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.

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.

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.

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.

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.

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

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.

270.11 Hearing on demurrer. The issue raised by a demurrer may be brought on for trial before the court at any time upon 5 days' notice.

270.115 Notice of trial. Every issue of fact or law may be noticed for trial at any time after issue joined, by service of notice of trial on the opposite party. In certiorari and appeals the date of filing the return is the date of issue. The notice of trial, or the copy served, with proof of service indorsed thereon or attached thereto may be filed with the clerk by either party. Such notice of trial shall state that the action will be placed on the calendar for trial at the time and in the manner prescribed by s. 270.12. It shall also contain the title of the action, the names of the attorneys, the time when issue was joined, and state whether the issue be of law or of fact, and if the latter, whether triable by the court or by the jury. If such notice of trial so filed fails to comply in any respect with the requirements of this section the presiding judge in his discretion, if satisfied that the opposite party has not been misled or prejudiced thereby, may direct the action to be placed on the calendar as hereinafter provided.

History: Sup. Ct. Order, 265 W viii.

270.12 Calendar. (1) TIME OF ARRANGEMENT. When the notice of trial is filed with the clerk he shall place issues on the calendar as follows:

(a) Issues of law or fact triable by the court shall be placed on the calendar of the current term when 10 days have elapsed after service of notice of trial.

(b) Issues of fact triable by the jury shall be placed on the calendar of the next term, if notice of trial is filed 15 days or more before commencement of such term. If such notice is filed less than 15 days before commencement of the next term, issues shall be placed on the calendar of the term following the next one.

(1m) CRIMINAL CASES. Criminal cases and prosecution for violations of municipal ordinances shall be placed on the calendar of the current term.

(2) ADVANCEMENT OF ISSUES. Whether or not a case has been noticed for trial, the court may, on application of any party upon notice, or on its own motion, on 8 days' prior notice by regular mail if no notice of trial has been filed, place on the calendar or advance for trial any action which is at issue.

(3) PENDING MATTERS CONTINUED. All matters pending and undisposed of at the end of a term are continued to the next term and shall be placed upon the calendar of the next term in accordance with their nature and date of filing notice of trial.

(4) 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 sub. (3), containing the title of each action, and the names of the attorneys, and arranged as follows: (a) criminal cases in the order of filing, (ab) prosecutions for violations of municipal ordinances and appeals thereof from inferior, municipal and justice courts to the circuit courts, (b) civil jury issues, (c) issues of fact for court, and (d) issues of law in the order in which notice of trial was filed. The calendar shall be disposed of in the above order unless for convenience of parties, the dispatch of business, or the prevention of injustice, the presiding judge shall otherwise direct.

(5) LARGE CALENDARS. In circuit courts having 1,000 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.

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

(7) CORRECTION OF CALENDAR. All motions to correct the calendar or to strike causes therefrom shall be made immediately after the calling of the calendar.

(8) 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 4 days before the term.

History: 1953 c. 511; Sup. Ct. Order, 265 W v, vi, viii; 1955 c. 577, 652.

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, ordinance violation cases and appeals thereof from inferior, municipal and justice courts and the first 6 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.

History: 1955 c. 577.

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.

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

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

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

270.15 Drawing of petit jury. (1) At every term of any court for which jurors are drawn as provided in s. 255.04 the clerk shall place in a tumbler only the names of the petit jurors in attendance who have been drawn and summoned according to law for service at such term. The names shall be written upon separate cards and enclosed in opaque envelopes as required by s. 255.04 (2) (b).

(2) When a jury issue is to be tried the clerk shall, in the presence and under the direction of the court, openly draw out of the tumbler, one at a time, as many envelopes containing cards as are necessary to secure a jury. Before drawing each card he shall close the tumbler and rotate it.

(3) The jury may consist of any number of persons less than 12 that the parties agree upon. If there be no such agreement it shall consist of 12 persons so drawn who are not lawfully challenged and who are approved as indifferent between the parties.

(4) During the trial the cards containing the names of the jurors shall be kept separately until the jury is discharged, and then they shall be returned, properly enclosed in envelopes, to the tumbler, and the same course shall be taken as often as a jury is required.

(5) The card containing the name of the juror who is set aside or excused for any cause shall be replaced in its envelope and returned to the tumbler as soon as the jury is sworn.

(6) If a jury issue is brought to trial while a jury is trying another cause, the court may order a jury for the trial of the former to be drawn out of the tumbler in the ordinary way; but in any other case all the cards containing the names of the petit jurors. returned at and attending the term, shall be placed in the tumbler before a jury is drawn.

History: 1955 c. 167.

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.

The trial court's acceptance of a juror whose husband was insured by the defendant liability insurer, and of 5 jurors who were policyholders in the same company, was not prejudicial nor an abuse of discretion. Good v. Farmers Mut. Ins. Co. 265 W 596, 62 NW (2d) 425.

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

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.

270.20 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 attorneys 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.

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

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.

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

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

There is no error in refusing to give a requested instruction which assumes a fact not proved. The trial court has some discretion as to what special instructions it will give based on isolated portions of the testimony in the case. Gustafson v. Engelman, 259 W 446, 49 NW (2d) 410.

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

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

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

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

An instruction on proximate cause is held erroneous so far as including the element of foreseeability therein. (Such instruction was substantially verbatim the one recommended in Deisenrieter v. Kraus-Merkel Malting Co. 97 W 279, but was impliedly repudiated by the decision in Osborne v. Montgomery, 203 W 223.) It was also error to charge that proximate cause is one which "produces the injury as a natural and probable result" of the defendant's negligence, since the use of the term "probable result" carries with it a connotation of foreseeability, which is disapproved. An instruction on proximate cause would be proper which informs the jury that by proximate cause, legal cause, or cause (whichever of such 3 terms as may have been used in framing the causation question in the special verdict) is meant such efficient cause of the accident as to lead the jurors, as reasonable men and women, to conclude that the negligence of A (A having been found negligent by the jury's answers to prior question in the verdict) was a substantial factor in causing the injury. Pfeifer v. Standard Gateway Theater, Inc. 262 W 229, 55 NW (2d) 29.

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

The failure of the defendant's counsel to object to the form of the special verdict, or to submit requested questions for the same, waived the defendant's right to object to any error in the form of the verdict, but the failure to object to prejudicially erroneous instructions, given in connection with such defective form of verdict, did not constitute a waiver that would prevent such error from being raised on appeal. Deaton v. Unit Crane & Shovel Corp. 265 W 349, 61 NW (2d) 552.

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

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

An instruction given to the jury, in connection with the question submitted as to negligence of the operator of a tractor-trailer unit, was erroneous and prejudicial, requiring a new trial, in that it incorrectly assumed that the overturned unit blocked the entire traveled portion of the highway, in that it incorrectly stated the law applicable to the situation to be that when a vehicle is in a position on the highway where it has no legal right to be it is presumed that its position is due to some act of negligence on the part of the operator, and in that it thereby placed the burden on the operator to prove otherwise. Olson v. Milwaukee Automobile Ins. Co. 266 W 106, 62 NW (2d) 549, 63 NW (2d) 740.

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

Instruction on lookout approved. Weber v. Mayer, 266 W 241, 63 NW (2d) 318.

It is error to instruct a jury that 85.40 (2) (b) requires a driver to drive at such speed and under such control as to avoid accident, since his duty is to use ordinary care to that end. This error is not prejudicial where the jury found no negligence as to speed. Swanson v. Maryland Casualty Co. 266 W 357, 63 NW (2d) 743.

The provision in 270.21 that each instruction asked by counsel shall be given without change or refused in full, must be considered together with the provision in 274.37 that no judgment shall be reversed or set aside or new trial granted on the ground of misdirection of the jury or for error as to any matter of procedure unless it shall appear that the error complained of has affected the substantial rights of the complaining party. Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

Where injury to land is in question the jury should be asked to find the values before and after the injury, and not told that the difference constitutes the damages. Where defendant made no objection to the

trial court as to an allegedly improper instruction, he cannot raise the matter for the first time on appeal. Zombkowski v. Wisconsin River Power Co. 267 W 77, 64 NW (2d) 236.

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

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

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

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

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

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

In submitting to the jury a question on negligence as to position on the highway on the part of the driver of an automobile struck from the rear by a following truck, an instruction should not have been given on the duty of giving to traffic to the rear an appropriate signal of intention to make a turn either to the right or the left, nor on the duty, when moving from a parked position, to yield the right of way to approaching vehicles, where there was no evidence in the record that such driver may have signaled an intention to turn or that his car had been parked prior to the collision. Jaster v. Miller, 269 W 223, 69 NW (2d) 265.

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

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

In an action for the death of a person struck by a truck while standing at the side of a tractor-trailer stalled in a ditch off the shoulder of the highway, the refusal to give requested instructions, relating to mere skidding not being in itself proof of negligence and to skidding occurring without fault, was not prejudicial where it appeared that the driver of the truck, bringing sand to help extricate the stalled vehicle, was aware that the shoulder of the road declined to the ditch and was covered with ice, and that he stopped his truck on the slippery shoulder at a place where he should have anticipated that it would skid toward the deceased. Williams v. Monroe County 271 W 243, 73 NW (2d) 501.

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

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

To avoid an inconsistent verdict, the question asking whether the host-driver was operating his car while under the influence of intoxicating liquor should preferably be omitted from the special verdict, and the matter of intoxication should be covered in the instructions given in respect to questions dealing with the host's negligence and the guest's assumption of risk, since intoxication in itself does not give rise to liability but does so only when combined with some act of causal negligence. (Doubt is expressed as to the form of verdict recommended in Erickson v. Pugh, 268 W 53.) Frey v. Dick, 273 W 1, 76 NW (2d) 716, 77 NW (2d) 609.

Where, no matter whose burden it was to prove that the injured boy failed to realize the risk involved, the jury, under

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

An erroneous instruction is not cured, nor the presumption of prejudice therefrom overcome, by a correct statement of the law on the same subject elsewhere in the charge. Ackley v. Farmers Mut. Automobile Ins. Co. 273 W 422, 78 NW (2d) 744.

With reference to an instruction as to the duty of a driver to slow down or stop when his vision is completely obscured, a portion thereof stating, "provided there is time and distance in which in the exercise of ordinary care to accomplish such stop before the vehicle comes into collision with some object on the highway which is completely obscured from the vision of the driver," related to causation rather than to negligence and should not have been included in such instruction, which was given with respect to a question inquiring as to whether the driver of the colliding vehicle was negligent as to speed. Vidakovic v. Campbell, 274 W 168, 79 NW (2d) 806.

Where certain instructions were not requested in the trial court, error cannot be predicated on their omission; and likewise, where instructions given to the jury are incomplete and do not cover a point that ought to be covered, the supreme court will not reverse unless a timely request for appropriate instructions was made to the trial court. Grinley v. Eau Galle, 274 W 177, 79 NW (2d) 797.

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

See note to 270.27, citing Bronk v. Mijal, 275 W 194, 81 NW (2d) 481.

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

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.

See note to 251.251, citing Klassa v. Milwaukee Gas Light Co. 273 W 176, 77 NW (2d) 297.

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.

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

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.

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

270.25 Verdicts; five-sixths; directed. (1) A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same cause of action, the same five-sixths of the jurors must agree on all such questions.

(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.

History: 1951 c. 36.

If the evidence is conflicting, or if the inferences to be drawn from the credible evidence are doubtful, and there is any credible evidence which under any reasonable view will support an inference either for or against the claim or contention of any party, then the proper inference to be drawn therefrom is a question for the jury and the court should not assume to answer such question. Trautmann v. Charles Schefft & Sons Co. 201 W 113, 115, 228 NW 741; Elder v. Sage, 257 W 214, 42 NW (2d) 919; Webster v. Heyroth, 257 W 238, 43 NW (2d) 23.

A guest occupant of an automobile brought an action against her host and a streetcar company for injuries sustained in a collision between the automobile and a streetcar. There was no issue of assumption of risk or contributory negligence on the part of the plaintiff. The jury by special verdict found that the streetcar motorman was not negligent as to speed or lookout or control, with 2 jurors dissenting from the answer on control; found that the motorist was not negligent as to speed or lookout or control but was causally negligent as to yielding the right of way to the streetcar, with 2 other jurors dissenting from the answer on control; and assessed the plaintiff's damages at a stated sum, with 2 other jurors dissenting therefrom. Held, (a) The verdict was complete as to nonliability of the streetcar company by the agreement of the same 10 jurors on all questions in regard thereto. (b) The verdict was complete as to liability of the motorist by the unanimous

answers to the questions of his causal negligence as to yielding the right of way, so as to render immaterial the 2 dissents to the answer on control. (c) The verdict was complete as to assessment of the plaintiff's damages by the agreement of 10 jurors thereto. (d) In such circumstances, the verdict was not defective as failing to comply with the requirements of a five-sixths verdict. Augustin v. Milwaukee E. R. & T. Co. 259 W 625, 49 NW (2d) 730.

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

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

Where the evidence is as consistent with the theory that an accident may be ascribed to a cause not actionable as to a cause that is actionable, the jury may not be allowed to guess where the truth lies; but when the possible nonactionable cause is present only in the imagination, the question of speculation does not arise. From the fact that the right wheels of an automobile dropped off the pavement when the driver turned to the right on meeting a car on a curve, and that the car hit a bump as the driver tried to bring it back, and then zigzagged and overturned, the jury could reasonably infer that the accident was caused by the driver's negligent management and control. Schimke v. Mut. Automobile Ins. Co. 266 W 517, 64 NW (2d) 195.

Where the jury unanimously found the defendant guilty of causal negligence and the plaintiff not guilty of contributory negligence, but on the damage question the jury found the plaintiff's loss of earnings to be $1,000, with one juror dissenting, and damages for permanent injuries to be $4,500, with 2 other jurors dissenting, no same 10 jurors agreed in answering all the questions necessary to support a judgment, so that the verdict was defective, requiring a new trial. The trial court's estimate of damages could not be substituted for the several appraisals by different jurors, when the question was one of fact for the jury. McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

When the trial court, reducing the damages awarded, sets the reduced amount at the highest amount which a fair-minded jury properly instructed would probably allow, the option to accept it or have a new trial must be given to the defendant, the plaintiff getting the option only when the court sets the lowest amount. McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

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

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

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

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.

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.

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

A question in the special verdict asking whether the place where the plaintiff was injured was a portion of the depot grounds of the defendant, together with an instruction that the burden of proof was on the plaintiff to satisfy the jury that such question should be answered "No," properly presented the issue to be decided, and was not error for putting the burden of proof on the negative rather than on the affirmative. (Dictum in Kausch v. Chicago & M. E. R. Co. 173 W 220, that questions should always be so framed as to put the burden of proof on the affirmative, not followed.) The form of a special verdict rests in the sound discretion of the trial court, and that discretion will not be interfered with so long as the issues of fact in the case are covered by appropriate questions. Garcia v. Chicago & N. W. R. Co. 256 W 633, 42 NW (2d) 288.

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

Where, in an action for injuries sustained in a collision, the case was properly submitted to the jury and a special verdict was

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

In determining whether there is credible evidence in the record which would sustain the jury's answer to a question in a special verdict, the evidence must be considered in the light most favorable to sustain the verdict. Smith v. Benjamin, 261 W 548, 53 NW (2d) 619.

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

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

The inclusion in the special verdict of a separate question inquiring as to the truck driver's negligence in failing to sound his horn on turning into a smoke-filled alley was not error as covering an element included in the question inquiring as to management and control; and, although the complaint did not allege a failure of duty to sound the horn, the inclusion of the question thereon in the special verdict was not prejudicial where the truck driver himself testified that he did not sound the horn and the evidence warranted a finding that he should have done so. Where specific acts of negligence are charged in the complaint and litigated on the trial, a special verdict should contain specific questions covering those alleged acts. Cook v. Wisconsin Telephone Co. 263 W 56, 56 NW (2d) 494.

Any objection to the form of a special verdict is waived by failure to interpose such objection before the case is submitted to the jury; where the real controversy has not been tried because of the form of the special verdict submitted, the discretionary power granted by 251.09, to reverse judgments on appeal and to remand the cause for a new trial on the ground that the real controversy has not been fully tried, should be exercised only when the supreme court is clearly of the opinion that there has been a probable miscarriage of justice in the trial court. Minkel v. Bibbey, 263 W 90, 56 NW (2d) 844.

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

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

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

Questions in a special verdict should be framed, so far as practicable, to secure the most direct consideration of the evidence as it applies to the issues made by the pleadings and supported by the evidence. Thoresen v. Grything, 264 W 487, 59 NW (2d) 682.

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

Where there is a jury issue as to statutory right of way under 85.18 (1), the special verdict should not contain a separate question asking whether the 2 vehicles approached or entered the intersection at approximately the same time, but such matter, and the matter of the duty of the driver approaching on the left, should be covered in the instructions given to the jury in connection with the question to be submitted asking whether such driver was negligent in respect to failure to yield the right of way, which is the ultimate question to be determined by the jury in such a case. Vogel v. Vetting, 265 W 19, 60 NW (2d) 399.

See note to 270.21, citing Deaton v. Unit Crane and Shovel Corp. 265 W 349, 61 NW (2d) 552.

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

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

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

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

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

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

Where special verdict inquired as to negligence of driver in failing to stop before entering arterial, and as to lookout,

failure to yield right of way and speed, a question as to management and control in failing to apply brakes or otherwise reduce speed would be a duplication. Roeske v. Schmitt, 266 W 557, 64 NW (2d) 394.

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

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

In an action by the driver of one automobile against the driver of another in which a guest was riding, and an action by the guest against both drivers, consolidated for trial, assumption of risk by the guest was not an issue where it was not specially pleaded as a defense, and hence questions on assumption of risk should not have been submitted to the jury in the special verdict where timely objection had been made to the introduction of evidence thereon and to the inclusion of such questions in the verdict; further, the questions on assumption of risk were not in proper form and erroneously referred to certain other questions submitted; rendering the verdict defective and requiring a new trial. Catura v. Romanofsky, 268 W 11, 66 NW (2d) 693.

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

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

Where the defendant set up the defense of assumption of risk, and there was evidence of considerable drinking, a question should have been asked as to whether defendant was operating the car under the influence of intoxicants. If answered in the affirmative, the guest assumed the risk as a matter of law. If answered in the negative, then the jury should have answered the questions of increase of the risk, assumption of the new danger, and causation. Erickson v. Pugh, 268 W 53, 66 NW (2d) 691.

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

Where there was nothing in the record to show that a gas heater was in a defective condition when delivered by the seller, and there was no testimony as to when or by whom it was uncrated or what its condition was on delivery, the failure to include a question asking whether such heater was damaged or in a defective condition was not error. Fonferek v. Wisconsin Rapids Gas & Electric Co. 268 W 278, 67 NW (2d) 268.

Where the testimony was that the damage by smoke and soot could be due either to improper regulation of the gas heaters or to improper venting, and one such cause was actionable and the other was not, the jury could not be allowed to guess which was responsible for the damage, and hence the failure to include a question asking whether the seller was negligent in the manner in which it adjusted or regulated the heaters was not error. Fonferek v. Wisconsin Rapids Gas & Electric Co. 268 W 278, 67 NW (2d) 268.

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

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

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

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

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

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

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

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

Two separate questions inquiring as to the negligence of the driver of a stalled truck in failing to put out warning flares or use any other device or method of warning were duplicitous and, further, no question on failure to warn should have ben included in the special verdict since there was no evidence from which the jury could infer that the truck had been stalled long enough before the accident for its driver to employ any means of warning traffic. Szymon v. Johnson, 269 W 153, 69 NW (2d) 232, 70 NW (2d) 2.

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

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

Negligence of plaintiff, if any, is to be compared by the jury with that of defendant, and it was error to direct a verdict where plaintiff skidded and went off the road to avoid hitting defendant's car parked partly on the highway at night without lights. Ryan v. Cameron, 270 W 325, 71 NW (2d) 408.

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

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

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

The refusal of the trial court to include in the special verdict questions concerning the possible negligence of the operator of the truck in tow in stopping on the highway, in not leaving a clear and unobstructed width of 15 feet of roadway opposite his vehicle, and in failing to put out fusees or other lights mentioned in 85.06 (18) was prejudicial error, which was not cured by questions included in the special verdict asking whether such operator was negligent in having his vehicle towed on the highway and as to lights, especially in view of inadequate and erroneous instructions given to the jury in connection with such submitted questions. Robinson v. Briggs Transportation Co. 272 W 448, 76 NW (2d) 294.

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

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

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

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

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

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

See note to 270.21, citing Frey v. Dick, 273 W 1, 76 NW (2d) 716, 77 NW (2d) 609.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

Where the special verdict, containing no question on the plaintiff's negligence, was submitted to counsel before the case was argued to the jury, and counsel for the defendant made no request for findings by the jury in respect to the plaintiff's conduct, except as might be inferred from their argument on their motion for a directed verdict, it will be presumed that the decision of the matter was left to the trial court, and the court's implied finding that the plaintiff was not negligent, supported by sufficient evidence, may not be disturbed. Siblik v. Motor Transport Co. 262 W 242, 55 NW (2d) 8.

On an appeal from a judgment for the defendant in an action for injuries sustained by the plaintiff when she attempted to board a one-man streetcar at the rear or exit door and the defendant's motorman started the streetcar, the failure of the special verdict to include a question asking whether the plaintiff was a passenger or a trespasser at the time, where no request was made for the submission of such question and no objection was made to the special verdict without it, does not constitute grounds for reversal but, the omitted question, if material, will be deemed determined by the trial court in conformity with its

judgment. Fondow v. Milwaukee E. R. & T. Co. 263 W 180, 56 NW (2d) 841.

See note to 85.39, citing Miller v. Keller, 263 W 509, 57 NW (2d) 711.

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.

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

See note to 270.25, citing McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

An award of $6,400 to parents for loss of the services of a son who was about 17½ years old at the time of his death, and who helped his father with chores on the farm, but who would have had another year in high school and was to enter college, is deemed excessive. Based on a calculation of services which might have been rendered by the son up to the time of his entering college, the sum of $1,716 is deemed the lowest amount which an impartial jury properly instructed should allow to the surviving parents. Paul v. Hodd, 271 W 278, 73 NW (2d) 412.

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

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.

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.

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.

See note to 103.56, citing Brown v. Sucher, 258 W 123, 45 NW (2d) 73.

Where, in a proceeding on a claim against the estate of a decedent, the trial court did not make formal findings but did file a written opinion and judgment stating findings and conclusions, there was a sufficient compliance with this section. Estate of Vogel, 259 W 73, 47 NW (2d) 333.

In a trial to the court, findings of fact will not be set aside on appeal unless they are contrary to the great weight and clear preponderance of the evidence. Swazee v. Lee, 259 W 136, 47 NW (2d) 733.

A trial court may file a separate opinion when he wishes to set forth his own views on the questions presented, supplemented by citations of legal authorities, but such opinion should not be combined with a formal order, or formal findings of fact, or conclusions of law. State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

A finding of the trial court may not be disturbed as being contrary to the preponderance of the evidence solely on the ground that one significant circumstance, which might suggest a contrary finding, tends to contradict the determination of the trial court. Engle v. Peters, 261 W 347, 52 NW (2d) 8.

A finding as to the reasonable value of personal services rendered to a corporation by its directors-officers, in the capacity of skilled executives in operating a large and thriving business, based on the independent judgment of the trial court, however experienced he may be, cannot stand where such finding is against the evidence in the case. Gauger v. Hintz, 262 W 333, 55 NW (2d) 426.

In a replevin action by the lessee of a farm and machinery, livestock, and other personal property, to recover the increase of calves, or the value thereof, from the lessor and a purchaser to whom the lessor had sold the farm and personal property at the expiration of the one-year lease, the value found by the trial court as to 2 of the calves was based on a misinterpretation of the testimony, requiring that the judgment be reversed and the plaintiff be given the option to accept judgment for a specified less amount or a new trial on the issue of damages only. Jankowski v. Komisarek, 262 W 435, 55 NW (2d) 361.

Where a release from all claims, on account of "unknown" as well as known injuries resulting from an automobile collision was executed in reliance by both parties on a written report of the releasor's physician diagnosing the releasor's injuries as "sprained back," and the trial court set aside the release on the ground of "mutual" mistake because neither party knew of an injury to the releasor's coccyx at the time of executing the release, and there was no

mistake of fact on the part of the releasee if only a sprained coccyx or injury to the ligaments thereof was involved, but there was a mistake of fact on its part if a fracture of the coccyx was involved, and there was conflicting testimony as to whether there was a fracture of the coccyx as well as injury to the ligaments, but the trial court made no specific finding on this point, the cause must be remanded for the trial court to make a specific finding thereon. Doyle v. Teasdale, 263 W 328, 57 NW (2d) 381.

This section is directory, and it is not error to make and file the findings and judgment after the expiration of the 60-day period. Galewski v. Noe, 266 W 7, 62 NW (2d) 703.

See note to 270.25, citing Thiel v. Damrau, 268 W 76, 66 NW (2d) 747.

The judgment entered pursuant to the stipulation for settlement of the action was not reversible for the trial court's failure to make findings of fact and conclusions of law, since findings are necessary only when there is to be a determination of facts, and no such determination was necessary in this case in view of the stipulation. Czap v. Czap, 269 W 557, 69 NW (2d) 488.

The findings, conclusions and judgment, as to the time within which the defendant wife was to remove her personal effects and other property from the home, took precedence over a memorandum decision fixing a somewhat different time, and such difference did not constitute a basis for a claim of error. Gordon v. Gordon, 270 W 332, 71 NW (2d) 386.

Where no formal findings are made, the decision of the trial court is accorded the same consideration and weight on appeal as the findings; where both are filed and there is conflict between them, the findings control; and where the findings are insufficient in themselves, they may be supplemented by the decision. Estate of Wallace, 270 W 636, 72 NW (2d) 383.

Where no formal findings of fact are made, or the findings do not cover a point in issue, facts which are stated in the trial court's memorandum decision will be accorded the same weight on appeal as if contained in formal findings. The trial court, where it files no formal findings of fact apart from its memorandum decision, should set apart a portion of the memorandum decision and expressly designate such portion as "Findings of Fact" in which are stated the facts as found by the court. Estate of Olson, 271 W 199, 72 NW (2d) 717.

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.

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.

A referee's findings, confirmed by the trial court, will not be disturbed unless against the clear preponderance of the evidence. Mohs v. Quarton, 257 W 544, 44 NW (2d) 580.

Where, in an action to recover compensation for bookkeeping and accounting services performed for the defendants, the referee's findings of fact were general and no specific finding as to the reasonable number of hours involved was made, nor requested, and the trial court on reviewing and confirming the referee's report did not amend the same by including such a finding but did state in its memorandum decision that the referee's general finding in favor of the plaintiff was a finding of a reasonable number of hours, the findings, although not complying with 270.33, 270.35, were sufficient to render it unnecessary to return the case for more specific findings. The findings of a referee, when confirmed by the trial court, become the findings of the court. MacPherson v. Strand, 262 W 360, 55 NW (2d) 354.

In a matter of the custody of a minor child, referred to a court commissioner in habeas corpus proceedings, interested parties should have made timely application to the court to end the reference if they desired to question the jurisdiction of the court commissioner on the ground of delay in making a ruling, and they waived the objection by waiting until after the ruling had been made and then proceeding by writ of

certiorari to challenge the validity of the ruling on the ground of unreasonable delay. Manninen v. Liss, 265 W 355, 61 NW (2d) 336.

Where an act required to be done by a referee might as well be done after the time fixed as before, no presumption arises that an injury or a wrong was done because of the belated report. A provision as to the time of filing a referee's report is deemed not mandatory but directory merely. Manninen v. Liss, 265 W 355, 61 NW (2d) 336.

Alleged errors of the referee, not pointed out to the trial court or shown in an effort to have the judgment set aside, cannot be reviewed on appeal. Berning v. Giese, 274 W 401, 80 NW (2d) 270.

270.36 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.

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 rulings 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 s. 251.09.

For cases sustaining findings by trial court, or overruling them as against great weight and clear preponderance of evidence, see cases annotated under 270.33.

An "objection" to a decision of a court on a matter of law is an "exception," and under the provision that it shall not be necessary to except to errors in the charge to the jury but that the same shall be reviewed by the appellate court without exception, the right of review of an erroneous instruction does not depend on objection (exception) to it at the trial. Reuling v. Chicago, St. P. M. & O. R. Co. 257 W 485, 44 NW (2d) 253.

See note to 326.16, citing Timm v. Rahn, 265 W 280, 61 NW (2d) 322.

Where general objections to certain questions asked on the trial were sustained, and counsel did not ask to have the objections made specific and the rulings reconsidered in that light, reversible error may not be claimed on the ground that the objections should have been specific, and particularly where there were grounds on which the rulings might be sustained and it is not shown that the trial court ruled as it did for untenable reasons. Briggs Transfer Co. v. Farmers Mut. Auto Ins. Co. 265 W 369, 61 NW (2d) 305.

This section does not do away with the necessity of objecting to rulings of the trial court, but merely provides that if the rulings are unfavorable after objections have been made, it is not necessary to note an exception in order to preserve the right to review on appeal. Berning v. Giese, 274 W 401, 80 NW (2d) 270.

270.43 Bill of exceptions authorized. After trial of an issue of fact, a bill of exceptions may be settled as provided in this section and s. 270.44. The bill of exceptions, when settled, shall be signed by the judge before whom the issue was tried or the referee's report reviewed (whether he is still in office or not) and it shall thereby become a part of the record. It shall be filed with the clerk.

History: Sup. Ct. Order, effective January 1, 1958.

270.44 Settlement of bill of exceptions. Any party may propose a bill of exceptions. Unless the parties stipulate otherwise, it shall include all the evidence with the testimony set forth by question and answer, as in the reporter's notes, and the oral proceedings had on the trial and the oral rulings and decisions of the court or referee not otherwise reduced to writing and filed with the clerk. He shall serve a copy thereof on the adverse party and, if there are adverse parties united in interest, then upon such as the trial judge designates, and he shall give notice of such service to each of the other adverse parties united in interest. If there are adverse parties not united in interest, service of the proposed bill shall be made upon each of them. Within 10 days after service upon him, any party may serve proposed amendments upon all other parties. Thereupon the trial judge may settle the bill at any time and place, upon notice thereof served by any party on all the interested parties, not less than 4 nor more than 20 days prior to such time. If no amendments are served within the time allowed, the proposed bill may be signed by the judge on proof of its service as aforesaid and that no amendment has been served. If proposed amendments are served and accepted the proposed bill as so amended may be signed by the judge, on proof made of its service and of the service of the amendments and of their acceptance.

History: Sup. Ct. Order, effective January 1, 1958.

Where there is no bill of exceptions on an appeal, the case is before the supreme court for decision on the record brought before it. Garcia v. Chicago & N. W. R. Co. 256 W 633, 42 NW (2d) 288.

Presumptions on appeal in absence of bill of exceptions. Dunn v. Dunn, 258 W 188, 45 NW (2d) 727.

In the absence of a bill of exceptions on appeal, the supreme court cannot review the

findings to determine whether the evidence supports them. Hensle v. Carter, 264 W 537, 59 NW (2d) 455.

In the absence of a bill of exceptions, an appeal from a judgment dismissing a complaint for damages, alleging that the defendant attorney had signed a stipulation in behalf of the plaintiff without authority to do so, is before the supreme court on the pleadings, charge to the jury, verdict and judgment, and the court cannot go further than these in considering the appellant's claims of error. Harvey v. Hartwig, 264 W 639, 60 NW (2d) 377.

Where an order determined that petitioners, who claimed to be assignees of part of an escheated estate, were not entitled thereto under 318.03 (4), and the order shows that it was made after full hearing, it will not be reversed in the absence of a bill of exceptions or of proof in the record in support of petitioner's claims. Estate of Niemczyk, 266 W 512, 64 NW (2d) 193.

Defendant cannot complain that a proper transcript was not prepared, his counsel having signed the stipulation settling the bill of exceptions. State v. Perlin, 268 W 529, 68 NW (2d) 32.

In the absence of a bill of exceptions, the supreme court must presume that the evidence sustains the findings of the trial court, and the only question in such case is whether the judgment appealed from is in accordance with the findings. Estate of Wallace, 270 W 636, 72 NW (2d) 383.

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.

See note to 269.45, citing Valentine v. Patrick Warren Construction Co. 263 W 143, 56 NW (2d) 860.

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.

Interpreted in connection with (1), the provision in (2) that the presiding judge may "upon notice" extend the time for settling a bill of exceptions the same as the trial judge might have done, applies only in a case where the trial judge is dead or incapacitated to act, and hence, where such was not the case, a successor judge, properly entering such an order without notice within the statutory 90-day period for settling a bill of exceptions, erred in vacating his order on the grounds that it should have been granted only on notice and that only the trial judge could so extend the time. Briggson v. Viroqua, 264 W 40, 58 NW (2d) 543.

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.

Cross Reference: For limitation on granting of new trials, see 274.37.

The refusal to grant a new trial to a defendant not represented by counsel was not error. The record showed that the trial had been ordered despite the defendant's lack of counsel only after the case had been delayed from time to time at the defendant's request and she had failed to secure counsel to replace counsel whom she had dismissed without apparent cause, and that her lack of counsel was her fault, and that all of the relevant issues had been considered and decided by the trial court, and that the defendant had not suffered by reason of the lack of counsel. Lazich v. Arsenovich, 256 W 296, 41 NW (2d) 282.

Where the trial court issued an order granting a new trial because the verdict was contrary to the evidence and in the interest of justice, but stated no reasons in the order and supplied no written opinion, and the evidence amply supported the jury's verdict for the defendant, the order is re-

versed and the cause remanded with directions to reinstate the verdict and enter judgment for the defendant thereon. Bradle v. Juuti, 257 W 523, 44 NW (2d) 242.

See note to 251.09, citing Brown v. Erb, 258 W 444, 46 NW (2d) 329.

Reasons stated in an order granting a new trial on the question of damages, that in respect to damages the verdict was perverse and reflected bias and prejudice on the part of the jury, that the evidence failed to establish a fair standard as a basis for compensation of the plaintiff's wage loss and the medical proof was so indefinite and uncertain in respect to the plaintiff's disability that any allowance required resort to speculation and conjecture, and that a new trial as to damages was in the interest of justice, were sufficient to warrant the court's action if the record disclosed a sufficient basis for them. Evidence as to a painful back condition suffered by a widow, 55 years of age, who did house work and practical nursing and who was struck by an automobile and evidence as to the extent and duration of disability to perform services outside her household to provide for her maintenance, as to need for surgery, as to continued pain, and as to time devoted to practical nursing and as to earnings, supported awards of $5,000 for disability, $500 for pain and suffering, and $500 for future care and treatment, and the record did not disclose a sufficient basis for the reasons stated by the trial court for granting a new trial on the question of damages. Graff v. Hartford Accident & Indemnity Co. 258 W 22, 44 NW (2d) 565.

Where 2 cases arising out of the same automobile collision were consolidated for trial, and the trial court referred to only one cause in its opinion on motions for a new trial but the reasoning applied to both, the omission was obviously oversight, and the order granting a new trial applied with equal force to both cases. Popko v. Globe Indemnity Co. 258 W 462, 46 NW (2d) 224.

Where there is evidence which makes a jury issue the court is precluded from changing the answers of the jury and ordering judgment on the verdict so changed, but where the answers are against the great weight of the evidence the court does have discretion to grant a new trial. In an action arising out of a collision between 2 automobiles approaching from opposite directions, wherein the testimony on behalf of the defendant was strong although diametrically opposed by testimony on behalf of the plaintiff, and the jury found that the defendant was negligent as to speed, management and control, and driving on the wrong side of the road, but that the plaintiff was not negligent in any of such respects, the granting of a new trial because the verdict was contrary to the great weight of the evidence was not an abuse of discretion. Popko v. Globe Indemnity Co. 258 W 462, 46 NW (2d) 224.

Since it is not clear that the trial court followed the correct rule in reducing the amount of damages determined by the jury, the judgment is reversed with directions to the trial court to fix an amount of damages in conformity thereto, and give the plaintiff an election to take judgment for that amount or, in the event of her failure to do so, grant a new trial to the defendants on the question of damages only. A plaintiff who has elected to take a reduced amount of damages rather than a new trial may not ask for a review of the trial court's action in reducing the award of damages when an appeal has been taken by the defendant. Rasmussen v. Milwaukee E. R. & T. Co. 259 W 130, 47 NW (2d) 730.

Where the plaintiff's experienced counsel made no protest when a defense counsel, in argument to the jury, allegedly referred to the plaintiff's counsel as not an ordinary lawyer but one of Wisconsin's noted criminal lawyers, and that he had kept more criminals out of prison than any other lawyer, and was now demanding heavy and exorbitant damages for the plaintiff, it cannot be concluded that the trial court erred in holding that such argument was not prejudicial to the plaintiff's rights and did not warrant the granting of a new trial. Stellmacher v. Wisco Hardware Co. 259 W 310, 48 NW (2d) 392.

The inadequacy of damages awarded, in order to be held perverse, should be of such a nature and be sufficient to justify the court in saying that the verdict was perverse; and this must be in the exercise of sound discretion. Denial of a new trial was proper, as against a contention that, because of the jury's assessment of limited damages resulting to a motorist involved in a collision, the verdict, whereby the jury found that he was negligent in several respects and that he contributed 60 per cent of the total causal negligence involved, was perverse. Wagner v. Peiffer, 259 W 566, 49 NW (2d) 739.

In an action for injuries sustained in a collision between 2 automobiles approaching from opposite directions on a curve, an order granting a new trial in the interest of justice for the stated reason that the affirmative answer of the jury to a question in the special verdict relating to the plaintiff driver being on the wrong side of the road was contrary to the overwhelming weight of the credible evidence, and for other stated reasons, was warranted by the record, and constituted a valid and effective order, and it was not necessary for the court to state that the testimony in support of the verdict was false. Roskom v. Bodart, 260 W 276, 50 NW (2d) 451.

A defendant, whose motion for a reduction in damages was granted by the trial court with an option which the defendant did not accept, did not lose its right to an appeal on the other issues in the case. Umnus v. Wisconsin Public Service Corp. 260 W 433, 51 NW (2d) 42.

In an action for damages for assault and battery, wherein the defendant did not take the stand in his own behalf, the plaintiff's questioning of the defendant concerning the defendant's conviction for a crime, on calling the defendant as an adverse witness, was error; and whether the prejudicial effect of thus bringing the defendant's criminal history to the attention of the jury was so serious as to require a new trial was within the sound discretion of the trial court, and its order granting a new trial was not an abuse of discretion. Alexander v. Meyers, 261 W 384, 52 NW (2d) 881.

Where the evidence supported the jury's findings that neither the defendant husband-driver nor the defendant driver whose car was passed by the defendant husband's car was negligent, and where, although the plaintiff wife may have failed to fairly present the evidence as against the defendant husband, yet the defendant other driver consistently maintained that the defendant husband was negligent in the operation of his car and that his negligence was the sole cause of the accident, and the jury had before it all of the testimony which could be adduced, and all of the issues were litigated, the trial court was not justified in ordering a new trial in the interest of justice as between the plaintiff wife and the defendant husband and his insurer. Stikl v. Williams, 261 W 426, 53 NW (2d) 440.

Where damages found by a jury are excessive, the trial court may grant a new trial unless the plaintiff exercises the option given him by the court to remit the excess and consents to take judgment for the least amount that an unprejudiced jury, properly instructed, would, under the evidence, probably assess; but in every such case the proper rule as to the measure of damages must be applied. Kimball v. Antigo Bldg. Supply Co. 261 W 619, 53 NW (2d) 701.

In an action to recover for the death of an insured under a policy excluding coverage for fatal or nonfatal injuries suffered by the insured while intoxicated, the jury, on conflicting evidence, could determine that the insured was not intoxicated at the time of sustaining his fatal injuries, and the trial court should not have changed the jury's answer and entered judgment for the defendant, but the court should have granted a new trial because of grossly improper and prejudicial argument persistently made to the jury by the plaintiff's attorney notwithstanding the objections of the defendant's attorney and the court's rulings sustaining such objections. Blank v.

National Casualty Co. 262 W 150, 54 NW (2d) 185.

An unauthorized communication to the jury or a member thereof, not made in open court and a part of the record, is ground for the granting of a new trial, in a criminal or in a civil case. State v. Cotter, 262 W 168, 54 NW (2d) 43.

Allegedly improper and prejudicial statements by the plaintiff's attorney in argument to the jury, in the absence of the trial judge and the reporter from the courtroom and without any record made as to what the statements were, required the granting of the defendant's motion for a new trial. Caesar v. Wegner, 262 W 429, 55 NW (2d) 371.

The giving of options to consent to judgment for reduced damages or to submit to a new trial was properly based on the ground that the jury's award of damages for the plaintiff's loss of earnings and impairment of earning capacity was not supported by the evidence, and it was not necessary also that the excessive award be the result of passion or prejudice. The granting of a new trial is a highly discretionary action on the part of the trial judge, and such action will not be disturbed by the supreme court unless it clearly appears that there has been an abuse of judicial discretion; and likewise as to the determination of the trial court in fixing the maximum and minimum amounts of damages in connection with options. Flatley v. American Automobile Ins. Co. 262 W 665, 56 NW (2d) 523.

Where the trial court, on motions after verdict, properly changed the jury's answers on the defendant's negligence as to speed and as to management and control from "No" to "Yes," a new trial was required so that the jury might have a proper basis for the comparison of negligence. Cook v. Wisconsin Telephone Co. 263 W 56, 56 NW (2d) 494.

Where there was no evidence of pain suffered by the plaintiff after his discharge from the hospital except his own testimony, and the doctors could not account for it on the basis of their objective findings, and the evidence as to the cause of a fracture or bone chip in the plaintiff's wrist was such that a conclusion that it was caused by the accident in question would be pure speculation, and the plaintiff had permanently returned to his employment within 2 months after the accident, and had made a complete recovery at the time of trial from all injuries suffered in the accident, the evidence was insufficient to sustain the jury's award of $4,000 for pain and suffering and disability, warranting the granting of a new trial in the interest of justice on the question of damages. (Plaintiff did not exercise the option of accepting the lowest amount a jury would award.) Karsten v. Meis, 263 W 307, 57 NW (2d) 360.

Where counsel could easily have found out before trial whether a teen-age driver whom they represented was licensed to drive, but merely assumed that he was licensed, and allowed a juror to serve who had stated on voir dire that he would not be prejudiced against a teen-age driver if such driver had a driver's license, and counsel made no objection to a question asked on the trial as to whether such driver was licensed at the time of the collision, and did not move for a mistrial when surprised by his negative answer but waited for the jury's verdict, which was unfavorable, the protest in motions after verdict came too late, and did not entitle the complaining parties to a new trial on the ground of surprise. Briggs Transfer Co. v. Farmers Mut. Auto. Ins. Co. 265 W 369, 61 NW (2d) 305.

Where the trial court ordered a new trial on the ground of an excessive award of damages, this was sufficient under (2). The grounds must be set forth in detail only when the new trial is ordered "in the interest of justice." Dittman v. Western Casualty & Surety Co. 267 W 42, 64 NW (2d) 436.

See note to 270.21, citing Zombkowski v. Wisconsin River Power Co. 267 W 77, 64 NW (2d) 236.

Where the jury found the defendant's driver free from all negligence, but found the plaintiff's intestate causally negligent, the granting of a new trial on the ground that the questions in the special verdict inquiring as to the negligence of the plaintiff's intestate were duplicitous cannot be sustained, since the jury's findings freeing the defendant's driver from all negligence required the dismissal of the plaintiff's action regardless of any questions or findings respecting contributory negligence. Starry v. E. W. Wylie Co. 267 W 258, 64 NW (2d) 833.

In an action for injuries sustained by the plaintiff when she was thrown or bounced while riding as a passenger in the defendant's cab, wherein there was no evidence of the cabdriver's negligence except as negligence might be inferred from the fact that an injury was sustained, the trial court erred in granting a new trial in the interest of justice on the ground that the jury's findings that the cabdriver was not negligent in respect to lookout or management and control were contrary to the great weight of the evidence. Jury findings are not required to be in accord with the great weight of the evidence in order to stand. Mayer v. Boynton Cab Co. 267 W 486, 66 NW (2d) 136.

Where the plaintiff, sustaining a fracture of 2 vertebrae as the result of being thrown or bounced while riding as a passenger in a cab, and testifying as to continual disability and pain in her back, had undergone 2 major operations prior to the accident, and walked with a cane and a crutch as the result of an attack of polio prior to the accident, the jury might discount some of her claims without perversity, and its assessment of $1,290 as damages sustained as the direct result of the injuries sustained in the accident was not so inadequate as to show that its verdict, finding the cabdriver not negligent, was perverse. Mayer v. Boynton Cab Co. 267 W 486, 66 NW (2d) 136.

A motion for a new trial is only necessary to preserve for review errors committed by the jury; and errors committed by the trial court, such as improperly directing a verdict or improperly denying a motion for a directed verdict, can be reviewed on appeal without a motion for a new trial. McNamer v. American Ins. Co. 267 W 494, 66 NW (2d) 342.

Although no loss of income and no disfigurement was involved, an award of $4,500 to a dentist for the loss of an eye was inadequate, warranting the granting of a new trial on this ground, along with other grounds for a new trial. Frankland v. Peterson, 268 W 394, 67 NW (2d) 865.

An award of $15,000 for pain and suffering and permanent injury to a 19-year-old girl, who suffered a dislocated hip, ruptured ball-and-socket joint, and numerous other injuries, necessitating 2 operations, and resulting, among other things, in a shortened leg and a condition such that the thigh bone might become lifeless, was not excessive. Van Matre v. Milwaukee E. R. & T. Co. 268 W 399, 67 NW (2d) 831.

Conduct of a juror in a personal-injury case, in meeting with some third person after the case had been submitted to the jury and before a verdict was reached, warranted the granting of a new trial, even though no one may have been prejudiced by the incident. Rasmussen v. Miller, 268 W 436, 68 NW (2d) 16.

Alleged errors of the trial court in refusing to submit a requested question and instruction in the special verdict are not properly before the supreme court in the instant case, since the right to raise them here was not properly preserved by motions after verdict. Huffman v. Reinke, 268 W 489, 67 NW (2d) 871.

An award of $25,000 to a husband for loss of the services, society, and assistance of his wife, where the husband's life expectancy was 12.26 years and the wife's life expectancy was 18.79 years, and the wife was 95 per cent totally and permanently disabled, was not so excessive as to disclose perversity on the part of the jury and to require a new trial. Atkinson v. Huber, 268 W 615, 68 NW (2d) 447.

An order providing that the defendants should have the option to pay a reduced amount of damages or submit to a new trial

on such issue, if a judgment for the defendants should be reversed on appeal and the plaintiffs be permitted to recover, must be treated as imposing a condition on the judgment, and void under the rule that the court cannot render a conditional judgment in an ordinary action at law. Coenen v. Van Handel, 269 W 6, 68 NW (2d) 435.

An award of $50 for personal injuries which included a bruise and blood clot over the first and second sacral vertebrae, wrenched knees, bruised hip, chest and shoulder, and wrenched neck, and which resulted in total disability from working during a period of 2½ weeks following the accident, was grossly inadequate. Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571.

Under the requirement of (1), that a motion for a new trial must be "decided" within 60 days after the verdict, an order for a new trial is timely made where a written decision or opinion of the trial court, determining that the motion for a new trial should be granted, is filed with the clerk within 60 days after the return of the verdict, even though the formal order itself, directing the new trial, is not entered until after the 60-day period. Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571.

A trial court may order a new trial in the interest of justice when a jury's comparison of negligence is against the great weight of the evidence, even though it cannot be held as a matter of law that one of the tort-feasors was guilty of at least 50 per cent of the total negligence. If the reasons for ordering a new trial in the interests of justice are set forth in a filed written memorandum opinion, an incorporation of the reasons in the order by reference to the memorandum is a sufficient compliance with (2). Standing alone, the fact that a verdict is against the great weight of the evidence is not a ground for a new trial. Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571.

See note to 251.09, citing Guptill v. Roemer, 269 W 12, 68 NW (2d) 579, 69 NW (2d) 571.

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

The determination of the trial court that an award of $27,000 for pain, suffering, disability, and loss of income was not excessive, and that the award was not based on bias and prejudice, must be given weight, and is affirmed on the basis of the record. Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756.

An award of $750 for personal injuries, including pain and suffering, and the failure to assess any damages for future medical expenses, as to a plaintiff who sustained lacerations and contusions on his face and forehead, a slight brain concussion, and traumatic injuries to back and knee, and who apparently had made a good recovery from such injuries, did not show that the jury's findings in favor of the defendant and against the plaintiff on issues of negligence were perverse and the result of passion and prejudice. Wolf v. United Shipping Co. 269 W 623, 70 NW (2d) 184.

The evidence in an action by parents for the death of a son 17½ years of age, who had acquired the particular knowledge and skill of metal sorting required in the scrap-metal business in which the father was engaged, and who had quit high school to assist his father in the business, supported an award of $7,500 as reasonable compensation to the parents for their pecuniary loss occasioned by the loss of the son's contribution until he would have reached the age of 21. (Costello v. Schult, 265 W 243, distinguished.) Wing v. Deppe, 269 W 633, 70 NW (2d) 6.

Where a new trial has been ordered in the interest of justice, and the record discloses that such granting of the new trial was based on an erroneous view of the law by the trial court, such order constitutes an abuse of discretion. Schill v. Meers, 269 W 653, 70 NW (2d) 234.

An award of 14,000 to a man who sustained a comminuted fracture of the 2 bones in the lower right leg and other injuries resulting in a diminution in the size of the leg, a hammertoe, some loss of feeling in the leg, a limitation of motion in the ankle joint, a loss of one half of the motion in bending or twisting the foot, and a one-half inch shortening of the leg, and who was hospitalized and lost time from work for several months, and who might have to undergo more operations, was not excessive. Taylor v. Western Casualty & Surety Co. 270 W 408, 71 NW (2d) 363.

The granting of a new trial for error or in the interest of justice rests largely in the discretion of the trial court, but such rule does not apply where it is clear that the court proceeded on an erroneous view of the law. Holtz v. Fogarty, 270 W 647, 72 NW (2d) 411.

For discussion of excessive damages in a death case see Paul v. Hodd, 271 W 278, 73 NW (2d) 412.

In actions by property owners to recover damages in several respects for a nuisance resulting from the defendant's operation of a dump, wherein the trial court granted judgment for the plaintiffs on the special verdict, except as to the amount found for damages peculiar to the plaintiffs as a natural result with regard to their respective property rights or privileges other than for physical property (diminution or depreciation of the rental or usable value of the plaintiffs' property), and granted a new trial in the interest of justice on the issue of such damages only because of failure of proof thereon, the court should have granted a new trial on all issues raised under the pleadings, for the reason that the issues were not severable and a new trial, limited to the proof of such damages only, would not bring before the jury sufficient facts to render a just verdict. Nissen v. Donohue, 271 W 318, 73 NW (2d) 418.

The proper test in determining a motion to set aside a verdict is whether there was any credible evidence which supported the jury's answers. A trial court should not assume to set aside a verdict when its ruling would require it to pass on the credibility of witnesses, or weigh testimony, or would require it to resolve conflicts in the evidence. Braatz v. Continental Casualty Co. 272 W 479, 76 NW (2d) 303.

An award of $30,000 to a 10-year-old girl who suffered a compound depressed skull fracture along an eye socket, a fractured collarbone, a lacerated eardrum, a fractured rib, and laceration in the lumbar region, and was hospitalized, and who suffered permanent disabilities consisting of a scar and deformity in the left anterior temporal region, a partial paralysis of facial muscles involving the left forehead and eye and resulting in an inability to completely close the eye, periodic headaches, and a reduction in her intellectual capacity, was not excessive. Montalto v. Fond du Lac County, 272 W 552, 76 NW (2d) 279.

An award of $6,500 to an 8-year-old girl who was rendered unconscious by the accident, suffered a fractured forearm and considerable pain, and was hospitalized, and who still had some bowing of the forearm and a bump on her forehead at the time of the trial about 2½ years later, was not excessive. Montalto v. Fond du Lac County, 272 W 552, 76 NW (2d) 279.

Where the jury's verdict was inconsistent, but plaintiff did not request a new trial, the order dismissing the complaint will be affirmed, where no strong equities exist which warrant the granting of a new trial in the interest of justice under 251.09. Frey v. Dick, 273 W 1, 76 NW (2d) 716, 77 NW (2d) 609.

Where the plaintiff was found to have assumed the risk but the jury's verdict was inconsistent, where plaintiff did not request a new trial, the order dismissing the complaint will be affirmed, where no strong equities exist which warrant the granting of a new trial in the interest of justice under 251.09. Frey v. Dick, 273 W 1, 76 NW (2d) 716, 77 NW (2d) 609.

Where an order granting a new trial did not expressly state the reasons therefor but did state that the trial court was convinced that the damages were excessive, such statement will be considered on appeal as being the equivalent of a finding that the damages found were not supported by the evidence. Blong v. Ed. Schuster & Co. 274 W 237, 79 NW (2d) 820.

An award of $5,000 for pain and suffering to a woman patron, who fell while in the defendant's department store and sustained a severe contusion to her left hip and back, and of $3,100 to her husband for the loss of services and society was excessive. Blong v. Ed Schuster & Co. 274 W 237, 79 NW (2d) 820.

An award of $1,000 to the surviving parents for loss of the society and companionship of their deceased son, who probably would have lived at home for one year more, was not so insufficient as to indicate that the verdict was perverse. Spiegel v. Silver Lake Beach Enterprises, 274 W 439, 80 NW (2d) 401.

In an alternative motion for a new trial, which specified 5 grounds in support thereof, but none of which specifically referred to a duplicitous verdict, an allegation merely that the verdict was contrary to the evidence and contrary to law was not sufficient in itself to properly raise the issue of duplicitous verdict before the trial court after verdict. Wells v. Dairyland Mut. Ins. Co. 274 W 505, 80 NW (2d) 380.

No error by the court should be reviewable as a matter of right on appeal without first moving in the trial court for a new trial bottomed on such error, if the error is of a category that a trial court could correct by granting a new trial. Error by the court includes the giving of an erroneous instruction to the jury, the failure to submit a requested proper question in a special verdict, and the submission of a duplicitous verdict which included questions which should not have been submitted. (Prior rule to the contrary, repudiated.) Wells v. Dairyland Mut. Ins. Co. 274 W 505, 80 NW (2d) 380.

In an action for injuries sustained by a 68-year-old pedestrian who was struck by an automobile, and who suffered a broken leg and a consequent shortening of the injured leg, wherein the jury found that the pedestrian was causally negligent as to lookout and failure to yield the right of way, and that the defendant driver was causally negligent as to lookout, and apportioned the negligence at 50 per cent to each participant, an award of $2,000 for the personal injuries was not so extremely low as to indicate passion and prejudice on the part of the jury, especially in view of its award of $6,000 for loss of earnings. Frion v. Craig, 274 W 550, 80 NW (2d) 808.

Where the trial court on motions after verdict should have changed the jury's answer to the question as to causal negligence of the pedestrian in respect to lookout to the affirmative, but the comparison of causal negligence is deemed to have been for the jury under the evidence, and the jury might have made a different apportionment than they did in answering the comparative-negligence question, a new trial is required. Metz v. Rath, 275 W 12, 81 NW (2d) 34.

Improper argument to jury discussed. Pedek v. Wegemann, 275 W 57, 81 NW (2d) 49.

An award of $30,000 for permanent injuries, future pain and suffering, and future loss of earnings, to a policeman who was 36 years of age at the time of the accident and had a life expectancy of 31.07 years, and whose monthly salary was $369.60 per month immediately prior to the accident, and whose injuries consisted of a cranial injury with multiple fractures of the skull and cerebral concussion, and who was experiencing headaches, dizziness, insomnia, and occasional nosebleeds approximately 4 years after the accident, and who would be able in the future to undertake only light work for short periods of time and not necessitating any bending or undue stress or strain, was not excessive. Pedek v. Wegemann, 275 W 57, 81 NW (2d) 49.

The evidence supported an award of $5,000 for pecuniary loss sustained by parents by reason of the death of a son, 15½ years of age, who was a high-school student, already earning substantial amounts of money, and not intending to go to college. Spang v. Schroeder, 275 W 92, 80 NW (2d) 768.

Setting forth the reasons for granting a new trial in the interests of justice in a memorandum decision but not in the order is not a compliance with (2). Peters v. Zimmerman, 275 W 164, 81 NW (2d) 565.

Award of $14,000 reduced to $7,000 where young man suffered some facial scars, lost 4 teeth and had a minor ankle fracture, but was hospitalized only 2 weeks and made a good recovery. Twist v. Aetna Casualty & Surety Co. 275 W 174, 81 NW (2d) 523.

Damages for pain and suffering while semi-conscious discussed. Blaisdell v. Allstate Ins. Co. 1 W (2d) 19, 82 NW (2d) 886.

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.

A rule, that the supreme court may not order a new trial on the ground of newly discovered evidence unless it appears that proof of the facts offered would compel a different conclusion or, at least, that it is reasonably probable that a different result would be reached on another trial, applies in divorce cases as in other civil actions. Starzinski v. Starzinski, 263 W 104, 56 NW (2d) 784.

In proceedings in county court involving a controversy over the value of a trust estate as determined by trustees under a will requiring them to determine the gross cash value of the testator's estate as of the day preceding his death, wherein the county court decided adversely to the trustees and fixed a lower value than they had fixed and was affirmed by the supreme court on appeal, it was not an abuse of discretion to deny the trustees' subsequent motion for a new trial on the ground of newly discovered evidence, which consisted of the testator's appraisal of his net worth made for a purpose not connected with his will, and which, if material, was merely cumulative to the evidence introduced at the trial, and was not likely to change the result on a new trial. Before a new trial will be granted on the ground of newly discovered evidence, the evidence must have come to the moving party after the trial, such party must not have been negligent in seeking to discover it, and it must be material to the issue and must not be merely cumulative to testimony introduced at the trial, and it must be reasonably probable that a different result would be reached on a new trial. Estate of Teasdale, 264 W 1, 58 NW (2d) 404.

In affidavits in support of a motion for a new trial on the ground of newly discovered evidence, general averments as to diligence are not sufficient, but the facts should be set out so as to negative fault on the part of the movant. Estate of Eannelli, 269 W 192, 68 NW (2d) 791.

In the absence of a bill of exceptions, the supreme court is without power to consider the appellant's affidavits supporting his motion for a new trial on the ground of newly

discovered evidence, since the supreme court cannot determine whether the trial court erred in denying such motion unless the supreme court knows what evidence was already before the trial court. Harvey v. Hartwig, 264 W 639, 60 NW (2d) 377.

In an action arising out of a head-on collision, wherein the jury found the defendant free from negligence, and wherein a passenger in a car following the plaintiff's car testified that she did not see the defendant's car on the wrong side of the road until after the collision, and the driver of such following car, who had made similar but unsworn statements before the trial to investigators for each party and to the plaintiff's counsel, was not called to testify, but contacted plaintiff's counsel after the trial and told him that she had been mistaken in her former statements and that she had in fact seen the defendant's car across the center line of the road just before the collision, the granting of a new trial on the ground of newly discovered evidence was not an abuse of discretion. The statements in question, although contradictory, but made out of court and not under oath, did not constitute an admission of perjury making the utterer's testimony unworthy of belief. Erickson v. Clifton, 265 W 236, 61 NW (2d) 329.

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.

A written decision of the trial court, giving the plaintiffs an option to enter judgment for reduced amounts of damages by notifying the defendant of their acceptance within 10 days after entry of "the order herein" or stand a new trial, contemplated the signing of formal orders pursuant thereto. The trial court did later sign formal orders. The court's interpretation of its decision will not be disturbed, as against a contention that the decision was an "order" so that the defendant was entitled to a new trial because the plaintiffs did not accept the reduced amounts within 10 days thereafter although they did accept within 10 days after the formal orders. A court of general jurisdiction has complete control of its orders during the term in which they are made or entered, except in cases especially covered by statute. Matosian v. Milwaukee Automobile Ins. Co. 257 W 599, 44 NW (2d) 555.

In proceedings on an order to show cause why a defendant should not be granted relief from a default judgment on a note, and be permitted to defend the action, the trial court's opinion, so entitled, and reciting the contentions of the parties and citing legal authorities on the question of permitting the defendant to defend the action, was intended to be merely an opinion to be followed by a formal order to be thereafter drafted, and the concluding words, "Defendant's motion must be granted," did not amount to a formal direction within the meaning of 270.53 (2), and did not make the opinion an "order" on which the time for relieving a party therefrom under 269.46 (1) would run. State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

The rule, that it is not within the province or power of a court to enter orders or decrees without notice, because to do so would be a violation of due process, has reference to orders which affect substantive rights, and not to mere procedural orders. Briggson v. Viroqua, 264 W 40, 58 NW (2d) 543.

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 question until the report, verdict or subsequent finding.

The legislative purpose, in providing for interlocutory judgments, and in allowing appeals therefrom under 274.09 (1), was to authorize a judgment which would finally dispose of a portion of the controversy. Winslow v. Winslow, 257 W 393, 43 NW (2d) 496.

See note to 247.32, citing Schall v. Schall, 259 W 412, 49 NW (2d) 429.

Under 270.53 (1), to be effective as a judgment, the ruling must be a final determination of the rights of the parties. A proper interlocutory judgment must dispose of a portion of the controversy, not merely rule on a question of law. What the trial judge calls it is not controlling. Northland Greyhound Lines v. Blinco, 272 W 29, 74 NW (2d) 796.

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.

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.

On recovering on a liquidated claim for the return of money paid to apply on the purchase price of 2 prefabricated houses which the defendant failed to deliver by a specified date, the plaintiff was entitled as a matter of law to interest from the time of the defendant's breach, and hence it was unnecessary to demand interest in the prayer of the complaint. Thayer v. Hyne, 259 W 284, 48 NW (2d) 498.

The plaintiff, respondent on appeal, may not ask for a modification of the judgment so as to enjoin any use of the easement by the defendants on the ground that it is difficult to distinguish the increased burden, which the judgment enjoined, from the lawful use of the easement to which the defendants are entitled, where the judgment granted all of the relief prayed for by the plaintiff in its complaint, and there was no abuse of judicial discretion in the failure of the trial court to enjoin the defendants from making any use of their easement. S. S. Kresge Co. v. Winkelman Realty Co. 260 W 372, 50 NW (2d) 920.

It is not the rule in this state that no relief can be granted in an independent equitable action for relief from a judgment of divorce unless the fraud is extrinsic, occurring outside the action, and affecting the question of jurisdiction. Fraud, such as the commission of perjury in an action, resulting in the wrongdoer obtaining a judgment, constitutes a wrong which equity may remedy under some circumstances. Weber v. Weber, 260 W 420, 51 NW (2d) 18.

In an action against an executor and legatees for equitable relief from a judgment of divorce, granted to the plaintiff against the defendants' testator and making a division of property based on his allegedly fraudulent misstatement and understatement of his assets, a complaint alleging that representations were made as to such material facts, that they were false, that the plaintiff was ignorant of the falsity thereof and believed and relied on the same, and that by reason of such belief she was injured, stated a good cause of action. The plaintiff, if able to prove her case, would be entitled to have the court fix the amount to which the plaintiff should have been justly entitled in the divorce action as a claim against the estate of the defendants' testator, but the plaintiff could not have the relief prayed for of vacation of the judgment of divorce so that she might still be the widow of the defendants' testator, the judgment dissolving the marriage ties having been based on sufficient evidence. Weber v. Weber, 260 W 420, 51 NW (2d) 18.

Neither the trial court nor the jury may substitute a different measure of damages for the only one that is applicable in the case. Kimball v. Antigo Bldg. Supply Co. 261 W 619, 53 NW (2d) 701.

A judgment of divorce, even if erroneous as to division of property, as granting relief exceeding that demanded in the husband's complaint or as violating 247.35, relating to a wife's separate property, is not void. Reading v. Reading, 268 W 56, 66 NW (2d) 753.

In actions for fraudulent representations inducing a contract the measure of damages is the difference between the value of the property as it was when purchased and what it would have been as represented. The price paid by the purchaser is relevant evidence on the issue of the value of the property if it had been as represented. Anderson v. Tri-State Home Improvement Co. 268 W 455, 67 NW (2d) 853.

An award of $4,500 to a woman who sustained numerous bodily injuries when struck by an automobile, and who, among other things, thereafter suffered from continuing headaches and from a lateral displacement of the septum of the nose, which was probably the result of a fracture and which would require surgery, was not excessive. Merkle v. Behl, 269 W 432, 69 NW (2d) 459.

Although the complaint asked only for $25,000 for personal injuries and the jury awarded $27,000, it was not error for the trial court to permit judgment to be entered for the amount of the award without giving an option for a new trial on the issue of damages, where there was an answer to the complaint, the relief was consistent with the case made by the complaint, was embraced within the issue, and was supported by sufficient credible evidence so that the award was not excessive. (Certain language in McCartie v. Muth, 230 W 604, and Pietsch v. Groholski, 255 W 302, compared and reconciled.) Schwartz v. Schneuriger, 269 W 535, 69 NW (2d) 756.

Where, previous to the opening of the term, the trial court took under advisement both an application for a default judgment and a motion to make an amended complaint more definite and certain, and there was an agreement between counsel that the defendants could answer within such time that the case could be heard at the term and such time extended beyond the date at which the plaintiff initiated proceedings to obtain judgment by default, and the court's determination of the motion to make more definite and certain, with short leave granted to plead as provided in 270.14, would have given the defendants sufficient time, the court's failure to do so constituted prejudicial error, requiring that the default judgment be set aside. Linker v. Batavian Nat. Bank, 271 W 484, 74 NW (2d) 179.

The relief granted to the plaintiff, if there is no answer, cannot exceed that which he has demanded in his complaint. Linker v. Batavian Nat. Bank, 271 W 484, 74 NW (2d) 179.

The rule as to damages being measured by the cost of repairs or the diminution in value of the injured structure, whichever is the smaller, applies where both factors are in evidence, but where the plaintiffs produced evidence only as to the cost of repairs it was sufficient to support a finding of damages in such amount; the burden not being on the plaintiffs to produce evidence of diminution in value, but the burden being on the defendant, if dissatisfied with damages based on cost of repairs, to show that diminution in value was a smaller sum. Engel v. Dunn County, 273 W 218, 77 NW (2d) 408.

270.58 State and political subdivisions thereof to pay judgments taken against officers. (1) 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.

(2) Any town officer held personally liable for reimbursement of any public funds paid out in good faith pursuant to the directions of electors at any annual or special town meeting shall be reimbursed by the town for the amount of the judgment for damages and costs entered against him.

History: 1957 c. 576.

Where the complaint stated a cause of action against the defendant village marshal in his official capacity, the village was properly made a party defendant, in view of 260.11 (1) and 270.58, the latter of which would make the village liable for the payment of a judgment as to damages entered against the defendant village marshal if found on the trial that he was, as alleged, a public officer of the village at the time of the assault, and that he was acting in his official capacity and in good faith. 270.58 was intended to protect, among others, police officers, marshals and constables, and as to acts involving the performance of a governmental function; but it does not include acts of a sheriff, since sec. 4, art. VI provides that a county shall never be held responsible for the acts of the sheriff. Larson v. Lester, 259 W 440, 49 NW (2d) 414.

A patrolman on the police force of a city, who discharged a shotgun resulting in injuries to the plaintiff, was a "public officer" within the meaning of this section providing that where the defendant in any action, except in actions for false arrest, is a "public officer" proceeded against in his official capacity and found to have acted in good faith, the judgment as to damages entered against him shall be paid by the state or political subdivision of which he is an officer. Matczak v. Mathews, 265 W 1, 60 NW (2d) 352.

Pursuant to sec. 4, art. VI, the county cannot be made liable for the acts of the sheriff or his undersheriff or deputies. But the state, county, or other municipality is liable under 270.58 for damages caused by other officers in negligently setting up a roadblock, if done in good faith. Such officer cannot bind his governmental unit by promising that it will take care of any damages to commandeered property. 45 Atty. Gen. 152.

270.59 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.

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.

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 Default judgment. (1) NATURE OF DEFAULT. A default judgment may be entered as provided in this section if no issue of law or fact has been joined and if the time for joining issue has expired.

(2) GENERAL. Upon filing with the court the summons and complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default according to subsection (1), the plaintiff may apply to the court for judgment according to the demand of the complaint. If taking an account or the proof of any fact is necessary to enable the court to give judgment, a reference may be ordered to take such account or proof and to report the same to the court, and such reference may be executed anywhere in the state; or the court may take the accounts or hear the proof. The court may order damages to be assessed by a jury. If the defendant has appeared in the action, he shall be entitled to notice of the application for judgment.

(3) ACTIONS ON CONTRACT FOR MONEY ONLY. In any action on contract for the recovery of money only, the plaintiff may file with the clerk the summons and complaint, proof of personal service of the summons on one or more of the defendants and an affidavit that the defendant is in default according to subsection (1). The clerk shall there-

upon enter judgment for the amount demanded in the complaint against the defendants who are in default. Leaving the summons at the abode of a defendant is not personal service within this subsection.

(4) IN CASE OF PUBLICATION. If service of summons is made without the state or by publication and the defendant is a nonresident, the plaintiff or his agent shall be examined on oath as to any payments that may have been made to or for the plaintiff on account of the demand and the court shall render judgment for the amount which he is entitled to recover but not exceeding the relief demanded in the complaint; and before entering judgment the court may require the plaintiff to file security to abide the order of the court requiring restitution of any property delivered to the plaintiff under the judgment in case the defendant defends the action and succeeds in his defense.

History: Sup. Ct. Order, 258 W v.

Cross Reference: For time required for notice under (2), see 269.31.

Comment of Advisory Committee, 1951: Rewritten to state in (2) the standard basis for taking default judgments, and the variations in (3) and (4). Default judgments are common and they involve great property interests. Therefore, the utmost care should be exercised in stating the procedure clearly and completely. Five days' notice to defendant is changed to the usual 8 days. No other change in the law is intended. The difference between "proof of service" when application is made to the court, and "proof of personal service" when application is made to the clerk, embodies in the rule the decision in Moyer v. Cook, 12 W 335. [Re order effective July 1, 1951]

In an action against nonresident, nonappearing defendants to recover on a note, wherein the summons and complaints were served on the defendants outside the state, and the property which the defendants owned in the state was not levied on or seized prior to judgment, a money judgment entered on behalf of the plaintiff, reciting only that it appears from the pleadings and affidavits on file that the defendants own property in Wisconsin, and containing no description, either direct or by reference to the description in the affidavit of the plaintiff's attorney, is deemed to be merely a judgment in personam, not one in rem, hence is invalid because no jurisdiction was obtained over the defendants. A judgment should clearly indicate on its face whether it is in personam or in rem. In actions of this type, the better practice would be to describe the property affected by the action in the complaint so that at the time of service the defendant is thereby given notice that his interest in such property is sought to be impressed. Schultz v. Schultz, 256 W 139, 40 NW (2d) 515.

See notes to 269.46, citing State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

A trial court may refuse to enter judgment on default and allow defendant to answer, where excusable neglect and a meritorious defense are shown. Willing v. Porter, 266 W 428, 63 NW (2d) 729.

See note to 270.14, citing Linker v. Batavian Nat. Bank, 271 W 484, 74 NW (2d) 179.

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.

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.

On the plaintiffs' motion for summary judgment on the complaint granting recovery of money deposited by them in escrow, an affidavit of the plaintiffs' attorney, to which was attached a letter addressed by such attorney to the escrow agent, was insufficient to establish the terms of the escrow, since such affidavit rose no higher as proof than the same allegations when made by the plaintiff's atorney on oath in the verified complaint (which allegations the defendants had on oath denied), and since, the escrow agent being out of the case by stipulation, an objection to the competency of the letter would have to be overcome before it could even be received as evidence. Under (7), it was not error for the trial court to deny the plaintiffs' motion for summary judgment dismissing the defendants' counterclaim. Ryan v. Berger, 256 W 281, 40 NW (2d) 501.

In the plaintiff's affidavit in support of his motion for summary judgment enjoining the use of a certain newspaper as the official newspaper of a city, a statement that the plaintiff's own newspaper was legally qualified to be the official newspaper, without stating any facts to prove he had the required paid circulation to actual subscribers of not less than 300 copies at each publication, was a mere conclusion of law, inadequate to support a summary judgment. Madigan v. Onalaska, 256 W 398, 41 NW (2d) 206.

Where the defendant's affidavits on motion for summary judgment did not contain the words "that the action has no merit" but, on the undisputed facts in the record, leave could have been granted to renew the motion on affidavits containing the statutory language if the question had been raised in the trial court, no harm was done to the plaintiff. Townsend v. La Crosse Trailer Corp. 256 W 609, 42 NW (2d) 164.

In an action by a former director against a corporation for damages for alleged wrongful termination of an employment contract, facts evidenced by undisputed corporate records controlled on the defendant's motion for summary judgment over contrary statements in the plaintiff's affidavits in opposition to such motion. Stoiber v. Miller Brewing Co. 257 W 13, 42 NW (2d) 144.

As between the plaintiff and another common stockholder, the record presented no issue as to the plaintiff's consent to a sale of the corporate assets by the creditors' committee to such other stockholder, but showed that the creditors' committee, by written agreement with the plaintiff, was given the power to sell the assets, and was free to sell to such other stockholder regardless of whether the plaintiff consented or objected. When undisputed documents submitted in support of a motion for summary judgment show that the movant is entitled to the judgment demanded, the court must grant the motion, whatever other facts may be in dispute under the record. Joannes v. Rahr Green Bay Brewing Corp., 257 W 139, 42 NW (2nd) 479.

On a motion, in an action against a motorist and his liability insurer, for summary judgment dismissing the action as to the insurer, the insured's statements as to the address to which he claimed he had sent a notice of accident, although involving discrepancies, presented a substantial issue of fact as to whether the insured had sent the notice as required by the policy, thereby precluding the entry of summary judgment and requiring that the case proceed to trial. The court could not determine as a matter of law that the insured's failure to notify the insurer of a change of address resulted in a failure to co-operate as required by the policy, where an issue of fact as to whether the insurer exercised reasonable diligence in ascertaining the insured's whereabouts and his address was raised by the affidavits. Under the provision that the moving party shall make an affidavit that he believes that there is no defense to the action or that the action has no merit, as the case may be, neither such averment is required of the opposition. Heimbecher v. Johnson, 258 W 200, 45 NW (2d) 610.

On a motion for summary judgment of dismissal as to one of the defendants in an action, based on the safe-place statute for personal injuries sustained by a tenant in a rooming house, the affidavits and counter-affidavits presented a substantial issue of fact at least as to whether such defendant was operating the rooming house at the time of the injury and, hence, her motion for summary judgment should have been denied. It is not for the court, on a motion for summary judgment, to pass on the veracity of opposing affiants and by so doing dispose of the action. Batson v. Nichols, 258 W 356, 46 NW (2d) 192.

Where the defendant's counterclaims and the plaintiff's reply thereto presented issues of fact, the plaintiff's motion for summary judgment on his complaint should have been denied, even though the granting thereof would not prevent the defendant from pursuing the remedy which he sought to enforce by the counterclaims, since the general and recommended practice in the courts of this state is to dispose at one trial of all of the issues made by the pleadings. Borg v. Fain, 260 W 190, 50 NW (2d) 387.

If a complaint against several defendants for damages for injuries from an alleged conspiracy and assault did not state a cause of action, such defect should have been raised by demurrer, rather than by motion for summary judgment. The demurrer is designed to test the sufficiency of pleadings, as such, with opportunity to cure defects by pleading over; summary-judgment procedure searches the whole record, including the pleadings, to discover whether a valid cause of action or defense exists; if one is found and a substantial issue of fact connected therewith appears, the motion for summary judgment must be denied. When the defendants did not demur or move to make the complaint more definite and certain but proceeded to answer to the merits, their motions for summary judgment bring the court to the merits also. Fredrickson v. Kabat, 260 W 201, 50 NW (2d) 381.

The pleadings and affidavits on the defendants' motions for summary judgment, in an action for damages for injuries from an alleged conspiracy and assault by the defendants when the plaintiff found it necessary to eject one defendant from a dance hall, established, among other things, the existence of substantial issues of fact as to whether the laying on of hands was assistance or assault, and whether the actions of the various defendants were by agreement in furtherance of a common illegal undertaking, on which the plaintiff was entitled to a trial, so that the trial court properly denied the defendants' motions. Fredrickson v. Kabat, 260 W 201, 50 NW (2d) 381.

The pleadings and affidavits on the plaintiff's motion for summary judgment in an action to recover on a promissory note presented issues of fact which could not be determined on such a motion. The sufficiency of a pleading is not determined on a motion

for summary judgment where it appears that issues of fact are presented. Schneeberger v. Dugan, 261 W 177, 52 NW (2d) 150.

In proceedings on the defendants' motion for summary judgment, there was no necessity for the plaintiff to file a counter-affidavit, where the verified pleadings, together with the facts set forth in the affidavits that were filed, raised a clear question of law as to the construction and validity of the ordinance which the plaintiff was seeking to have declared invalid. The entry of summary judgment is proper where the issues presented on the motion for such judgment are legal rather than factual. Des Jardin v. Greenfield, 262 W 43, 53 NW (2d) 784.

See note to 263.06, citing Nelson v. American Employers' Ins. Co. 262 W 271, 55 NW (2d) 13.

See note to 180.12, citing Lawrence Investment Co. v. Wenzel & Henoch Co. 263 W 13, 56 NW (2d) 507.

See note to 269.05, citing Connecticut Indemnity Co. v. Prunty, 263 W 27, 56 NW (2d) 540.

Disputed questions of fact, where they are immaterial to the questions of law presented, do not afford a basis for denying an application for summary judgment. In proceedings on the defendant's motion for summary judgment, the plaintiff was bound by allegations of fact in its own pleadings. Carney-Rutter Agency v. Central Office Buildings, 263 W 244, 57 NW (2d) 348.

Where the facts appear from the affidavit of the plaintiff's attorney opposing the defendant's motion for summary judgment, and are undisputed, it is unnecessary, on appeal, to consider whether the affidavit of the defendant's attorney is based solely on hearsay and therefore inadequate to support the motion. Ylen v. Mutual Service Casualty Ins. Co. 263 W 270, 57 NW (2d) 391.

Questions of law are proper to be decided on motions for summary judgment where only such questions are presented by the motions. Fredrickson v. Kabat, 264 W 545, 59 NW (2d) 484.

In action by guest against owner and his insurer for injuries sustained when automobile overturned on curve, substantial issues raised by answer and affidavits as to owner's negligence and assumption of risk by guest precluded summary judgment for plaintiff on question of liability, though no evidence in support of allegations was produced at adverse examination of owner and guest before trial or by affidavits of witnesses. Beskidniak v. Masny, 265 W 74, 60 NW (2d) 723.

Where the parties were in dispute as to the terms of their original compensation agreement, and as to whether subsequent modifications were conditioned on the yield to the plaintiff salesman being equal to or in excess of the amount to be due him on a net-profits method of computation, the defendant employer's motion for summary judgment dismissing the action for additional compensation or damages was properly denied, since summary judgment will not be granted where an examination of the proper documents in connection with the motion shows that any issue of fact remains to be tried. Kinzfogl v. Greiner, 265 W 105, 60 NW (2d) 741.

On motion by liability insurer for summary judgment on ground that it had canceled the policy before the accident and mailed insured notice to that effect, where insured denied receiving notice and questioned the mailing, a substantial question of fact is presented, warranting denial of the motion. Putman v. Deinhamer, 265 W 307, 61 NW (2d) 319.

In an action for damages resulting from allegedly false and fraudulent representations by the defendant insurer inducing the plaintiff insured to sell the steam boiler in his steam laundry and install a new boiler in order to obtain a continuation of boiler insurance, the pleadings raised issues of material fact for trial, warranting the denial of motions for summary judgment. Grady v. Hartford Steam Boiler Insp. & Ins. Co. 265 W 610, 62 NW (2d) 399.

As to costs on allowance of summary judgment, see Al Shallock, Inc. v. Zurich General Acc. & L. Ins. Co. 266 W 265, 63 NW (2d) 89.

Where the issue is as to the ownership of a car involved in a collision, and reasonable inferences could be drawn in support of either party, a motion for summary judgment will be denied. Udovc v. Ross, 267 W 182, 64 NW (2d) 747, 66 NW (2d) 200.

Where a summons and complaint served on December 27, 1950, which was within 2 years after the plaintiff's injuries, was a nullity as to the defendants herein, and a summons and complaint served on the defendants herein on May 22, 1953, which was more than 2 years after the injuries, was ineffectual as an amendment of the earlier summons and complaint, it is held that the motion of the defendants herein for summary judgment was a general appearance only as to the action commenced on May 22, 1953, and in effect had the force of a plea in bar, as against a contention that such motion for summary judgment constituted a general appearance effectuating a waiver of defect of the summons and complaint served on December 27, 1950. Ausen v. Moriarty, 268 W 167, 67 NW (2d) 358.

Summary-judgment procedure is not calculated to supplant the demurrer, and a summary judgment should be granted only when it is perfectly plain that there is no substantial issue to be tried. Where the effect of the failure either to serve a summons and complaint or a notice of claim within 2 years after the plaintiff's injuries was to bar any claim for the injuries thereafter, but the face of the complaint did not disclose such failure, a motion for summary judgment dismissing the complaint, grounded on such failure, was proper procedure as against a contention that the matter should have been raised by demurrer or answer. Ausen v. Moriarty, 268 W 167, 67 NW (2d) 358.

In an action to recover a down payment on the ground that the written offer to purchase was materially altered after plaintiff signed it, without his knowledge or consent, where defendant did not contradict the allegation as to the time of alteration, the plaintiff was entitled to summary judgment. Leuchtenberg v. Hoeschler, 271 W 151, 72 NW (2d) 758.

Depositions taken on adverse examination are not a part of the record on the trial until they are offered. A deposition taken on adverse examination, or parts of such deposition, may be effectively used by a party for the purpose of setting forth evidentiary facts in connection with motions for summary judgment, provided that the evidentiary matters from the deposition are stated in an affidavit such as is specified in the statute, or are incorporated in such affidavit in whole or relevant part by proper reference. Commerce Ins. Co. v. Merrill Gas Co. 271 W 159, 72 NW (2d) 771.

In proceedings on motion for summary judgment the knowledge by an attorney of matters set forth in his affidavit in behalf of the plaintiff, and based on statements of witnesses at adverse examinations, admissions contained in the answer, and the content of instruments of record, was sufficient to satisfy the requirements of personal knowledge as provided in (2). Phillips Petroleum Co. v. Taggart, 271 W 261, 73 NW (2d) 482.

It is proper to apply the doctrine of equitable estoppel on a motion for summary judgment. Phillips Petroleum Co. v. Taggart, 271 W 261, 73 NW (2d) 482.

Where lessee signed copies of lease already signed by lessor but failed to return a copy to lessor, and lessee paid the increased rent called for in the lease for over 2 years, lessor is estopped from asserting that lease was not in effect. Phillips Petroleum Co. v. Taggart, 271 W 261, 73 NW (2d) 482.

Where policy separately valued a barn, barn basement and silo, but the silo was in fact attached, and all were destroyed by windstorm, the insurer was not entitled to summary judgment on its offer to replace the barn and basement and pay only the insured value of the silo. Gowan v. Homestead Mut. Ins. Co. 272 W 127, 74 NW (2d) 634.

This section was not intended to be used after trial where it is claimed that newly discovered evidence would bar recovery. It is not a substitute for regular trial nor intended to replace any of the rules of practice or procedure except as provided. Modl v. National Farmers Union Prop. & Cas. Co. 272 W 650, 76 NW (2d) 599, 77 NW (2d) 607.

A motion for summary judgment is not a substitute for a demurrer and may not be used for such purpose since, where a demurrer is sustained, the plaintiff, except in certain exceptional situations, is given an opportunity to plead over, which right is denied when a summary judgment dismissing the complaint on the merits is entered. Hermann v. Lake Mills, 275 W 537, 82 NW (2d) 167.

In proceedings on the defendants' motion for summary judgment in a taxpayers' action to have declared void a sale of no-longer-needed municipally owned real estate to a manufacturing corporation on the ground of inadequacy of consideration, the pleadings and affidavits presented a material issue of fact to be litigated as to the fair market value of the parcel being sold, thereby making it error to enter summary judgment. Hermann v. Lake Mills, 275 W 537, 82 NW (2d) 167.

Where the defendant's answer raised a fundamental issue of fact, and the plaintiff's affidavits on its motion for summary judgment did nothing to eliminate such issue, the plaintiff's motion for summary judgment was properly denied. Wisconsin P. & L. Co. v. Berlin Tanning & Mfg. Co. 275 W 554, 83 NW (2d) 147.

Under (2), even though the allegations of the complaint are sufficient to make out a cause of action against a defendant, nevertheless, if the latter has filed an affidavit complying with the statute and setting forth evidentiary facts clearly establishing that the plaintiff has no cause of action against him, such defendant is entitled to summary judgment unless the plaintiff "shall, by affidavit or other proof, show facts which the court shall deem sufficient to entitle him to a trial." The words "or other proof" necessarily refer to something beyond the mere allegations of the complaint. Laughnan v. Griffiths, 271 W 247, 73 NW (2d) 587; Behringer v. State Farm Mut. Auto Ins. Co. 275 W 586, 82 NW (2d) 915.

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.

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.

270.66 Costs when taxed; executions. Within 60 days after filing of a verdict on which the clerk is authorized to enter judgment without an order, or within 60 days after an order to enter judgment is filed, the successful party may tax costs and perfect the judgment and cause it to be entered and if he fails so to do the clerk of the court shall prepare and enter the proper judgment, but without costs. If there be a stay of proceedings after the filing of the findings or verdict, judgment may be perfected at any time within 60 days after the expiration of such stay. If the parties agree to settle all issues but fail to file an order of dismissal the judge may direct the clerk to draft an order dismissing the action. No execution shall issue until the judgment is perfected by the taxation of costs and the insertion of the amount thereof in the judgment or until the expiration of the time for taxing costs.

History: 1953 c. 511.

A verdict was entered on October 26th, and motions were made and argued after verdict, and the trial court signed orders on December 2d giving the plaintiffs an option to enter judgment for reduced amounts of damages or stand a new trial. The plaintiffs were not required to tax costs within 60 days from the date of the verdict. Matosian v. Milwaukee Automobile Ins. Co. 257 W 599, 44 NW (2d) 555.

Where a verdict against the plaintiff was returned on November 16th and the plaintiff made a motion for a new trial on November 27th, such motion operated as a stay of proceedings until disposed of, and the stay operated to extend the 60-day period within which the defendant was entitled to tax costs, so that, where the plaintiff's motion for a new trial was denied and an order for judgment was made on January 29th, and the defendant applied for costs on January 29th, they should have been allowed. Throm v. Koepke Sand & Gravel Co. 260 W 479, 51 NW (2d) 49.

Where the decision on motions after verdict was filed on December 11, 1953, the fact that exceptions were taken to certain items on the defendant's original bill of costs did not justify the defendant's failure to timely file a judgment in its favor signed by the trial court on December 10, 1953, and such judgment not having been filed, it was proper for the clerk of court, at the instance of counsel for the plaintiffs, to enter judgment on February 26, 1954, without costs. Fonferek v. Wisconsin Rapids Gas & Electric Co. 268 W 278, 67 NW (2d) 268.

The plaintiff's objection to the taxation of costs by both defendants, not raised below, cannot be considered on appeal. Bank of Ashippun v. Ells, 274 W 530, 80 NW (2d) 357.

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. Noth-

ing herein shall affect or impair the right or title of a purchaser for value in good faith without notice.

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.

History: Sup. Ct. Order, effective January 1, 1958.

In a proceeding by the administrators of the estate of a deceased accommodation maker of judgment notes, wherein judgment was entered in favor of the administrators, without process, on the warrants of attorney contained in the notes, it appeared on the face of the record that the notes had been paid by the administrators, and that the warrant of attorney in each note only authorized the confession of judgment for such amount as might appear to be "due and unpaid thereon," the judgment so entered was void for want of jurisdiction of the court to enter it, and it should have been vacated on motion made therefor. Halbach v. Halbach, 259 W 329, 48 NW (2d) 617.

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.

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, orders and reports which purport to finally dispose of an action or proceeding or which the judge orders to be recorded shall be recorded in the judgment book.

History: 1955 c. 553.

270.72 Case file. The clerk, immediately after entering the judgment, shall attach together and file the summons, pleadings and all orders and papers in any way involving the merits and necessarily affecting the judgment.

History: Sup. Ct. Order, effective January 1, 1958.

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 is produced in evidence and filed with the court or with the clerk thereof, and the clerk notes upon each order the date of such filing. Any order so filed shall not be 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.

History: Sup. Ct. Order, effective January 1, 1958.

270.74 Judgment docket. At the time of entry of 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.

History: Sup. Ct. Order, effective January 1, 1958.

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.

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 is docketed as provided in ss. 270.69, 270.74 and 270.75, or a warrant is docketed as provided in ss. 108.22 (2) and 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 from the original docket, certified to be a true copy therefrom by the clerk of the circuit court having custody thereof.

History: 1955 c. 553.

270.78 Enforcement of real estate judgment in other counties. Whenever a judgment affecting real property is rendered in any county other than that in which such property is situate the trial court may, at any time, order that the judgment with all papers filed and copies of entries, orders and minutes made in the action, 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 papers shall be so transmitted.

History: Sup. Ct. Order, effective January 1, 1958.

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 10 years from the date of the entry thereof, be a lien on the real property (except the homestead mentioned in s. 272.20) in the county where docketed, 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 10 years. A judgment discharged in bankruptcy shall upon entry of the order of discharge cease to be and

shall not thereafter become a lien on any real property of the discharged person then owned or thereafter acquired.

(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.

History: 1955 c. 553; 1957 c. 572.

Revisor's Note: See 270.91 (2) for procedure to be followed to obtain satisfaction of judgment discharged in bankruptcy.

See notes to 269.46, citing State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

A judgment does not become a lien against property of the debtor which he has contracted to sell by valid contract. As to such property the debtor has only a security title. Mueller v. Novelty Dye Works, 273 W 501, 78 NW (2d) 881.

Where the supreme court modified a judgment of the lower court in favor of the plaintiff and remitted its judgment for costs in favor of the defendant to the lower court, it was within the power and discretion of the lower court to offset the amount of such supreme court judgment against the amount of the lower court judgment. Hyman-Michaels Co. v. Ashmus Equip. Sales Corp. 274 W 527, 80 NW (2d) 446.

270.80 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.

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.

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."

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.

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.

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.

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.

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.

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.

Revisor's Note: See 270.79 (1) which provides that a judgment discharged in bankruptcy ceases to be a lien upon entry of the order of discharge.

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.

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.

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.

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.

The assignee of the judgment is the same party as the assignor in the contemplation of the statute so that the assignee must obtain leave to bring this action. Gould v. Jackson, 257 W 110, 42 NW (2d) 489.

270.96 Uniform enforcement of foreign judgments act. (1) DEFINITIONS. As used in this section:

(a) "Foreign judgment" means any judgment, decree or order of a court of the United States or of any state or territory which is entitled to full faith and credit in this state.

(b) "Register" means to file and docket a foreign judgment in a court of this state.

(c) "Levy" means to take control of or create a lien upon property under any judicial writ or process whereby satisfaction of a judgment may be enforced against such property.

(d) "Judgment debtor" means the party against whom a foreign judgment has been rendered.

(2) REGISTRATION OF JUDGMENT. On application made within the time allowed for bringing an action on a foreign judgment in this state, any person entitled to bring such action may have a foreign judgment registered in any court of this state having jurisdiction of such an action.

(3) APPLICATION FOR REGISTRATION. A verified complaint for registration shall set forth a copy of the judgment to be registered, the date of its entry and the record of any subsequent entries affecting it all authenticated in the manner authorized by laws of the United States or of this state, and a prayer that the judgment be registered. The clerk of the registering court shall notify the clerk of the court which rendered the original judgment that application for registration has been made, and shall request him to file this information with the judgment.

(4) PERSONAL JURISDICTION. At any time after registration the plaintiff shall be entitled to have summons issued and served upon the judgment debtor as in an action brought upon the foreign judgment, in any manner authorized by the law of this state for obtaining jurisdiction of the person.

(5) NOTICE IN ABSENCE OF PERSONAL JURISDICTION. If jurisdiction of the person of the judgment debtor cannot be obtained, a notice clearly designating the foreign judgment and reciting the fact of registration, the court in which it is registered, and the time allowed for pleading, shall be sent by the clerk of the registering court by registered mail to the last known address of the judgment debtor. Proof of such mailing shall be made by certificate of the clerk.

(6) LEVY. At any time after registration and regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained, a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to execution or other judicial process for satisfaction of judgments.

(7) NEW PERSONAL JUDGMENT. If the judgment debtor fails to plead within 30 days after jurisdiction over his person has been obtained, or if the court after hearing has refused to set the registration aside, the registered judgment shall become a final personal judgment of the court in which it is registered.

(8) DEFENSES. Any defense, set-off, counterclaim or cross complaint which under the law of this state may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions. Such pleadings must be filed within 30 days after personal jurisdiction is acquired over him or within 30 days after the mailing of the notice prescribed in subsection (5).

(9) PENDENCY OF APPEAL. If the judgment debtor shows that an appeal from the original judgment is pending or that he is entitled and intends to appeal therefrom, the court shall, on such terms as it thinks just, postpone the trial for such time as appears sufficient for the appeal to be concluded, and may set aside the levy upon proof that the defendant has furnished adequate security for satisfaction of the judgment.

(10) EFFECT OF SETTING ASIDE REGISTRATION. An order setting aside a registration constitutes a final judgment in favor of the judgment debtor.

(11) APPEAL. An appeal may be taken by either party from any judgment sustaining or setting aside a registration on the same terms as an appeal from a judgment of the same court.

(12) NEW JUDGMENT QUASI IN REM. If personal jurisdiction of the judgment debtor is not secured within 30 days after the levy and he has not, within 30 days after the mailing of the notice prescribed by subsection (5), acted to set aside the registration or to assert a set-off, counterclaim or cross complaint the registered judgment shall be a final judgment quasi in rem of the court in which it is registered, binding upon the judgment debtor's interest in property levied upon, and the court shall enter an order to that effect.

(13) SALE UNDER LEVY. Sale under levy may be held at any time after final judgment, either personal or quasi in rem, but not earlier except as otherwise provided by law for sale under levy on perishable goods. Sale and distribution of the proceeds shall be made in accordance with the law of this state.

(14) INTEREST AND COSTS. When a registered foreign judgment becomes a final judgment of this state, the court shall include as part of the judgment interest payable on the foreign judgment under the law of the state in which it was rendered, and the cost of obtaining the authenticated copy of the original judgment. The court shall include as part of its judgment court costs incidental to the proceeding in accordance with the law of this state.

(15) SATISFACTION OF JUDGMENT. Satisfaction, either partial or complete, of the original judgment or of a judgment entered thereupon in any other state shall operate to the same extent as satisfaction of the judgment in this state, except as to costs authorized by subsection (14).

(16) OPTIONAL PROCEDURE. The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this section remains unimpaired.

(17) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(18) SHORT TITLE. This section may be cited as the uniform enforcement of foreign judgments section.

History: 1951 c. 247 s. 53.