1931*]

270.43 Bill of exceptions. Any party may, after trial of an issue of fact therein, either by jury, by the court or referee, have a bill of exceptions settled as hereinafter provided, containing the proceedings had and evidence given on the trial and the rulings and decisions of the court or referee not otherwise appearing of record, or so much thereof as may be material to questions desired to be raised on review by the supreme court. The bill of exceptions when settled shall be signed by the judge before whom the issue was tried or the referee's report reviewed and shall thereby become a part of the record. It need not be sealed. It shall be filed with the clerk and be by him annexed to and be deemed part of the judgment roll. If the judge who tried the issue shall, from any cause, have ceased to be such judge, he shall, notwithstanding, settle and sign the bill of exceptions, as the late judge, as if in office; and may be compelled, as if in office by mandamus or otherwise, so to do. [*Supreme Court Order, effective Sept. 1, 1931; Supreme Court Order, effective July 1, 1945*]

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

Note: Wanting a bill of exception, the only question for review upon appeal is whether the judgment is supported by the findings; and the findings cannot be challenged by a reference to the pleadings to show a misdescription of the obligee in the bond. Fidelity & D. Co. v. Madson, 202 W 271, 232 NW 525.

In the absence of a bill of exceptions the supreme court upon appeal is limited to ascertaining whether the judgment is sustained by the pleadings and findings. Parke, Austin & Lipscomb v. Sexauer, 204 W 415, 235 NW 785.

Generally no error will be considered on appeal which was not assigned or presented to the trial court. Marshall & Ilsley Bank v. Voigt, 214 W 27, 252 NW 355.

Although the trial judge erred in excluding from evidence the entire deposition of the plaintiff, taken on adverse examination before the trial, and offered at the close of the defendants' case after cross-examination of the plaintiff on parts thereof, the supreme court cannot presume that his adverse examination, not in the bill of exceptions, contained anything contradictory of or not covered by his testimony, and hence cannot assume that the error was prejudicial. Demochitz v. Wells, 214 W 599, 253 NW 790.

In the absence of a bill of exceptions preserving the evidence on which the order was based, the supreme court will not review an order fixing the amount payable to a

receiver as profits derived from a lease of mortgaged premises. A. J. Straus Paying Agency v. Terminal W. Co., 220 W 85, 264 NW 249.

Affidavit and copies of highway proceedings taken from town records, which had been incorporated in bill of exceptions after judgment entered, and appeal taken, would be struck from bill, since they were improperly incorporated. State v. Maresch, 225 W 225, 273 NW 225.

No bill of exceptions is needed in an appeal from a summary judgment where the order for judgment makes reference to the affidavit and documents used upon the motion for the order and no oral testimony was taken. Barneveld State Bank v. Rongve, 228 W 293, 280 NW 295.

The record of proceedings before the commissioners on an appeal to the county judge from the town board's order laying out a highway is not part of the record of, or properly returnable by, the board on certiorari to review such order. State ex rel. Paulson v. Town Board, 230 W 76, 283 NW 360.

Where there is no bill of exceptions, stipulated facts, not incorporated in the findings, are not a part of the record on appeal. Beck v. First Nat. Bank of Madison, 238 W 346, 298 NW 161.

Without a bill of exceptions, the supreme court has no means of knowing whether the pleadings were amended below to set up an issue of conspiracy to defraud the insurer, not submitted to the jury, nor whether the trial court's finding of conspiracy on motions after verdict is against the great weight and clear preponderance of the evidence, but it must be assumed that there was evidence in the record below supporting the verdict favorable to the insured as to the specific matters submitted to the jury and other evidence supporting the trial court's finding of conspiracy, and in such situation it must be held that the judgment for the insurer notwithstanding the verdict is supported by the findings and that the findings are supported by the evidence. Bobczyk v. Integrity Mut. Ins. Co., 239 W 196, 300 NW 909.

In the absence of a bill of exceptions, the judgment must be affirmed if the special verdict on its face supports the judgment. Singer v. Horn, 240 W 310, 3 NW (2d) 383.

Although this section [before amendment by Supreme Court Order effective July 1, 1945] by its terms applied to "actions" only, nevertheless it has been the common practice under the authority of this section to settle bills of exceptions in special proceeding where there has been a trial on an issue of fact the same as in actions. In re Henry S. Cooper, Inc., 240 W 377, 2 NW (2d) 866.

270.44 Settlement of bill. The party desiring to settle a bill of exceptions must prepare the same as proposed by him and the same shall include all testimony set forth by question and answer as shown by the transcript of the reporter's notes, unless the parties to the action stipulate otherwise. He shall serve a copy thereof on the adverse party and, if there be more than one, upon such as the trial judge shall designate. Within ten days thereafter the adverse party may serve proposed amendments thereto. Either party may then serve upon the other a written notice that the bill of exceptions will be settled by the trial judge at a time and place therein specified not less than four nor more than twenty days after service of such notice. If no proposed amendments shall be served within the time aforesaid the proposed bill shall be taken as agreed to and may be signed by the judge without notice to the adverse party on proof made of its service and that no amendments have been served. If proposed amendments be served and be accepted the proposed bill as so amended may be signed by the judge without notice to the adverse party, on proof made of its service, the service of the amendments, and their acceptance. [*Stats. 1929 s. 270.44 to 270.46; Supreme Court Order, effective Sept. 1, 1931*]

270.45, 270.46 [*Repealed by Supreme Court Order, effective Sept. 1, 1931*]

270.47 Time for service of bill of exceptions. After judgment is perfected either party may serve upon the other a written notice of the entry thereof; and service of a proposed bill of exceptions, by either party, must be made within ninety days after service of such notice. If a bill of exceptions be proposed with a view to an appeal from an order it must be served within ninety days after service of a copy of such order and written notice of the entry thereof. [*Supreme Court Order, effective Sept. 1, 1931*]

Note: An appeal is not dismissible because no bill of exceptions was settled until nine months after judgment was rendered, where written notice of entry of judgment was never served. State v. Mueller, 220 W 435, 265 NW 103.

The record, which showed that counsel, employed to perfect an appeal, moved to vacate the judgment, that because of the trial judge's illness counsel did not ask him to rule on the motion until the judge had made his trip for the purpose of regaining his health, that counsel decided not to serve the bill of exceptions until the judge ruled on the motion so that one bill of exceptions would be needed if the motion should be denied, showed good cause for failure to timely serve the bill of exceptions and hence refusal to extend the time for settling and serving the bill constituted an abuse of discretion. Kisten v. Kisten, 229 W 479, 282 NW 629.

Granting the defendant's motion to extend the time for settling the bill of exceptions was not abuse of discretion where there had been a substitution of attorneys after judgment and the defendant was endeavoring to get the appeal taken and acted with reasonable diligence, and by inadvertence of defendant's present counsel the application was not made within the required time. Bettack v. Conachen, 235 W 559, 294 NW 57.

The record in this case, disclosing that a bill of exceptions could have been prepared by other members of a law firm than an absent member who had handled the case, and that the court reporter was available at all times to transcribe the testimony, and that the real cause for the delay was that the plaintiff could not make up his mind whether to appeal, did not make a sufficient showing of "good cause" to authorize an order extending the time for serving and settling a bill of exceptions under 269.45. Millar v. Madison, 242 W 617, 9 NW (2d) 90.

The affidavits and record in this case, disclosing that the plaintiff's attorney through oversight neglected to order a transcript of the testimony until 6 days before the expiration of the 90-day period for serving a bill of exceptions, and that he then did not direct the court reporter, who could have proceeded forthwith, that immediate preparation was to be made, or inform the reporter of the necessity therefor, did not make a sufficient showing of "good cause" to authorize an order extending the time for serving a bill of exceptions. Bramman v. Teutonia Recreation Co., 242 W 620, 9 NW (2d) 113.

270.48 Bill of exceptions; settlement after death or incapacity of trial judge; new trial. (1) If the trial judge shall die, remove from the state, or become incapacitated to act, the bill of exceptions may be settled by stipulation of the parties. If they cannot agree thereon, then the presiding judge of the court shall settle such bill and he may take testimony and determine any dispute relative to the proceedings had on the trial.

(2) The presiding judge may, upon notice, extend the time for settling the bill the same as the trial judge might have done.

(3) If the presiding judge would have been disqualified the party proposing such bill may designate a judge of an adjoining circuit, who shall settle the same in the manner provided in this section; or he may move for a new trial and the court may grant a new trial upon condition that he pay the costs taxed in the judgment, provided the motion is made at the first term of court succeeding the death or disability of the trial judge, and is accompanied by his affidavit that the application is made in good faith and not for the purpose of delay. [*1935 c. 541 s. 159; Supreme Court Order, effective July 1, 1945*]

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

270.49 Motion for new trial on minutes. (1) The trial judge may entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial because of errors in the trial or because the verdict is contrary to law or to the evidence, or for excessive or inadequate damages or in the interest of justice; but such motion must be made and heard within sixty days after the verdict is rendered, unless the court by order made before its expiration extends such time for cause. When an appeal is taken from the order on such motion a bill of exceptions must be settled. Such motion, if not decided within the time allowed therefor, shall be deemed overruled. In case judgment be entered without deciding a pending motion for a new trial, the supreme court may direct the trial court to determine such motion within sixty days after notice of filing the remittitur.

(2) Every order granting a new trial shall specify the grounds therefor. In the absence of such specification, the order shall be deemed granted for error on the trial. No order granting a new trial in the interest of justice shall be valid or effective, unless the reasons that prompted the court to make such order are set forth in detail therein. The court may grant or deny costs to either party.

(3) All motions for new trials shall be reduced to writing and filed before being heard. [*Court Rule XXXIII s. 2; Supreme Court Order, effective Sept. 1, 1932; Supreme Court Order, effective Jan. 1, 1934; 1941 c. 141*]

Note: The granting of a new trial for whatever reason 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.

An order granting a new trial will be reversed where it was granted solely on an erroneous view of the law. Kramer v. Bins, 205 W 562, 238 NW 407.

Granting a new trial in the interests of justice will not be disturbed in the absence of a clear abuse of judicial discretion. That discretion was not abused in this case. Fontaine v. Fontaine, 205 W 570, 238 NW 410.

A verdict for twenty-four thousand two hundred and fifty dollars, subsequently reduced to fifteen thousand dollars, did not, because of excessiveness, indicate prejudice which would require a new trial. Tomasik v. Lanferman, 206 W 94, 238 NW 857.

For new trial because of defective verdict, see note to 270.25, citing Biersach v. Wechselberg, 206 W 113, 238 NW 905.

A new trial should have been awarded where a five thousand dollar verdict for injuries was grossly inadequate and probably resulted from knowledge of the jury that such amount was the limit of defendant's insurance, and was therefore perverse. Beno v. Peasley, 206 W 237, 239 NW 407.

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.

Where the trial court erroneously changed answers of the jury to questions, but clearly indicated his opinion that justice was not accomplished by the verdict, reversal for a new trial is warranted. Wachowiak v. Spaight, 207 W 323, 241 NW 346.

Improper argument, consisting of a statement of plaintiff's counsel that not one of the jurors would trade his left hip for thirty thousand dollars, 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.

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 always 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 of Milwaukee county 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 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 trial court did not abuse its discretion in denying the motion where the case had been ably presented by counsel assisted by two 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.

Answers of the jury, sustained by competent evidence, cannot be disturbed, and a verdict approved by the trial court must be upheld on appeal if there is any credible evidence to support it. Juneau Store Co. v. Badger M. F. Ins. Co., 216 W 342, 257 NW 144.

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 a plaintiff is given an option of accepting a smaller verdict or standing a new trial, the option should be to take judgment for an amount as low as an impartial jury, on the evidence and properly instructed, would probably name, and not for the highest amount which in the opinion of the trial court any jury could find from the evidence, the highest amount being used where the option is given the defendant to choose between having the damages fixed at such an amount or a new trial. Reykdal v. Miller, 216 W 561, 257 NW 604.

Where answer to material question of a special verdict plainly shows that jury made answer perversely or by reason of passion or prejudice, court must set entire verdict aside unless answers to other questions were unaffected. Mauermann v. Dixon, 217 W 29, 258 NW 352.

Bastardy proceeding is "civil action," not "criminal action," within purview of constitutional provisions against double jeopardy; hence state is entitled to new trial of bastardy action upon proper showing. Trial court's discretion to grant state new trial of bastardy action is limited by fact that defendant must be found guilty beyond reasonable doubt, and acquittal cannot be set aside merely because against preponderance of evidence. State ex rel. Mahnke v. Kablitz, 217 W 231, 258 NW 840.

Where motion for 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 court extended time for hearing motion until July 30, order granting new trial on July 12 was valid. Paulsen v. Gundersen, 218 W 578, 260 NW 448.

Findings that no causal connection existed between motorist's negligence and collision and that motorist's negligence contributed 10 per cent to produce collision were not so inconsistent as to require new trial, where inconsistency of findings was referable to jury's confusion of terms rather than to perversity. Bodden v. John H. Detter Coffee Co., 218 W 451, 261 NW 209.

In action in which defendant's liability was clearly established on trial and in which plaintiff was entitled to judgment notwithstanding verdict, order granting new trial was reversed with directions to enter judgment in favor of plaintiff. Guardianship of Meyer, 218 W 381, 261 NW 211.

Jury does not necessarily have to act dishonestly or from improper motives to render verdict perverse; it is sufficient that jury disregarded court's instructions and rendered verdict clearly contrary to evidence. Grammoll v. Last, 218 W 621, 261 NW 719.

If evidence is conflicting, or if inferences to be drawn from credible evidence are doubtful and uncertain, and there is any credible evidence which under any reasonable view will support or admit an inference either for or against claim or contention of any party, rule that proper inference to be drawn therefrom is question for jury should be firmly adhered to, and trial court should not assume to answer such question either upon motion for nonsuit or direction of verdict, or by substituting another answer after verdict is returned. Burton v. Brown, 219 W 520, 263 NW 573.

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 held 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.

A judgment on a verdict assessing damages separately for suffering and for diminution of plaintiff's capacity to enjoy life is reversed for a new trial on the question of damages, in view of the confusing form of submission, and because the verdict as reduced by the trial court, in giving plaintiff the option to accept that amount or submit to a new trial, was not the lowest amount that a jury, properly instructed, would reasonably award. Becker v. Luick, 220 W 481, 264 NW 242.

In an action under the federal employers' liability act for the death of a night switchman who was killed when the engineer of a train, at the signal of a fellow employe of the switchman, slacked back to permit the uncoupling of cars between which the switchman was working, whether the death of the switchman was caused by the negligence of the railroad company was for the jury, and a verdict in the affirmative was sufficiently supported, under evidence which reasonably permitted inferences that the fellow employe did not warn the switchman that he was about to signal the engineer to slack back, and did not wait for any word from the switchman that the work the switchman was doing was completed. Schiefelbein v. Chicago, M., St. P. & P. R. Co., 221 W 35, 265 NW 386.

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 considerations 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.

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; Hale v. Schultz, 223 W 285, 270 NW 46.

New trial must be granted in interest of justice, where justice has not been done at the first trial, as where the verdict, though not wholly contrary to the evidence or on insufficient evidence in point of law, is manifestly wrong in point of discretion as contrary to the weight of the evidence. In street car passenger's action against street railway for injuries sustained while alighting from street car, excessiveness of the damages assessed by the jury was some indication of perversity of verdict, as regards railway company's right to a new trial. Markowitz v. Milwaukee E. R. & L. Co., 224 W 347, 271 NW 380.

Where court examined six-year-old witness but failed to test witness' understanding of difference between truth and falsehood, and witness' testimony contained gross inaccuracies, failure to strike testimony required new trial. De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

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 fifty 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 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.

Where the trial judge did not decide motions for a new trial on the judge's minutes and on newly discovered evidence within sixty days after verdict and did not make any order before the expiration of the sixty days 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 sixty-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 evidenced by an effective order. A statement by a witness that he committed perjury on the trial of a cause is not ground for a new trial based on newly discovered evidence. Beck v. Wallmow, 226 W 652, 277 NW 705.

The sixty-day requirement for acting on a motion for a new trial is applicable in a bastardy action because it is a civil action. State ex rel. Zimmerman v. Euclide, 227 W 279, 278 NW 535.

The award for pain and suffering was held excessive in this case. Butts v. Ward, 227 W 387, 279 NW 6.

The very 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 his 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 persevere 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, 36.

In this case the damages were held excessive. There was overlapping of damages under separate items and the instructions were confusing and misleading. Dunham v. Wisconsin Gas & Electric Co., 228 W 250, 280 NW 291.

The restriction that the motion must be made and heard within sixty 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.

Where the defendant appealed from the order a new trial after the jury returned a special verdict in his favor and the plaintiff did not move to review the trial court's refusal to enter judgment for the plaintiff notwithstanding the verdict the plaintiff thereby elected to abide by the order granting a new trial and 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 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.

While an order for a new trial in the interest of justice is highly discretionary, it ceases to be so when the views of the trial court are grounded on an erroneous view of the law. A respondent, on an appeal from an order granting a new trial, may move for a review under 274.12 of other orders asserted by him to be erroneous, notwithstanding the fact that he had moved for a new trial and to that extent received what he asked for. Huebner v. Fischer, 232 W 600, 288 NW 254.

The rule that the granting of a new trial in the interest of justice is highly discretionary, and that the supreme court will reverse such an order only in rare instances, 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.

The provision that a motion for a new trial made on the minutes of the trial judge must be decided within sixty 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. Except where the time has been extended by statute, the court cannot set aside a judgment at a term of court subsequent to that in which the judgment was rendered. 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 (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 of the trial judge but the cause itself must be shown, and good practice requires that the cause should appear in an order extending the time, and a mere recital that an extension is granted for cause is not a compliance with the statute. In the absence of an order extending the time for cause, 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 sixty days after the verdict was rendered. Anderson v. Eggert, 234 W 348, 291 NW 365.

It was highly improper and 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 Indemnity Co., 234 W 407, 291 NW 313.

In an action on contract the trial court, after verdict, held that the plaintiff could not recover on the contract, but held that the plaintiff 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 surprise 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 Owners' Loan Corp. v. Papara, 235 W 184, 292 NW 281.

In a prosecution under 340.45, permitting the state, over objection, to cross-examine a defendant as to alleged false reports of income made by her to the county welfare department, and to put in evidence the reports themselves, was prejudicial error as to such defendant at least as to the admission of the reports, since it introduced evidence of a wholly separate substantive offense, unconnected with the crime charged, and had a tendency to show that such defendant was willing to resort to dishonest and unscrupulous means to obtain money even from those administering relief; and the matter admitted was also prejudicial to a codefendant. Stockman v. State, 236 W 27, 293 NW 923.

In reviewing its order granting judgment on the verdict, the circuit court is without jurisdiction to set aside the verdict and grant a new trial on a motion on the minutes of the judge where more than 60 days have elapsed after the verdict was rendered and no order has been made extending the time for cause. Volland v. McGee, 236 W 358, 294 NW 497, 295 NW 635.

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 on entering the host's automobile, must be deemed to have been granted for an error on the trial and consequently no question of abuse of discretion is involved on the guest's appeal, 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.

There is no limit on the power of the trial court to grant successive new trials where the triers of fact have erred or there has been improper conduct affecting the verdict, 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.

In an action against a city for injuries allegedly caused by a defective sidewalk, wherein the jury, after being out from 11:45 a.m. to 10:10 p.m., were divided 8 to 4 on a question in the special verdict relating to the condition of the sidewalk, statements of the trial 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 as bringing the jury to ostensible agreement, where the jury returned a unanimous verdict into court a half hour later. Mead v. Richland Center, 237 W 537, 297 NW 419.

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.

While an order for a new trial in the interest of justice is highly discretionary, it loses its character as such when the views of the trial court are grounded on an erroneous view of the law. Beattie v. Strasser, 240 W 65, 2 NW (2d) 713.

See note to 331.045, citing Jackowska-Peterson v. D. Reik & Sons, 240 W 197, 2 NW (2d) 873.

Subsection (1), providing that a motion for a new trial on the judge's minutes must be made and heard within 60 days after the verdict is rendered, unless the "court" by order made before its expiration extends such times for cause, requires a "court order" for extension of the time; and 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 or recorded, and where they were not filed or recorded until after the expiration of the statutory 60-day period, they were likewise 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 Power Co., 241 W 27, 4 NW (2d) 130.

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 Casualty 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.

When the jury found that the plaintiff was free from all negligence, there was no occasion for its further finding that 20 per cent 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.

The rule that the granting of a new trial lies largely within the discretion of the trial court, which will not be disturbed unless abused, does not apply where it is clear that the trial court proceeded on an erroneous view of the law. Goelz v. Knoblauch, 242 W 186, 7 NW (2d) 420.

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 Telephone Co. v. Russell, 242 W 247, 7 NW (2d) 825.

The granting of a new trial in the interest of justice is discretionary, and an order therefor, 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.

A motion for a new trial on the minutes of the trial judge after verdict is not permitted unless it is made and heard within 60 days after the verdict was rendered, unless the court by order made before its expiration extends such time for cause, but where defendants in default are timely in their motion to review a default judgment so as to reduce the recovery to the amount demanded in the complaint, the court is within its jurisdiction under (1) in review-

ing the same. Parish v. Awschu Properties, Inc., 243 W 269, 10 NW (2d) 166.

As a general rule, the supreme court will not overthrow the refusal of a trial court to grant a new trial in a criminal case on newly discovered evidence that is only cumulative and impeaching, but every case must stand on its own facts. In this case, in view of affidavits in support of a motion for a new trial alleging facts showing that 8 days after the trial the prosecuting witness gave birth to a fully developed child about 68 days before the expiration of the normal period of gestation if the period was computed from the date of the defendant's alleged act as testified to by the prosecuting witness, and in view of statements of the district attorney tending to mislead the jury to think that the penalty would be slight and that pregnancy might be considered in determining guilt, and in view of the sentence of 10 years imposed, the judgment and an order denying a new trial are reversed in the interest of justice and the cause remanded with directions for a new trial. State v. Garnett, 243 W 615, 11 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 automobile 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.

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. Casualty Co. 244 W 632, 12 NW (2d) 918.

The provision in 269.45, that a court may extend the time within which any act or proceeding in an action or special proceeding must be taken, even "after the time has expired," does not apply so as to authorize a court to extend the time for hearing a motion under 270.49 (1) for a new trial on the judge's minutes after that time has expired, but in such case the special provision in 270.49 (1) governs. Boyle v. Larzelere, 245 W 152, 13 NW (2d) 528.

Where a woman, as the result of the dropping of a tray of dishes and waste food on her by a waiter in the dining room of the defendant hotel, sustained some slight damage to clothes, a bruise on the shoulder, annoyance due to disturbing her luncheon and visit with a friend, all resulting in a hysterical condition of limited duration, and the chief annoyance came from "razzing" by friends after the accident, and there was no wage loss or need for medical services, an award of $500 is deemed excessive, and $200 is deemed the highest amount which a fair-minded jury would probably assess. Murphy v. Hotel Pfister, Inc., 245 W 211, 13 NW (2d) 927.

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.

Although the testimony of a witness may be confused, inconsistent even so contradictory as greatly to impair his credibility, it is generally the province of the jury, not that of the court, to determine its weight. Smith v. Koch, 247 W 551, 20 NW (2d) 566.

Where the jury found an unprovoked assault by the defendants on a man unable to defend himself, which subjected him not only to physical injuries but also to humiliation and ridicule, an award of $1,000 as compensatory damages was not excessive, although the plaintiff sustained no permanent injuries. Depner v. Thompson, 247 W 633, 20 NW (2d) 576.

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 plaintiff, 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.

The granting or denial of a motion for a new trial is largely within the discretion of the trial court. State v. Graff, 248 W 576, 22 NW (2d) 483.

An award of $2,000 to parents for loss of contributions by a son after he should become 21, where the son, although only 20 years of age at the time of fatal injury, was earning wages of over $200 a month as a timekeeper, and was living alone with his parents and was affectionate and generous toward them, was not excessive. Zigler v. Kinney, 250 W 338, 27 NW (2d) 433.

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 Lumber Co. 250 W 463, 27 NW (2d) 367.

270.50 Motion for new trial on newly discovered evidence. A motion for a new trial founded upon newly discovered evidence may be heard upon affidavits and the papers in the action. In case of an appeal the bill of exceptions must be settled as provided in section 270.49. Such a motion may be made at any time within one year from the verdict or finding. [*1935 c. 541 s. 160*]

Revisor's note, 1935: A motion based on the judge's minutes is covered by 270.49. (Bill No. 50S, s. 160)

The trial court may grant a new trial on newly discovered evidence within one year from the verdict notwithstanding the supreme court has affirmed the judgment. Belt L. R. Co. v. Dick, 202 W 608, 233 NW 762.

Granting of new trial constituted an abuse of discretion, because plaintiff's attorneys, when the appeal was heard in supreme court, had knowledge of newly discovered evidence, but failed to disclose it to 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.

A motion for a new trial on the ground of newly-discovered evidence, is not a motion for a retrial of the case upon the whole record and equivalent to a motion for a new trial under 270.49. The newly-discovered evidence whereon the motion is based is immaterial, or if material is cumulative, and there was not a sufficient showing of diligence on defendant's part; and a grant of the motion for 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.

Evidence which merely tends to impeach credibility of a witness does not entitle accused to a new trial on the ground of newly discovered evidence. State v. Debs, 217 W 164, 258 NW 173.

Where stipulation was controlling not only as to facts stated but as to what findings court might enter, new trial would not be granted for newly discovered evidence respecting such facts, since under stipulation facts found would be same as upon first trial. 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 conducted for a week was not erroneous, where the proffered evidence was only cumulative in effect, 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.

270.51 [*Repealed by 1935 c. 541 s. 161*]

270.52 Irregularities in venires, etc., immaterial. No irregularity in any writ of venire facias or in the drawing, summoning, returning or impaneling of petit jurors shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity or unless the objection was made before the returning of the verdict.

270.53 Judgment and order defined. (1) A judgment is the final determination of the rights of the parties in the action.

(2) Every direction of a court or judge made or entered in writing and not included in a judgment is denominated an order. [*1935 c. 541 s. 140, 162*]

Cross Reference: For limitation of time for court to review its own orders and judgments, see 252.10.

Note: Order dismissing an action for want of prosecution is not a "judgment." State v. Eigel, 210 W 275, 246 NW 417.

If court pronounces judgment from bench, and all that remains to be done is clerical duty of reducing judgment to writing or entering it, or both, judicial act is complete. State ex rel. Wingenter v. Circuit Court, 211 W 561, 248 NW 413.

Existing final judgment rendered upon the merits without fraud or collusion by 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 case of a jury trial, the findings of the court in case of trial by the court, 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.

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.

See note to 270.33 citing Wolfrom v. Anderson, 249 W 433, 24 NW (2d) 881, 25 NW (2d) 880.

270.54 Judgment for or between defendants; interlocutory. Judgment may be given for or against one or more of several defendants or in favor of one or more of several plaintiffs, and it may determine the ultimate rights of the parties on each side, as between themselves, either on cross complaint or equivalent pleadings or otherwise, and may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the complaint, with costs, in favor of one or more defendants in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants or to proceed in the cause against the defendant or defendants served. In case of a finding or decision substantially disposing of the merits, but leaving an account to be taken, or issue of fact to be decided or some condition to be performed, in order fully to determine the rights of the parties, an interlocutory judgment may be made, disposing of all issues covered by the finding or decision, and reserving further questions until the report, verdict or subsequent finding. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: Trial of the issue of whether the insurer contracted to cover the insured's operation of the automobile he was driving at the time of the accident before trial of the issue of the insured's liability to the plaintiff was permissible at least in so far as such trial disposed of the merits of the insurer's special defenses. Cooper v. Commercial C. Ins. Co., 209 W 314, 245 NW 154.

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 within this section. Security S. Bank v. Monona Golf Club, 213 W 581, 252 NW 287.

Appeal on June 3, 1936, from interlocutory judgment entered October 6, 1934, held not timely, though final judgment was not entered until December 18, 1935. Richter v. Standard Mfg. Co., 224 W 121, 271 NW 14, 914.

See note to 260.19, citing Liberty v. Liberty, 226 W 136, 276 NW 121.

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 in effect an "interlocutory judgment" under 270.54, hence appealable under 274.09. Estate of Pardee, 240 W 19, 1 NW (2d) 803.

270.55 Judgment when all defendants not served. When the action is against two or more defendants and the summons is served on some, but not on all of them, the plaintiff may proceed as follows:

(1) If the action be against several persons jointly indebted he may proceed against the defendant served unless the court shall otherwise direct, and, if he recover judgment, it may be entered in form against all the defendants jointly indebted and may be enforced against the joint property of all and the separate property of the defendant served.

(2) In any action against defendants severally liable he may proceed against the defendants served in the same manner as if they were the only defendants.

(3) A judgment entered under subsection (1) shall not bar an action against the debtors who were not served but judgment in such action shall not be entered until execution has been returned unsatisfied in whole or in part in the prior action and then only for the sum still due the plaintiff on the joint debt. [*1935 c. 541 s. 163*]

Note: A question of fact once litigated and determined by the verdict and judgment is final between the parties. In subsequent litigations between the same parties, upon a different cause of action, the prior judgment is conclusive only as to those matters which had in fact been adjudicated. Milwaukee Automobile Ins Co v. Felton, 229 W 29, 281 NW 637.

270.56 Judgment when all not liable. When it shall appear on the trial of an action on contract or tort against several defendants, sought to be charged as jointly or jointly and severally liable, that some were liable and others not judgment may be rendered against either or any of the defendants found liable to the plaintiff at the commencement of the action, and in favor of such as may be found not liable, and costs awarded in the discretion of the court.

270.57 Measure of relief. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Note: For distinction between erroneous judgment and judgment void for want of jurisdiction, see note to 261.01, citing State ex rel. Hammer v. Williams, 209 W 541, 245 NW 663.

Sustaining demurrer to answer and defendant's election to stand upon sufficiency of answer held not equivalent to withdrawal of answer, as regards whether relief granted could exceed relief demanded by complaint. Numbers v. Union M. L. Co., 211 W 30, 247 NW 442.

Judgment for an amount alleged to be in excess of that demanded in the complaint did not violate this section, 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.

270.58 [*Repealed by Supreme Court Order, effective Jan. 1, 1936*]

270.58 State and political subdivisions thereof to pay judgments taken against officers. Where the defendant in any action, writ or special proceeding, except in actions for false arrest, is a public officer and is proceeded against in his official capacity and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer shall be paid by the state or political subdivision of which he is an officer. [*1943 c. 377*]

270.59 Judgment in replevin. In any action of replevin judgment for the plaintiff may be for the possession or for the recovery of possession of the property, or the value thereof in case a delivery cannot be had, and of damages for the detention; and when the property shall have been delivered to the defendant, under section 265.06, judgment may be as aforesaid or absolutely for the value thereof at the plaintiff's option, and damages for the detention. If the property shall have been delivered to the plaintiff under chapter 265 and the defendant prevails, judgment for the defendant may be for a return of the property or the value thereof, at his option, and damages for taking and withholding the same. [*Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective July 1, 1939*]

Note: In mortgagee's replevin action against buyer claiming under oral contract of sale which was invalid under statute of frauds, where amount due on mortgage debt did not appear from record, 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.

Replevin action in civil court for Milwaukee county to recover an article valued at $675 is governed by the circuit court procedure. Where the defendant prevails, a money judgment in favor of a defendant and against a plaintiff was 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.

270.60 Judgment in replevin against principal and sureties. The judgment in replevin may be entered both against the principal and the sureties on his bond for a return or delivery of the property, as prescribed in chapter 265; and where the officer, to whom the execution thereon is directed, cannot find sufficient property of the principal to

satisfy the same, he shall satisfy it out of the property of such sureties; and the execution shall so direct. [*1935 c. 541 s. 164*]

Note: 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 Damages in actions on bonds, etc. In all actions brought for the breach of the conditions of a bond or to recover a penalty for nonperformance of any covenant or agreement if the plaintiff recover his damages shall be assessed and judgment entered for the amount thereof, and enforced as in other actions upon contract. No such judgment shall conclude any claim upon such bond, covenant or agreement not embraced in the pleadings or be a discharge of the penal sum beyond the amount of damages recovered thereby. This section does not apply to actions regulated by chapter 19.

270.62 Judgment on failure to answer. Judgment may be had if the defendant fail to answer the complaint, as follows:

(1) IN ACTIONS ON CONTRACT. In any action arising on contract for the recovery of money only the plaintiff may file with the clerk, with the summons and complaint, proof of personal service of the summons on one or more of the defendants and that no answer or demurrer has been received or if any such has been received that the same has been struck out by order of the court or a judge, and that no other answer or demurrer has been received, and the time granted by any order therefor has expired. If the complaint be duly verified the clerk shall thereupon enter judgment for the amount demanded in the complaint against such defendant or defendants or against one or more of the several defendants in the cases provided for in section 270.55. But if the complaint be not duly verified and such action is on an instrument for the payment of money only, the clerk, on its production to him, shall assess the amount due to the plaintiff thereon; and in other cases shall ascertain and assess the amount which the plaintiff is entitled to recover in the action from his examination under oath or other proof and enter the judgment for the amount so assessed. In case the defendant shall have appeared in the action he shall be entitled to five days' notice of the time and place of such assessment.

(2) IN OTHER ACTIONS. In other actions including all actions founded upon, or sounding in tort, the plaintiff may, upon the like proof, apply to the court for judgment according to the demand of the complaint. If the taking an account or the proof of any fact be necessary to enable the court to give judgment or to carry the judgment into effect the plaintiff may, with a view to such application, at any time after the expiration of the time for answering, have an order of reference, by the court or a judge, to take such account or proofs and report the same to the court at any time, in the circuit, at which judgment may be rendered, and such reference may be executed in any county most convenient therefor; or upon such application being made the court may take the account, or hear the proof, or in its discretion order a reference for that purpose. And when the action is for the recovery of money only or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury. If the defendant shall have appeared in the action he shall be entitled to eight days' notice of such application for judgment.

(3) IN CASES OF PUBLICATION. In actions where the service of the summons was made without the state or by publication proof shall be made, as aforesaid, of the demand mentioned in the complaint; and in case the defendant is a nonresident the plaintiff or his agent shall be examined on oath as to any payment that may have been made to such plaintiff or to any one for his use on account of such demand, and the court may render judgment for the amount which he is entitled to recover; and before entering judgment the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action and shall succeed in such defense. [*1931 c. 119*]

Note: 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 by 270.62 (2) and 281.209 (3), they were not entitled to have the judgment set aside or 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.

270.63 Judgment on admitted claim; order to satisfy. In an action arising on a contract for the recovery of money only if the answer admits any part of the plaintiff's claim or if such answer sets up a counterclaim or set-off for an amount less than the plaintiff's claim and contains no other defense to the action the clerk, on the application of the plaintiff and five days' notice to the defendant, shall enter judgment for the amount so admitted or for the amount claimed in the complaint, after deducting the amount of the defendant's counterclaim or set-off. When the defendant admits part of the plaintiff's claim to be just the court may, on motion, order such defendant to satisfy that part of the claim and may enforce the order as it enforces a judgment or provisional remedy. [*1935 c. 541 s. 165*]

270.635 Summary judgments. (1) Summary judgment may be entered as provided in this section in any civil action or special proceeding.

(2) The judgment may be entered in favor of either party, on motion, upon the affidavit of any person who has knowledge thereof, setting forth such evidentiary facts, including documents or copies thereof, as shall, if the motion is by the plaintiff, establish his cause of action sufficiently to entitle him to judgment; and, if on behalf of the defendant, such evidentiary facts, including documents or copies thereof, as shall show that his denials or defenses are sufficient to defeat the plaintiff, together with the affidavit of the moving party, either that he believes that there is no defense to the action or that the action has no merit (as the case may be) unless the opposing party shall, by affidavit or other proof, show facts which the court shall deem sufficient to entitle him to a trial.

(3) Upon motion by a defendant, if it shall appear to the court that the plaintiff is entitled to a summary judgment, it may be awarded to him even though he has not moved therefor.

(4) If the proofs submitted, on the motion, convince the court that the only triable issue of fact is the amount of damages for which judgment should be granted, an immediate hearing to determine such amount shall be ordered to be tried by a referee or by the court alone or by the court and a jury, whichever shall be appropriate; and, upon the determination of the amount of damages, judgment shall be entered.

(5) Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court may forthwith order the party employing them to pay the other party double motion costs and the amount of the reasonable expenses which the filing of the affidavits caused him to incur. This subsection shall not be construed as abridging or modifying any other power of the court.

(6) When an answer alleges a defense which is prima facie established by documents or public records, judgment may be entered for the defendant unless the plaintiff shows facts sufficient to raise an issue with respect to the verity or conclusiveness of such documents or records.

(7) This section is applicable to counterclaims the same as though they were independent actions; but the court may withhold judgment on a counterclaim until other issues in the action are determined. [*Supreme Court Order, effective Sept. 1, 1931; Supreme Court Order, effective Jan. 1, 1935; Supreme Court Order, effective July 1, 1941; Supreme Court Order, effective July 1, 1943*]

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.

Note: 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 full amount, and there was no occasion for assessing plaintiff's damages in any other manner than in any action upon contract to recover damages which are liquidated and definite. Schlesinger v. Schroeder, 210 W 403, 245 NW 666.

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 action to foreclose land contract wherein complaint was amended to foreclose the instrument as a mortgage, a cross complainant's motion for summary judgment was properly denied where 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 o 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 action brought by high school district treasurer against 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 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 town treasurer, plaintiff is entitled to summary judgment. Chalupnik v. Savall, 219 W 442, 263 NW 352.

Action to recover amount due on account of double liability of bank stockholder under 221.42 is an action to recover a "liquidated demand arising on an implied contract" within summary judgment statute. Schafer v. Bellin Memorial Hospital, 219 W 495, 264 NW 177.

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 Milw. Brewery, 220 W 605, 265 NW 564.

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.

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. 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 sufficient affidavit, on motion for summary judgment under 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.

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.

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 Corporation, 229 W 348, 281 NW 697.

The record in this case warranted the court in entering a summary judgment in favor of the defendant dismissing the complaint. Tregloan v. Hayden, 229 W 500, 282 NW 698.

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. Automobile Ins. Co. 233 W 313, 289 NW 606.

The plaintiffs' 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 plaintiffs' 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 plaintiffs' action had no merit conclusively appeared. Strelow v. Bohr, 234 W 170, 290 NW 603.

The action of the trial court, after argument 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.

An action brought against officers of a corporation to recover money deposited by the plaintiffs with the corporation, to be held in escrow, and caused by such officers to be disbursed for corporate purposes in violation of the escrow agreement, is not an action to recover on an implied contract, since the defendants who are being sued did not receive the money or use it for their own purposes, and such action is not one of the classes of actions in which summary judgment is authorized by 270.635 (1), Stats. 1939. Unmack v. McGovern, 236 W 639, 296 NW 66.

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.

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.

Prior to the amendment of 270.635, by rule effective July 1, 1941, motions for summary judgment were limited to the classes of actions enumerated in (1); and (2) did not enlarge such classification. Although there is no vested right in procedure, a procedural change by statute or rule cannot operate to confer jurisdiction on a court as of the time of the commencement of an action where the cause of action has ripened into a judgment. Prey v. Allard, 239 W 151, 300 NW 13.

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 "procedural" and not "jurisdictional." Prey v. Allard, 239 W 151, 300 NW 13.

Where the trial court properly sustained a demurrer to a third amended complaint on the ground that such complaint stated no cause of action against the demurring defendants, and the latter then served a notice of motion for judgment on the merits returnable in 9 days, and the plaintiff failed

to apply to the court for leave to further amend in compliance with the conditions imposed by the order on the demurrer, the court correctly dismissed the complaint on the merits as to the demurring defendants, a contention that the plaintiff did not have time to digest the decision of the court on the demurrer being deemed frivolous in the circumstances. Angers v. Sabatinelli, 239 W 364, 1 NW (2d) 765.

The summary judgment statute is to be availed of only when it is apparent that there is no substantial issue to be tried, and 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.

In respect to whether there was an issue for trial so that summary judgment should not be rendered against the plaintiff, allegations in the complaint that the defendant seller was the owner of and had control of the barn on his premises at the time the plaintiff was injured, thereby constituting a place of employment under the safe-place statute, were of no avail in view of the sales agreement set out in the pleadings and showing to the contrary. Mahar v. Uihlein, 240 W 469, 3 NW (2d) 683.

Affidavits on a motion for summary judgment under this section must state evidentiary facts. On the defendant hospital's motion for summary judgment dismissing the complaint, a statement in the plaintiff's counter-affidavit that the defendant was not a charitable institution was a mere 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 by-laws of the defendant, and constituting evidentiary facts showing the charitable character of the defendant. Schau v. Morgan, 241 W 334, 6 NW (2d) 212.

In the instant 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 the defendant's motion for summary judgment should have been granted. Petrie v. Roberts, 242 W 539, 8 NW (2d) 355.

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), since, under 270.635 (2), summary judgment may be entered in favor of a defendant only on a showing that his denials or "defenses" are sufficient to defeat the plaintiff, and the fact that an action has become moot is not a "defense" and a dismissal on that ground does not entitle the defendant to judgment. Duel v. State Farm Mut. Automobile 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, and hence, on the plaintiff's motion for summary judgment, error, if any, in receiving a supporting affidavit made by the attorney for the plaintiff and not alleging the affiant's personal knowledge of the facts was immaterial. Monroe County Finance Co. v. Thomas, 243 W 568, 11 NW (2d) 190.

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.

Summary judgment is a drastic procedure and one not to be availed of except when it is apparent that there is no substantial issue to be tried; but 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 by the court, no issue exists and an entry of summary judgment is proper. Marco v. Whiting, 244 W 621, 12 NW (2d) 926.

Under the summary judgment statute 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. 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, although it does not defeat the claim or cause of action on which recovery is sought, as does a judgment on the merits. 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 Acc., F. & L. Assur. Corp. 246 W 228, 16 NW (2d) 787.

If there is any issue of fact raised which entitles the plaintiff to a jury determination, the defendant's motion for summary judgment is properly denied. Holzschuh v. Webster, 246 W 423, 17 NW (2d) 553.

The summary judgment is drastic and is to be availed of only when it is apparent that there is no substantial issue to be tried; it 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.

The existing cause of action between the parties need not necessarily be fully determined before summary judgment can be en-

tered, 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.

If the pleadings, taken as they stand, 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 pleadings and affidavits in an action to foreclose a mortgage presented questions of fact which should only be determined on the trial of the case, the plaintiff's motion for summary judgment was properly denied. Seymour Holding Corp. v. Wendt, 248 W 130, 21 NW (2d) 267.

An action for unlawful detainer is summary. State ex rel. Milwaukee E. T. Corp. v. River Realty Co. 248 W 589, 22 NW (2d) 593.

Where the answer stated no defense, the plaintiff was entitled to judgment on the pleadings, and hence it was immaterial that the judgment entered was considered to be a summary judgment or whether the plaintiff strictly followed the procedure designated in the summary-judgment statute. That 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, whatever other facts may be in dispute under the record. Londo v. Integrity Mut. Ins. Co. 249 W 281, 24 NW (2d) 628.

Where there is no dispute in 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.

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 might conflict with statements in the affidavits of the city that the viaduct was constructed under the provisions of ch. 376, laws of 1901. Milwaukee v. Chicago, M., St. P. & P. R. Co. 250 W 451, 27 NW (2d) 356.

Federal courts recognize state summary judgment statute. Atkinson v. Bank of Manhattan T. Co., 69 F (2d) 735.

270.64 Judgment after law issue tried. When the plaintiff is entitled to judgment after trial upon an issue of law he may proceed in the manner prescribed in section 270.62 or according to such order for judgment as the court may have made. If the defendant be entitled to judgment after a like trial he may proceed according to such order therefor as may have been likewise made and the court may take any account, or hear proof, or order a reference or an assessment of damages by a jury, when necessary to enable the court to complete the judgment. [*1935 c. 541 s. 166*]

270.65 Judgment, signing and entry. Except where the clerk is authorized to enter judgment without the direction of the court, the judgment shall be entered by the clerk upon the direction of the court. The judge, or the clerk upon the order of the court, may sign the judgment. [*Supreme Court Order, effective July 1, 1942*]

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.

270.66 Costs taxed within sixty days; executions. Whenever a finding or verdict shall be filed the successful party shall perfect the judgment and cause it to be entered within sixty days after such filing and if he fails so to do the clerk of the court shall prepare and enter the proper judgment, but without costs to either party. Whenever there shall be a stay of proceedings after the filing of the findings or verdict such judgment may be perfected at any time within sixty days after the expiration of such stay. No execution shall issue upon any judgment until the same is perfected by the taxation of costs and the insertion of the amount thereof in the judgment or until the expiration of the time hereinbefore mentioned. [*1935 c. 541 s. 167*]

Note: Where the defendant taxed costs and entered judgment seasonably, leaving the amount of costs blank, and the clerk neglected to insert the amount of the cost in the judgment, the defendant did not thereby waive right to costs. Voegeli v. Voegeli, 204 W 363, 236 NW 123.

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.

270.67 Restitution in case of reversed judgment; purchaser for value. If any judgment or part of a judgment be collected and such judgment be afterwards set aside or reversed the trial court shall order the same to be restored with interest from the time of the collection, but in case a new trial is ordered the party who has collected such judgment may retain the same pending such new trial, upon giving a bond in such sum and with such sureties as the court shall order, conditioned for the restoration of the amount collected with interest from the time of collection. The order of restitution may be obtained upon proof of the facts upon notice and motion and may be enforced as a judgment. Nothing herein shall affect or impair the right or title of a purchaser for value in good faith without notice. [*1935 c. 541 s. 168*]

270.68 Same. Whenever in a civil action on appeal to the supreme court the appellant shall have omitted to stay execution and pending such appeal the sheriff or other officer

shall collect all or any part of the judgment appealed from the officer collecting the same shall deposit the amount so collected, less his fees, with the clerk of the court out of which execution issued. In case of reversal on such appeal restitution may be made in accordance with the provisions of section 270.67. In case of affirmance the clerk shall pay over such deposit to the judgment creditor on the filing of the remittitur from the supreme court.

270.69 Judgment without action; warrant of attorney. (1) A judgment upon a bond or promissory note may be rendered, without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant or both, in the manner prescribed in this section.

(2) The plaintiff shall file his complaint and an answer signed by the defendant or some attorney in his behalf, confessing the amount claimed in the complaint or some part thereof, and such bond or note and, in case such answer is signed by an attorney, an instrument authorizing judgment to be confessed. The plaintiff or some one in his behalf shall make and annex to the complaint an affidavit stating the amount due or to become due on the note or bond, or if such note or bond is given to secure any contingent liability the affidavit must state concisely the facts constituting such liability and must show that the sum confessed does not exceed the same. The judgment shall be signed by the court or a judge and shall be thereupon entered and docketed by the clerk and enforced in the same manner as judgments in other cases. The documents above named shall constitute the judgment roll. [*1935 c. 541 s. 169, 170*]

Note: The word "note," as used in the statute, means not a writing with a mere notation of an amount payable, but a "promissory note," which is a unilateral instrument containing the express and absolute promise of the signer to pay to a specified person or order, or to bearer, or to a specified person, a definite sum of money at a specified time. United F. Corp. v. Peterson, 208 W 104, 241 NW 337.

See note to 116.02, citing Shawano F. Corp. v. Julius, 214 W 637, 254 NW 355.

A power of attorney to confess judgment contained in a note, being a power given for security, was not terminated by the subsequent incompetency of the maker of the note, and hence judgment by confession could properly be entered on the note subsequent to such incompetency. The entry of a judgment on cognovit is not the commencement of an action. Guardianship of Kohl, 221 W 335, 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 on a "note or bond." [United Finance Corp. v. Peterson, 208 W 104, applied.] Wisconsin Sales Corp. v. McDougal, 223 W 485, 271 NW 25.

The legislature has the power to declare what judgments may be entered on warrants of attorney. 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 under this section, 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 even be set aside on motion. [Any inference to the contrary in Sloane v. Anderson, 57 W 123, is 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 certain judgment note, and the note was filed, executed "Miller Bros. By M. Miller," the jurisdictional requirement of this section, 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 copartnership doing business as Miller Brothers and that as a member of the copartnership he was bound by the execution in the firm name. Husman v. Miller, 250 W 620, 27 NW (2d) 731.

270.70 [*Renumbered section 270.69 (2) by 1935 c. 541 s. 170*]

270.70 Entry of judgment or order defined. The filing of the judgment or order in the office of the clerk constitutes the entry of the judgment or order. [*Supreme Court Order, effective July 1, 1942*]

270.71 Judgment and order; specific requirements; recorded. (1) Each judgment shall specify clearly the relief granted or other determination of the action, and the place of abode of each party to the action and his occupation, trade or profession, as accurately as can be ascertained.

(2) All judgments and orders of the court or judge shall be recorded in the proper books. [*Supreme Court Order, effective Jan. 1, 1935*]

270.72 Judgment roll. Unless the party or his attorney shall furnish a judgment roll the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment roll:

(1) In case the complaint be not answered by any defendant the summons and complaint or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases the summons, pleadings or copies thereof and a copy of judgment, with any verdict or report, the offer of the defendant, exception, case and all orders and papers in any way involving the merits and necessarily affecting the judgment.

270.73 Judgments on municipal orders. No judgment shall be rendered in any action brought upon any county, town, city, village or school order, unless the order upon which said action is based shall be produced in evidence and filed with the court or with the clerk thereof, and such clerk shall note upon each order the date of such filing. Any order so filed shall be attached to and become a part of the judgment roll and the same shall not be detached from such judgment roll or removed from the files without an order of the court or presiding judge. Any judgment rendered in violation of this section shall be absolutely void. [*1935 c. 541 s. 171*]

270.74 Judgment docket. At the time of filing the judgment roll upon a judgment directing in whole or in part the payment of money the clerk shall enter in a judgment docket, either arranged alphabetically or accompanied by an alphabetical index, in books to be provided by the county and kept by him, a docket of such judgment containing:

(1) The name at length of each judgment debtor, with his place of abode and vocation. If the judgment fails to give the place of abode and the vocation of the judgment debtor, the judgment creditor may at any time file with the clerk an affidavit stating, on knowledge or information and belief, such place of abode and vocation; and the clerk shall thereupon enter the facts according to the affidavit in the docket, noting the date and hour of such entry.

(2) The name of the judgment creditor, in like manner.

(3) The name of the attorney for the judgment creditor, if stated in the record.

(4) The date of the entry of the judgment.

(5) The day and hour of entering such docket.

(6) The amount of the debt, damages or other sum of money recovered, with the costs.

(7) If the judgment be against several persons such statement shall be repeated under the name of each person against whom the judgment was rendered, in the alphabetical order of their names, respectively, when the docket is arranged alphabetically, or entered in the index under the name of each such person when the docket is kept with an alphabetical index accompanying. [*Supreme Court Order, effective Jan. 1, 1937*]

270.745 Delinquent income tax docket. At the time of filing the warrant provided by section 71.13 (3) or 71.11 (23), the clerk shall enter in the delinquent income tax docket, either arranged alphabetically or accompanied by an alphabetical index, in books to be provided by the county and kept by such clerk, a docket of such warrant containing:

(1) The name at length of each delinquent income tax debtor, with his place of abode, title and trade or profession, if any such be stated in the warrant.

(2) The date of the warrant.

(3) The day and hour of entering such docket.

(4) The amount of delinquent income taxes with interest, penalties and costs as set forth in the warrant.

(5) If the warrant be against several persons such statement shall be repeated under the name of each person against whom the warrant was issued, in the alphabetical order of their names, respectively, when the docket is arranged alphabetically, or entered in the index under the name of each such person when the docket is kept with an alphabetical index accompanying. [*1935 c. 519; 43.08 (2)*]

270.75 Transcript of justice's judgment. The clerk of the circuit court shall, upon the production to him of a duly certified transcript of a judgment for more than ten dollars, exclusive of costs, rendered by any justice of the peace in his county, forthwith file the same and docket such judgment in the docket of the court in the manner prescribed in section 270.74. When the transcript shall show that execution was stayed in the justice's court, with the name of the surety thereof, the clerk shall docket the judgment against such surety as well as the judgment debtor, and such surety shall be bound thereby as a judgment debtor and his property be subject to lien and be liable thereon to the same extent as his principal. Every such judgment, from the time of such filing of the transcript thereof, shall be deemed the judgment of the circuit court, be equally under the control thereof and be carried into execution, both as to the principal judgment debtor and his surety, if any, in the same manner and with like effect as the judgments thereof, except that no action can be brought upon the same as a judgment of such court nor execution issued thereon after the expiration of the period of the lien thereof on real estate provided by section 270.79.

270.76 Judgments docketed in other counties. When a judgment shall have been docketed as provided in sections 270.69, 270.74 and 270.75, or a warrant shall have been docketed as provided in section 270.745, it may be docketed in like manner in any other

county, upon filing with the clerk of the circuit court thereof a transcript of the original docket, certified by the clerk of the circuit court having custody thereof. [*1935 c. 519, 541 s. 172; 1939 c. 513 s. 52*]

270.77 Entry of judgment in journal. Every clerk of a court of record shall keep, in a book set apart for the purpose, a daily journal in which every judgment affecting real estate shall be entered immediately, and after such entry he shall immediately docket such judgment. All such judgments shall be numbered consecutively, and shall be entered in such journal thus:

Number of judgment.	Date and time of docketing.	Plaintiff.	Defendant.	Amount.	Plaintiff's attorney.	Defendant's attorney.	Property affected.	Suit number and volume and page where entered in record.

[*1935 c. 541 s. 173*]

270.78 Enforcement of real estate judgment in other counties. Whenever a judgment affecting real property shall be rendered in any county other than that in which such property is situate the trial court may, at any time, order that the judgment roll in the action with all papers filed and copies of entries, orders and minutes made therein, shall be by its clerk certified and transmitted to and filed by the clerk of the circuit court of the county where such property is situate; or order that certified copies thereof be so transmitted and filed and upon such filing such judgment may be enforced in such circuit court, with the same force and effect as if such judgment had been originally entered therein. The trial court shall have concurrent jurisdiction to enforce such judgment when certified copies of the judgment roll and papers shall be so transmitted. [*1935 c. 541 s. 174*]

270.79 Lien of judgment; priority; statute may be suspended. (1) Every judgment, when properly docketed, and the docket gives the judgment debtor's place of abode and his occupation, trade or profession shall, for ten years from the date of the rendition thereof, be a lien on the real property in the county where docketed, except the homestead mentioned in section 272.20, of every person against whom it is rendered and docketed, which he has at the time of docketing or which he acquires thereafter within said ten years. The priority of judgments as liens upon real estate shall be determined by their number on the daily journal required by section 270.77. The requirements as to place of abode and occupation shall not apply to judgments docketed prior to 1936.

(2) When the collection of the judgment or the sale of the real estate upon which it is a lien shall be delayed by law, and the judgment creditor shall have caused to be entered on the docket "enforcement suspended by injunction" or otherwise, as the case may be, and such entry dated, the time of such delay after the date of such entry shall not be taken as part of said ten years. And whenever an appeal from any judgment shall be pending and the bond or deposit requisite to stay execution has been given or made, the trial court may, on motion, after notice to the judgment creditor, on such terms as it shall see fit, direct the clerk to enter on the docket that such judgment is "secured on appeal," and thereupon it shall cease during the pendency of such appeal to be a lien.

(3) If the judgment be affirmed on appeal or the appeal be dismissed the clerk shall, on the filing of the remittitur, enter on the docket "lien restored by affirmance" or "lien restored by dismissal of appeal" with the date of such entry, and the lien thereof shall be thereupon restored. Similar entries may be made with the like effect upon the docket of such judgment in any other county upon filing with the clerk of the circuit court thereof a transcript of the original docket. [*1935 c. 541 s. 175; Supreme Court Orders effective July 1, 1939*]

Note: Lien arising from docketing of judgment does not constitute or create an estate, interest, or right of property, but merely gives 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 at common law or by statute to persons subsequently dealing with the judg-

ment debtor, nevertheless, under (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 378.

270.80 Supreme court judgment, docketing. The clerk of the supreme court, on demand and upon payment of one dollar, shall furnish a certified transcript of any money judgment of said court which transcript may be filed and docketed in the office of any clerk of the circuit court in the manner that other judgments are docketed and shall then be a like lien and for a like time as circuit court judgments on the real property in the county where docketed. And whenever the supreme court shall remit its judgment for the recovery of money or for costs to the lower court such judgment shall in like manner be docketed by the clerk of said court and shall have the like force and effect as judgments of the circuit court so docketed. [*1935 c. 541 s. 176*]

270.81 Docketing federal judgments. Every judgment and decree requiring the payment of money rendered in a district court of the United States within this state shall be, from the docketing thereof in said court, a lien upon the real property of the judgment debtor situated in the county in which it is so docketed, the same as a judgment of the state court. And a transcript of such docket may be filed with the clerk of the circuit court of any other county; and shall be docketed in his office as in the case of judgments and decrees of the state courts and with like effect, on payment of fees as provided in section 59.42. [*1935 c. 68*]

270.82 Docket entry of reversal of judgment. Whenever any docketed judgment shall be reversed and the remittitur filed the clerk shall enter on the docket "reversed on appeal." [*1935 c. 541 s. 177*]

270.83 [*Repealed by 1935 c. 541 s. 178*]

270.84 Time of docketing; damages. Every clerk who shall docket a judgment or decree and enter upon the docket a date or time other than that of its actual entry or shall neglect to docket the same at the proper time shall be liable to the party injured in treble the damages he may sustain by reason of such fault or neglect.

270.85 Assignment of judgment. When a duly acknowledged assignment of a judgment shall be filed with the clerk he shall note the fact and the date thereof and of filing on the docket. An assigment may be made by an entry on the docket thus: "I assign this judgment to A. B.," signed by the owner, with the date affixed and witnessed by the clerk. [*1935 c. 541 s. 179*]

270.86 Satisfaction of judgment by execution. When an execution shall be returned satisfied in whole or in part the judgment shall be deemed satisfied to the extent of the amount so returned unless such return be vacated and the clerk shall enter in the docket that the amount stated in such return has been collected. [*1935 c. 541 s. 180*]

270.87 Judgments, how satisfied. A judgment may be satisfied in whole or in part or as to any judgment debtor by an instrument signed and acknowledged by the owner or, at any time within five years after the rendition thereof, (when no assignment has been filed) by his attorney of record, or by an acknowledgment of satisfaction, signed and entered on the docket in the county where first docketed, with the date of entry, and witnessed by the clerk. Every satisfaction of a part of a judgment or as to some of the judgment debtors shall state the amount paid thereon or for the release of such debtors, naming them. [*1935 c. 541 s. 181*]

270.88 Satisfaction by attorney not conclusive. No satisfaction by an attorney shall be conclusive upon the judgment creditor in respect to any person who shall have notice of revocation of the authority of such attorney, before any payment made thereon or before any purchase of property bound by such judgment shall have been effected.

270.89 Duty of clerk on filing satisfaction. On filing a satisfaction, duly executed with the clerk he shall enter the same on the court record of the case and shall enter a statement of the substance thereof, including the amount paid, on the margin of the judgment docket with the date of filing the satisfaction. [*1935 c. 541 s. 182*]

270.90 Court may direct satisfaction. When a judgment has been fully paid but not satisfied or the satisfaction has been lost the trial court may authorize the attorney of the judgment creditor to satisfy the same or may by order declare the same satisfied and direct satisfaction to be entered upon the docket. [*1935 c. 541 s. 183*]

270.91 Judgment satisfied not a lien; partial satisfaction. (1) When a judgment shall have been satisfied in whole or in part or as to any judgment debtor and such satisfaction docketed, such judgment shall, to the extent of such satisfaction, cease to be a lien;

and any execution thereafter issued shall contain a direction to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(2) Upon proper notice, any person who has secured a discharge in bankruptcy may apply to the court where such judgment was entered, for an order to satisfy such judgment as may have been duly discharged in such order of discharge in bankruptcy and which judgment was duly set forth and included in such schedules of bankruptcy as to the name and address of such judgment holder. If the court is so satisfied that such order of discharge in bankruptcy was duly obtained and that the name and address of such judgment creditor was included in such schedules of bankruptcy, then the court shall declare such judgment to be satisfied and direct satisfaction thereof to be entered on the docket. The order of the court shall fully release the real property of any such bankrupt person from the lien of such judgment. Thereafter the entry of such order of satisfaction of judgment shall be a bar to any other action against the person securing a discharge in bankruptcy by such judgment creditor. [*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 No. 50 S, s. 184)

270.92 Filing transcript of satisfaction. When a satisfaction of a judgment has been entered on the docket, in the county where it was first docketed a certified transcript of such docket or a certificate by the clerk, under his official seal, showing such satisfaction, may be filed with the clerk of the circuit court in any county where it is docketed, and he shall thereupon make a similar entry on his docket. [*1935 c. 541 s. 185*]

270.93 [*Repealed by 1935 c. 541 s. 186*]

270.93 Satisfaction of judgment. For the purpose of paying any money judgment, the debtor may deposit with the clerk of the court in which the judgment was entered the amount of his liability thereon. The clerk shall give the debtor a certificate showing the date and amount of the deposit and identifying the judgment; and shall immediately note on the docket thereof and on the margin of the judgment journal the amount and date of the deposit. The debtor shall immediately give written notice to the owner of record of the judgment and to his attorney of record, personally or by registered mail, to his last known post-office address, stating the amount, date and purpose of the deposit, and that it is held subject to the order of such judgment owner. Ten days after giving the notice, the clerk shall, upon filing proof of such service, satisfy the judgment of record, unless the trial court shall otherwise order. Acceptance by such owner of the sum deposited shall have the same legal consequences that payment direct by the debtor would have. Payment to the clerk shall include fifty cents clerk's fees. [*Supreme Court Order, effective July 1, 1939*]

270.94 Refusal to satisfy judgment. If any owner of any judgment, after full payment thereof, fails for seven days after being thereto requested and after tender of his reasonable charges therefor, to satisfy the judgment he shall be liable to the party paying the same, his heirs or representatives in the sum of fifty dollars damages and also for actual damages occasioned by such failure. [*1935 c. 541 s. 187*]

270.95 Action on judgment, when brought. No action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties, without leave of the court, for a good cause shown, on notice to the adverse party.

270.96 [*Repealed by 1933 c. 436 s. 19*]