CHAPTER 544

PLEADINGS

544.01 PLEADINGS, HOW REGULATED.

HISTORY. R.S. 1851 c. 70 ss. 57 to 59; P.S. 1858 c. 60 ss. 61 to 63; G.S. 1866 c. 66 ss. 70 to 72; G.S. 1878 c. 66 ss. 88 to 90; G.S. 1894 ss. 5228 to 5230; R.L. 1905 s. 4126; G.S. 1913 s. 7752; G.S. 1923 s. 9249; M.S. 1927 s. 9249.

Legal pleadings and proceedings in the courts of this state shall be under the direction of the legislature. Minn. Const. Art. 6 s. 14.

The distinction which formerly existed between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished, and there now remains but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which is denominated a civil action. The form of proceedings in every such action, and the rules by which the sufficiency of pleadings therein are to be tested, are matters of statutory regulation. St. P. & Pac. v Rice, 25 M 292.

A general allegation of agency is limited by the allegation of specific facts supposed to give rise to the agency. The general allegation is in the nature of a conclusion of law, and if not sustained by the specific facts pleaded, it will be disregarded. Lovell v Marshall, 162 M 18, 202 NW 64.

Title by adverse possession may be proved by a general averment of ownership. McArthur v Clark, 86 M 165, 90 NW 369; Sawbridge v Fergus Falls, 101 M 378, 112 NW 385; Speer v Kramer, 171 M 489, 214 NW 283.

A demurrer searches all preceding pleadings. State ex rel v Hardstone Brick, 172 M 330, 215 NW 186.

While pleadings are but a means to an end, the end being the proper administration of substantive law, yet they are to be applied and enforced so as to disclose fully and freely the respective claims of parties and thereby facilitate and hasten the trial of issues. Rawleigh v Shogren, 192 M 483, 257 NW 102.

Motion for judgment on the pleadings is in the nature of a demurrer. It challenges the sufficiency of pleadings and admits the facts therein set out as true. Specific allegations in a pleading prevail over general allegations. Northwestern v Bank, 193 M 333, 258 NW 724.

The primary object of pleading is to apprise each party of the grounds of claim or defense asserted by the other, in order that he may come to trial with the necessary proof and be saved the expense and trouble of preparing to prove or disprove facts about which there is no real controversy between the parties. Rogers v Drewry, 196 M 16, 264 NW 225; Fortune v First Trust, 200 M 367, 274 NW 524.

An allegation in a petition for a writ of habeas corpus that two criminal informations were based upon exactly the same facts is not an allegation of a conclusion of law but one of fact, the admission of which by the state concedes the truth of the statement except in so far as the statement in the petition is contradicted by the copies of the information attached to the petition. State ex rel v Utecht, 206 M 41, 287 NW 229.

Pleadings are but means to an end, the end being the proper administration of the substantive law; and, since the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. Jasinski v Keller, 216 M 15, 11 NW(2d) 438.

Implied assumpsit as an alternative remedy in certain classes of torts. 11 MLR 534.

544.02 CONTENTS OF COMPLAINT.

HISTORY. R.S. 1851 c. 70 s. 60; P.S. 1858 c. 60 s. 64; G.S. 1866 c. 66 s. 73; G.S. 1878 c. 66 s. 91; G.S. 1894 s. 5231; R.L. 1905 s. 4127; G.S. 1913 s. 7753; G.S. 1923 s. 9250; M.S. 1927 s. 9250.

1. Title
2. Statement
3. Demand for relief
4. Generally

1. Title

The full Christian names of the party should be given, the use of initials being objectionable as leaving the record doubtful as to the parties concluded by the judgment. Suing by initials disapproved, but held no ground for demurrer. Gardner v McClure, 6 M 250 (167); Kenyon v Lemon, 43 M 180, 45 NW 10; Pinney v Russell, 52 M 443, 54 NW 484.

The addition "junior" is no part of a man's name, and need not be used in legal proceedings. Bidwell v Coleman, 11 M 78 (45).

Where several counties are attached for judicial purposes a complaint in civil cases, or an indictment in criminal prosecutions, is properly entitled if it names them all. State v Stokely, 16 M 282 (249); State v McCartey, 17 M 76 (54); Young v Young, 18 M 90 (72).

The number of the judicial district is not an essential element of the title. State v Munch, 22 M 67.

As a general rule, neither a middle name or its initial is recognized by law as a necessary part of a person's legal name. It is good practice to insert the middle initial. Stewart v Colter, 31 M 385, 18 NW 98.

The rule that the middle name or initial is not a material part of a person's name does not apply when the first name is not given, but only its initial. State v Higgins, 60 M 1, 61 NW 816.

When a change of venue takes place, the title should be changed to conform. Nystrom v Quinby, 68 M 4, 70 NW 777.

Entitling a cause in a particular county and bringing the action therein is a designation of that county as the place of trial. Hurning v Hurning, 80 M 373, 83 NW 342.

In an action to foreclose a mortgage, one of the parties defendant was described by his full name in the pleadings, but in the report of sale and order of confirmations by his initials only. The point as to the discrepancy not having been raised in the trial court, will not be considered on appeal. Piper v Sawyer, 82 M 474, 85 NW 206.

Where a summons names the proper court where the action is brought and is in all respects in proper form and properly served, jurisdiction over the person of the defendant is acquired, and a default judgment thereafter entered in the action is not void for want of jurisdiction by reason of the fact that in the caption of the complaint attached to and served with the summons the wrong court was named. Sievert v Selvig, 175 M 598, 222 NW 281.

In determining who the parties to an action are, the complaint must be taken as an entirety. Allegations in the body of the complaint control the caption. In suing a partnership in the firm name, it must appear somewhere in the complaint who the associates are. Gay v District Court, 200 M 207, 273 NW 701.

Where the ward is the real plaintiff, the plaintiff should be designated in the title of the action as ward by her guardian, rather than as guardian acting for ward. Dahlke v Metropolitan, 218 M 181, 15 NW(2d) 524.

2. Statement

Denials on information and belief, and affirmative allegations in the same form, are permissible and sufficient in the return to a writ of mandamus. State ex rel v Cooley, 58 M 514, 60 NW 338.

The admitted proof of ownership of the grain constituted a variance between it and the allegations of ownership set forth in the complaint, and therefore in-

admissible under the allegations in the complaint. Scofield v National, 64 M 527, 67 NW 645.

In an action in ejectment, it is sufficient for the plaintiff to allege in his complaint that he is the owner and entitled to the possession of the land therein described, without further allegation as to the nature, quantity, or kind of ownership relied upon. Atwater v Spalding, 86 M 101, 90 NW 370.

The complaint in an action for personal injuries need not make formal reference to the federal employers liability act, in order that the plaintiff may avail himself of the provisions thereof; it being sufficient to allege facts bringing the case within the terms of the act. Denoyer v Ry. Transfer, 121 M 271, 141 NW 175.

The plaintiff cannot recover for services other than those stated in the complaint, though the defendant seeks recoupment for the plaintiff's failure strictly to perform the contract sued upon. Blakely v Neils, 121 M 281, 141 NW 179.

Complaint states a cause of action for personal injuries occasioned by the alleged failure of defendant, an interstate carrier, to comply with the federal safety appliance act. Ahrens v Chicago, Milwaukee, 121 M 335, 141 NW 297.

An action against a physician for malpractice is based on the contract. Finch v Bursheim, 122 M 152, 142 NW 143.

Although the complaint alleged the plaintiff did not accept the dredge, it indicates an acceptance and a right to sue for breach of contract. Skoog v Mayer, 122 M 209, 142 NW 193.

Under false representations, the plaintiff entered into a contract to purchase a farm. He offered to rescind within the proper time and this action for rescission states a cause of action. Pennington v Roberge, 122 M 295, 142 NW 710.

In this, a personal injury action, the complaint contained sufficient allegations of negligence. Wells v Mpls. Baseball, 122 M 327, 142 NW 706.

Failure to allege the incorporation and corporate powers of defendant company, in a suit upon contract is not ground for demurrer. Neither is the failure to allege that plaintiffs were copartners at the time of suit. Klemik v Henricksen, 122 M 380, 142 NW 871.

The complaint states a cause of action against the defendant for not providing protective screens around machines from which plaintiff employee was injured. Bertram v Bemidji Co. 123 M 76, 142 NW 1045.

Complaint in an action for breach of contract held good as against a defense of lack of mutuality. Ratzien v Franson, 123 M 122, 143 NW 253.

This complaint by a taxpayer against the county auditor and treasurer for damages caused by their carelessness in preparation of tax records is held to be good against demurrer. Howley v Scott, 123 M 159, 143 NW 257.

Complaint in a personal injury case held demurrable because it failed to indicate the negligence of the defendent was the probable cause of the injury. Laine v Consol. Vermillion, 123 M 254, 143 NW 783.

Complaint did not state a cause of action for the value of property seized by an officer under a warrant, because it does not allege that the court had made an order directing return of the property to plaintiff. Manter v Petrie, 123 M 333, 143 NW 907.

An allegation in the alternative for conversion of personal property that one or the other of two defendants converted the goods, but which one plaintiff is unable to determine, does not state a cause of action against either. Casey v Booth, 124 M 117, 144 NW 450.

The complaint in a personal injury action alleged that defendants negligently drove against plaintiff, and at the time the relation of master and servant existed between the defendants, states a cause of action against the master. Bolstad v Armour, 124 M 155, 144 NW 462.

A general allegation of permanent injury is sufficient to admit evidence of the nature and character of the injury. Evertson v McKay, 124 M 260, 144 NW 950.

Complaint in an action for damages for false representations made by plaintiff in the sale of a stallion. Jones v Burgess, 124 M 265, 144 NW 954.

In a complaint for compensation for services alleging reasonable value, and also agreement as to compensation, the plaintiff may produce evidence, without

being obliged to choose between the allegation of express contract or quantum meruit. Kinzel v Barton & Duluth, 124 M 416, 145 NW 124.

Facts going to prove estoppel in pais need not be pleaded. Bemis v Pac. Coast Casualty, 125 M 54, 145 NW 622.

The complaint declaring on the express contract, and there being no pleading or proof of the reasonable value of the services, there can be no recovery on a quantum meruit. Bentley v Edwards, 125 M 179, 146 NW 347.

The complaint construed to allege negligence not alone as to speed but as to the manipulation of the motor car. Fairchild v Fleming, 125 M 431, 147 NW 434.

Where the complaint alleges employment by defendant and performance by plaintiff, it is not necessary to allege a promise to pay; but an allegation of a promise to pay, necessary at common law, is not necessary under the code, but merely makes the pleading one of both express and implied contract. Lufkin v Harvey, 125 M 458, 147 NW 444.

In this action for specific performance against the vendor for the cancelation of a real estate security given by the vendee, the complaint states a cause of action. Freeburg v Honemann, 126 M 52, 147 NW 827.

The parties voluntarily litigated the question whether plaintiff procured a purchaser under a contract not pleaded. Wright v Waite, 126 M 115, 148 NW 50.

Allegations of the complaint in an action for the wrongful death of defendant's employee, a highway crossing flagman, was sufficient to show negligence on defendant's part, whereby a car left standing near the crossing without brakes, caused the plaintiff's death. Sheehy v M. & St. L. Ry. 126 M 133, 147 NW 964.

The court abused its discretion in requiring plaintiff, in an action involving breach of contract, to elect to proceed either for rescission or to recover damages. Gulledge v Kenatchee, 126 M 176, 148 NW 43.

A vendee in an executory contract for the sale of land cannot maintain an action for damages for false representations, when it appears that he has failed to make the stipulated payments and by reason thereof the vendor has lawfully terminated the contract. Olson v Northern Pacific, 126 M 229, 148 NW 67.

Complaint states a cause of action for an injunction brought by persons who purchased property of defendant subject to building restrictions, against defendant about to build in violation of restrictions. Velie v Richardson, 126 M 334, 148 NW 286.

A complaint in an action by heirs against the administrator of their intestate's estate, for the value of lands lost through defendant's failure to pay taxes or redeem from a tax sale, is demurrable where it contains no allegation of negligence, and shows unassailed discharge of defendant by probate court. Winters v Ellefson, 128 M 3, 150 NW 170.

In a suit for commission for the sale of land, there being no pleading or proof of the value of plaintiff's services, it is not entitled to recover in this action. Sperry v Merriam, 128 M 217, 150 NW 785.

When one transaction or agreement constitutes an inducement or part consideration for another deal or contract, it is not objectionable in bringing suit upon the latter, to plead the pertinent matters of the former. Klemik v Henricksen, 128 M 490, 151 NW 203.

A village may properly, under some circumstances, pay a property owner for the opening of a street across his property. The court will not enjoin such expenditure, unless its illegality is made to appear. Vague allegations as to extravagent waste of funds is not sufficient. Tiedt v Argyle, 129 M 259, 152 NW 412.

The complaint sufficiently pleaded negligence of the defendants in ordering plaintiff without warning into a dangerous place. Burmeister v Gignerl, 130 M 28, 153 NW 134.

The complaint does not charge defendant with unlawful discrimination. Facts going to show discrimination must be alleged. General statements are insufficient. St. Paul Book v St. Paul Gaslight, 130 M 71, 153 NW 262.

A complaint, alleging a defective sidewalk whereby plaintiff was caused to stumble into the entrance of an abandoned building, the sidewalk being unguarded, states a cause of action. Murphy v City of St. Paul, 130 M 410, 153 NW 619.

If a complaint in an equitable action discloses delay in assertion of a right which, unexplained, amounts to laches, it must also allege facts excusing the delay. Sweet v Lowry, 131 M 109, 154 NW 793.

A complaint should allege ultimate and issuable facts and not conclusions of law or evidentiary facts; and, in a complaint based upon federal employers liability act, it is sufficient to allege that defendant is a common carrier in interstate commerce, and plaintiff was employed by defendant in such commerce, and received an injury while so employed, through defendant's negligence. Lewis v Denver & Rio G. 131 M 122, 154 NW 945.

In an action for damages resulting from negligence, plaintiff may allege all the grounds giving rise to his cause of action, and is not required to elect, at the beginning of the trial, whether he will establish by his proofs one or another of such grounds. Tecdor v Ore. Short Line, 131 M 317, 155 NW 200.

Under a complaint alleging that defendant's negligence in operating an automobile over a highway at a dangerous rate of speed resulted in killing plaintiff's cow, it was not error to admit evidence that defendants did not turn the car out of the wheel ruts but passed in close proximity to plaintiff's wagon and cow. Saylor v Motor Inn, 136 M 466, 162 NW 71.

There being no evidence that either defendant claimed any interest in the land described or ever trespassed thereon, plaintiff cannot recover and defendants are entitled to judgment non obstante. Roy v Donnehr, 137 M 464, 162 NW 1050.

A party may, in the same action, ask for reformation of a contract and for damages for breach thereof as reformed; and the allegations must be sufficient for both purposes; and where it is sought to reform a written instrument, good pleading requires that a copy of the instrument to be reformed be attached to the complaint. Schreiner v Rauweiler, 169 M 92, 210 NW 628.

Foreign laws are facts and, like other facts, must be pleaded when they are issuable but not when they are merely probative or evidentiary. Bank v Halvorson, 176 M 406, 223 NW 618.

The newspaper articles herein complained of were not libelous per se, and the complaint stated no extrinsic facts or circumstances showing that the publications were libelous in fact. The complaint stated no cause of action. Kervin v News-Tribune, 178 M 61, 225 NW 906.

The bank cannot be held liable on a negotiable promissory note signed by one of the directors and his wife at the bank's request. See section 335.11. Magee v Bank, 181 M 294, 232 NW 336.

The allegation that the driver negligently ran the car upon and against the plaintiff is a sufficient charge of actionable negligence in the absence of any motion to make the complaint more definite and certain. Saunders v Yellow Cab, 182 M 62, 233 NW 599.

On an objection to the introduction of evidence under a pleading, it should receive the most liberal construction. Krzyzaniak v Maas, 182 M 83, 233 NW 595.

The charge to the jury was erroneous because it permitted the finding of negligence on an independent ground not included in the pleadings. Farnum v Peterson, 182 M 338, 234 NW 646.

Special damages must be specially pleaded. Smith v Altier, 184 M 299, 238 NW 479.

A common count for money had and received is a good pleading. Oleson v Retsloff, 184 M 624, 238 NW 12, 239 NW 672.

Complaints held to charge facts which show that a collusive arrangement among bidders following stifling regulations by the highway department, resulted in bids so grossly excessive that their acceptance by the department amounted to constructive collusion with such contractors, and the allegations being true, the contracts are void. Regan v Babcock, 188 M 192, 247 NW 12.

In pleading fraud, the material facts constituting the fraud must be specifically alleged. Rogers v Drewry, 196 M 16, 264 NW 225.

The primary object of pleadings is to apprise each party of the grounds of claim or defense asserted by the other. Rogers v Drewry, 196 M 16, 264 NW 225; Baker v Hobedank, 202 M 231, 277 NW 925.

An ordinance, being an evidentiary fact in a negligence case, may be proved without having been pleaded, like any other fact tending to prove or disprove the ultimate fact of negligence. Larson v Lowden, 204 M 80, 282 NW 669.

Misrepresentations of law are treated as are misrepresentations of fact, so as to amount to actionable fraud, where one misrepresenting the law is learned in that field and has taken advantage of and solicited confidence of party defrauded, or where the person misrepresenting the law stands with reference to the person imposed on in a fiduciary or other similar relation of trust and confidence. Stork v Equitable, 205 M 138, 285 NW 466.

Pleaded conclusions of law are of no effect on a motion for judgment on the pleadings. Mahne v American Fraternal, 216 M 303, 12 NW(2d) 615.

Allegations that, after auditing the defendant's return the commissioner found and determined that defendant was indebted to the state in the sum of $462.10 and duly assessed the same, was a sufficient declaration. State v Haglin, 216 M 387, 13 NW(2d) 6.

The incorporation in a complaint by reference of certain other legal proceedings is not good practice. Thiede v Town of Scandia, 217 M 218, 14 NW(2d) 400.

A complaint alleging that decedent negligently started to climb a ladder behind the plaintiff thereby placing too great a strain so that the ladder broke causing plaintiff to fall, and that as proximate cause of such negligence plaintiff suffered injuries, was not demurrable. Johnson v Whitney, 217 M 468, 14 NW(2d) 765.

A motion for judgment on the pleadings raises the question of sufficiency of complaint and reply to state a cause of action. A general allegation of a complaint for specific performance that plaintiff had complied with all terms of the contract yields to a specific admission that plaintiff had not performed because of defendant's failure to furnish an accounting. Vogt v Ganlisle, 217 M 601, 15 NW(2d) 91.

In an action to set aside a mortgage foreclosure on the ground of fraud, a complaint merely stating that the mortgage was foreclosed for purpose of defrauding mortgagor's judgment, creditor, without alleging any facts or any lawful or wrongful act upon which such conclusion was drawn, did not state a cause of action. Twin Ports Co. v Whiteside, 218 M 78, 15 NW(2d) 125.

Generally, claims of creditors in a creditor's bill cannot be aggregated in order to make up the necessary jurisdictional amount. Frank v Lambert, 97 F(2d) 460.

Minnesota pleading as "fact pleading". 13 MLR 348.

Common courts in assumpsit followed by allegation of promise to pay. 21 MLR 757.

Negotiability of shares; right of subsequent transferee to sue. 23 MLR 498.

3. Demand for relief

If the defendant appears, the relief granted is not in any way limited or controlled by the prayer for relief, except that in actions for damages greater damages cannot be awarded than prayed, but this limitation may be avoided by amendment. Elfeldt v Smith, 1 M 125 (101); Eaton v Caldwell, 3 M 134 (81); Nichols v Wildemann, 72 M 344, 75 NW 208, 76 NW 41.

A prayer for relief may be in the alternative. Connor v Board, 10 M 439 (252); Henry v Meighen, 46 M 548, 49 NW 323, 646.

The prayer of the complaint though general was broad enough to authorize the relief granted. Sanborn v Nacken, 20 M 178 (163); Prince v Farrell, 32 M 293, 20 NW 234; Northern Trust v Albert Lea College, 68 M 112, 71 NW 9.

A complaint whether framed as a bill in equity or otherwise, regardless of prayer for relief, is good as against a general demurrer, if the facts alleged show plaintiff entitled to any substantial relief. Lovering v Webb, 106 M 62, 118 NW 61.

Plaintiff is entitled to such relief, legal or equitable, as the facts proved required, regardless of the fact that such might be broader than the prayer. Hoffman v Erickson, 124 M 279, 144 NW 952.

Forms of action under our system of code pleading are abolished and the nature of a cause of action is to be determined by the facts alleged and not by the formal character of the complaint. Recovery may be had either for tort or breach of contract if the facts proved within the allegations of the pleading justify it, though the pleader was mistaken as to the nature of his cause of action. Walsh v Mankato Oil Co. 201 M 58, 275 NW 377.

The labeling of a complaint to characterize it is unnecessary and improper. The vital question is whether the facts set out are such as to justify relief. The nature of the cause must be determined by the facts alleged and not by the formal character of the complaint. Equitable Holding v Equitable Bldg. 202 M 529, 279 NW 736.

4. Generally

When asking for reformation of a contract and a mistake is relied on, the particular mistake and how it occurred must be set forth and that the mistake was common to both parties. Schreiner v Rauweiler, 169 M 92, 210 NW 628.

The complaint in the prior action, though not verified and signed only by counsel, was admissible as impeachment of such plaintiff whose testimony supports the complaint in the second action. The complaint is admissible as an admission against interest; and failure of the plaintiff to know the contents of the pleading in the first case goes to the weight of the evidence but not to its admissibility. Carpenter v Tri State, 169 M 287, 211 NW 463.

The prayer for relief is not a part of the cause of action and is not traversible. Demurrer will not lie because wrong relief is demanded in the complaint or greater relief than the facts warrant. Oehler v City of St. Paul, 174 M 410, 219 NW 760.

Where it is clear that the plaintiff, on discovery of a fraud, makes a seasonable demand for a rescission of the contract tenders back what he received and demands only what he parted with, and in his complaint alleges those facts, he is not to be considered as suing for damages for the fraud rather than for a rescission solely because his complaint refers to the recovery sought as damages caused by the defendant. Premier v Western Surety, 177 M 256, 225 NW 12.

The complaint in this action was broad enough to cover either replevin or conversion. The court, at defendant's request, properly required plaintiff to elect as to which ground she relied upon. Le Veaux v Holt, 181 M 355, 232 NW 622.

Evidence as to the use of restraints as contributing to the cause of death is admissible under the general charges of negligence contained in the complaint. Brase v Williams, 192 M 304, 256 NW 176.

544.03 DEMURRER TO COMPLAINT.

HISTORY. R.S. 1851 c. 70 ss. 61, 62, 64, 65; P.S. 1858 c. 60 ss. 65, 66, 68, 69; G.S. 1866 c. 66 ss. 74, 75, 77, 78; 1867 c. 62 s. 5; 1867 c. 67 s. 4; G.S. 1878 c. 66 ss. 87, 92 to 94; 1881 c. 7 s. 1; 1885 c. 267; G.S. 1894 ss. 5227, 5232 to 5235; R.L. 1905 ss. 4124, 4128, 4129; 1909 c. 433 s. 1; G.S. 1913 ss. 7750, 7754, 7755; G.S. 1923 ss. 9247, 9251, 9252; M.S. 1927 ss. 9247, 9251, 9252.

SUBD. 1. GROUNDS

1. Statutory grounds exclusive
2. Defect must appear on face of pleadings
3. Demurrer for want of jurisdiction
4. For want of capacity to sue
5. For pendency of another action
6. For defect of parties
7. For misjoinder of causes of action
8. For failure to state cause of action
9. Not grounds for demurrer
10. Generally

SUBD. 2. REQUISITES

1. Demurrer to whole pleading
2. Demurrer to part of pleading
3. Specifying grounds
4. Objection by answer
5. Generally

SUBD. 3. WAIVER

SUBD. 4. HEARING AND DETERMINATION

SUBD. 1. GROUNDS

1. Statutory grounds exclusive

The fact that a complaint, in an equitable proceeding for specific performance, does not state a cause of action against each and every defendant, is not one of the objections for which a demurrer may be interposed. Seager v Burns, 4 M 141 (93).

There are, under our system of pleading, but six objections to a complaint, or to a cause of action mentioned in the section, of which the defendant can take advantage by demurrer. These objections are specifically enumerated, and must appear on the face of the pleading, else the objection must be taken by answer. Powers v Ames, 9 M 178 (164).

By demurring to the complaint for want of jurisdiction over the person, defendant appears, and becomes subject to the jurisdiction of the court. Reynolds v La Crosse, 10 M 178 (144).

The statute allows only one ground of demurrer to an answer, that it does not contain a defense or counter-claim; but under this ground, the objection to a counter-claim, that it cannot be determined without the presence of other parties, may be raised. Campbell v Jones, 25 M 155.

As applied in an action against an assignee for the benefit of creditors to recover property seized by him, the court here applies the rule that if a complaint shows plaintiff entitled to some relief, even though not that prayed for, it is not liable to a general demurrer. Leuthold v Young, 32 M 122, 19 NW 652.

An answer not "containing new matter", but consisting only of denials, is not subject to demurrer. Nelson v Pelan, 34 M 243, 25 NW 406.

Where face of complaint disclosed that the cause of action was barred by the statute of limitations, the trial court properly sustained the demurrer. Schueller v Palm, 218 M 469, 16 NW(2d) 773.

2. Defect must appear on face of pleadings

Defect must appear on the face of the pleadings. Powers v Ames, 9 M 178 (164); Reynolds v LaCrosse, 10 M 178 (144).

To sustain a demurrer upon the ground that it appears on the face of the complaint "that the plaintiff has not legal capacity to sue", it is not enough that it does not appear that the plaintiff has legal capacity to sue, but the want of such legal capacity must appear affirmatively. Mpls. Harvester v Libby, 24 M 327.

A defect of parties to an action is waived, unless objection is taken by demurrer or answer; and, where a complaint states facts constituting a cause of action, but shows that there is a defect of parties, a demurrer to the effect that the complaint does not state a cause of action must be overruled. Bell v Mendenhall, 71 M 331, 73 NW 1086.

In an action brought to enforce stockholder's liability, the complaint is not demurrable on the ground that it appeared therefrom that there was a defect of parties defendant in that all the stockholders had not been joined as defendants. Mendenhall v Duluth Dry Goods, 72 M 312, 75 NW 232.

Application of the rule that a defect in a pleading must clearly and affirmatively appear therein, in order to subject it to a general demurrer. Everett v O'Leary, 90 M 154, 95 NW 901.

While pleadings are but a means to an end, yet they are to be applied and enforced so as to disclose fully and freely the respective claims of the litigants. The claim of plaintiff in the instant case as couched, over a mere conclusion of law as based upon the moving statute. Rawleigh v Shogren, 192 M 483, 257 NW 102.

When demurrers are interposed to a complaint on the ground of misjoinder of causes, if no cause of action is stated in the matter asserted to constitute wrongful joinder, there is no misjoinder of causes. Aichele v Skoglund, 194 M 291, 260 NW 290.

The complaint shows no wrongful foreclosure or slander of title which could constitute wrongful interference with business. Hayward v Union Savings, 194 M 473, 260 NW 868.

3. Demurrer for want of jurisdiction

For want of jurisdiction over the person. Reynolds v LaCrosse, 10 M 178 (144). For want of jurisdiction over the subject matter. Ames v Boland, 1 M 365 (268); Stratton v Allen, 7 M 502 (409); Powers v Ames, 9 M 178 (164); Benson v Silvey, 59 M 73, 60 NW 847; Sullivan v Mpls. & Rainey River, 121 M 488, 142 NW 3.

4. For want of capacity to sue

It is not enough that it does not appear that plaintiff has legal capacity to sue, but the want of such incapacity must appear affirmatively. Wisconsin v Torinus, 22 M 272; Mpls. Harv. v Libby, 24 M 327; Soule v Thelander, 31 M 227, 17 NW 373; Walsh v Byrnes, 39 M 527, 40 NW 831; Lehigh v Gilmore, 93 M 432, 101 NW 796.

The objection that a plaintiff claiming to sue on behalf of himself and his associates in a joint adventure has no capacity to sue as their virtual representative must be taken by demurrer or answer or it is waived. Crawford v Lugoff, 175 M 235, 220 NW 822.

Defendant is not, after consolidation of several suits into one, in a position to urge the objection that when two of the suits were begun plaintiff had no capacity to sue or that a cause of action was split in one of the consolidated suits. Atkinson v Neisner, 193 M 175, 258 NW 151, 259 NW 185.

5. For pending of another action

A new trial was granted and a second trial had. On man served on both juries. He was disqualified for implied bias and a new trial must be had. Williams v McGrade, 18 M 82 (65).

The pendency of one action is not a bar to another where the relief sought in the two is entirely different, although the same questions may be to some extent involved in both. Coles v Yorks, 31 M 213, 17 NW 341.

An action to set aside a transfer of all the corporate assets brought by one creditor and in which a receiver is appointed, cannot be pleaded in bar of an action brought by a creditor on the behalf of himself and other creditors for the appointment of a general receiver. Oswald v St. Paul Globe, 60 M 82, 61 NW 902.

The bringing of an action to enforce stockholder's liability by the assignee or receiver is obligatory if no similar action is brought within six months of his appointment. That a suit is pending must be raised by special demurrer or by answer. Somers v Dawson, 86 M 42, 90 NW 119.

Demurrer cannot be sustained upon the ground that "there is another action pending between the same parties for the same cause" for the simple reason that this ground for a demurrer is not available when the pendency of the other action does not appear on the face of the complaint. Marquette v Doyle, 176 M 537, 224 NW 149.

A money judgment for $1,065.86 was not stayed by a $250.00 cash deposit as security for costs. Manemann v West, 218 M 602, 17 NW(2d) 74.

6. For defect of parties

The objection of defect of parties whether raised by demurrer or answer must be distinctly raised, and must specifically show wherein the defect consists in naming the person who should have been joined. Jones v Minneapolis, 31 M 230, 17 NW 377; Davis v Chateau, 32 M 548, 21 NW 748; Jaeger v Sunde, 70 M 356, 73 NW 171; Anderson v Dyer, 94 M 30, 101 NW 1061.

A general demurrer does not raise the question of defect of parties. Zimmerman v Benz, 162 M 47, 202 NW 272.

The distinction between actions at law and suits in equity is abolished and parties liable upon the same obligation may all or any of them be included in the same action. Bank v Royal, 167 M 494, 210 NW 66.

A party properly made defendant in an action cannot by demurrer object that other parties are improperly joined with him as defendants. Singer v Singer, 173 M 57, 214 NW 778, 216 NW 789.

There was no abuse of judicial discretion in refusing appellant's motion to amend the answer by pleading defect of parties defendant, for appellant's defense could neither be harmed nor aided by the amendment. Hanson v Bowman, 199 M 70, 271 NW 127.

If no objection or claim of defect of parties is raised by answer or demurrer, defendant is deemed to have waived the issue. He cannot later raise the objection by motion for dismissal for judgment on the pleadings, for direction of verdict, or by objection to the admission of evidence. Serr v Biwabik, 202 M 183, 278 NW 355.

An action on a bill or note payable to bearer, or endorsed in blank, may be maintained in the name of the nominal holder. Possession by such nominal holder is prima facie sufficient evidence of his right to sue, and cannot be rebutted by proof that he has no beneficial interest, or by anything else but proof of mala fides. N. W. v Hawkins, 205 M 490, 286 NW 717.

7. For misjoinder of causes of action

A general demurrer can only be sustained when the pleading does not state any cause of action; it does not reach duplicity or an improper joinder of parties. Smith v Jordan, 13 M 264 (246).

A cause of action against a defendant for the value of goods sold and delivered, and a cause of action against a third person on the promise to such defendants to pay said debt to the plaintiffs are improperly joined, and the complaint is bad on demurrer. Sanders v Clason, 13 M 379 (352).

Although the person making the excavation, and the city under its charter, may be each liable to the plaintiff for the injury, yet they are not jointly liable; that their improper joinder in such action is a ground of demurrer on the part of either. Trowbridge v Forepaugh, 14 M 133 (100).

If the facts stated in the complaint constitute a single cause of action, a prayer for inconsistent forms of relief will not render the pleadings demurrable on the ground of misjoinder of several causes of action. The remedy is by motion. Colstrum v M. & St. L. Ry. 31 M 367, 18 NW 94.

In an action by husband and wife to avoid usurious securities given by them upon a loan made to the wife, it is improper to join a cause of action by the wife alone to recover back money paid by her upon the usurious contract. Anderson v Scandia Bank, 53 M 191, 54 NW 1062.

Where the fact that several causes of action are improperly united appears upon the face of the complaint, the objection must be taken by demurrer or it is waived. Stolorow v Nat'l Council, 132 M 27, 155 NW 756.

Though there may be a misjoinder of causes of action in uniting disconnected contract and tort actions, the misjoinder will not be considered when not urged on appeal by the demurrant. Oleson v Retzloff, 184 M 624, 238 NW 12, 239 NW 672.

In an action by a bondholder against a trustee that it bid in the property at too high a price, and that it was guilty of mismanagement, may combine the two allegations into one cause of action. Sneve v First Nat'l, 192 M 355, 256 NW 730.

8. For failure to state a cause of action

Under a general demurrer the following objection may be raised: That the action is barred by the statute of limitations. Wentworth v Wentworth, 2 M 277 (238); Trebby v Simmons, 38 M 508, 38 NW 692; West v Hennessey, 58 M 133, 59 NW 894.

A defendant improperly joined may demur to the complaint on the ground that no cause of action is stated against him. Lewis v Williams, 3 M 151 (95).

The objection of an excess of parties defendant, cannot be taken by demurrer of all the defendants. Lewis v Williams, 3 M 151 (95); Goncelier v Foret, 4 M 13 (11).

The issue of former adjudication may be raised. State v Bachelder, 5 M 223 (178); Monette v Cratt, 7 M 234 (176).

In an action by a stockholder praying for a dissolution of a bank, and that an assignment executed by the officers without notice to the stockholders to be stockholders be set aside, the bank president, cashier, and assignee are proper parties defendant. Mitchell v Bank, 7 M 252 (192).

The following objections cannot be raised by demurrer. To warrant a demurrer to the complaint on the ground that the court has no jurisdiction of the subject of the action, it must affirmatively appear from the complaint that the court has not jurisdiction. Powers v Ames, 9 M 178 (164).

A general demurrer does not reach duplicity or an improper joinder of causes of action. Smith v Jordan, 13 M 264 (246).

That the contract alleged is void under the statute of frauds. Wilson v Schnell, 20 M 40 (33); Russell v Wisconsin, 39 M 145, 39 NW 302.

The complaint on demurrer was held sufficient, although it did not state the specific physical acts constituting the alleged negligence and carelessness. Clark v Chicago, Milwaukee, 28 M 69, 9 NW 75.

Nor the want of legal capacity or authority to sue. Soule v Thelander, 31 M 227, 17 NW 373; Walsh v Byrnes, 39 M 527, 40 NW 831.

That the facts pleaded do not authorize equitable relief may be raised by demurrer. Sanborn v Eads, 38 M 211, 36 NW 338.

The defense of a bona fide purchaser, Newton v Newton, 46 M 33, 48 NW 450.

The misjoinder of two parties as plaintiffs, when the cause of action is in one alone, is no ground for dismissal of the complaint as to both. It is a mere irregularity which may be corrected at any time, before or after judgment, by striking out the name of the party improperly joined. Wiesner v Young, 50 M 21, 52 NW 390.

The defense that the goods were sold on credit, the terms whereof had not expired when the action was brought, was new matter, which should have been specially pleaded. Iselin v Simon, 62 M 128, 64 NW 143.

Foreign statutory laws are usually regarded as matters of fact, and, because they are so regarded, they must be pleaded as well as proved, if they constitute the foundation of the claim or defense. Myers v Chicago, St. Paul, 69 M 476, 72 NW 694.

A defect of parties to an action is waived, unless objection is taken by demurrer or answer, and, where a complaint states facts constituting a cause of action, but shows that there is a defect of parties, a demurrer to the effect that the complaint does not state facts constituting a cause of action, is overruled. Bell v Mendenhall, 71 M 331, 73 NW 1086.

Objections may be raised by demurrer that the complaint does not state facts constituting a cause of action as to the defendant and in favor of the plaintiff, although it may state a cause of action between others. Rossman v Mitchell, 73 M 198, 75 NW 1053.

Where the demurrer is one of want of jurisdiction and insufficiency of facts in the complaint to constitute a cause of action, it does not reach an objection that there is a defect of parties either of nonjoinder or misjoinder. Swanberg v Fosseen, 75 M 350, 78 NW 4.

Where a complaint alleges in the alternative two statements of fact, one sufficient to constitute cause of action and the other not, they neutralize each other, and demurrer lies. Anderson v Mpls. & St. P. 103 M 224, 114 NW 1123.

Allegation in complaint in ejectment that plaintitff is owner in fee carries with it by inference immediate right of possession. The demurrer admits it as conclusion necessarily resulting from ownership. Bena v Sauve, 104 M 472, 116 NW 947.

A demurrer to a complaint on the ground that it fails to state facts to constitute a cause of action does not reach discrepancies between the relief to which the complaint may entitle and the prayer in the summons. Freeman v Paulson, 107 M 64, 119 NW 651.

As against a general demurrer to a complaint, the question is whether assuming every fact alleged to be true, enough has been stated to constitute any cause of action whatever. Vukelis v Virginia Lbr. 107 M 68, 119 NW 509.

Degree of insufficiency of complaint on demurrer. Finch v Bursheim, 122 M 152, 142 NW 143; Fairmont v Davison, 122 M 504, 142 NW 899.

Defendant's answer presented an issue upon the question of reasonableness, and a demurrer must be overruled. State ex rel v St. Paul, 122 M 164, 142 NW 136.

When it clearly appears from the complaint that, after the cause of action accrued, the time allowed by statute for bringing suit thereon expired before suit was brought, and no fact is set forth avoiding the operation of the statute, a demurrer is rightly sustained. Ferrier v McCabe, 129 M 342, 152 NW 734.

When the cause of action accrued more than two years prior to bringing the action, and is barred under the provisions of section 62.03(14), a general demurrer that the complaint does not state a cause of action must be sustained. McKitrick v Travelers, 174 M 354, 219 NW 286.

The contract pleaded in haec verba contains nothing to prevent the construction which plaintiff placed on it, and the sustaining of the demurrer was an error. Anchor v Carrier, 200 M 111, 273 NW 647.

It is immaterial that the complaint contains alternative allegations; if taken as a whole it contains allegations sufficient to sustain it. Kaiser v Butchart, 200 M 545, 274 NW 680.

"No one could tell from reading the complaint what plaintiff intended to prove." Demurrer sustained. Baker v Habedank, 202 M 231, 277 NW 925.

On general demurrer the test of sufficiency is whether the facts stated in the complaint, show the plaintiff entitled to some judicial relief. Hartford v Dahl, 202 M 410, 278 NW 591; Smith v Smith, 204 M 255, 283 NW 239.

Allegation that "it became and was the duty of defendant to guard against said danger", is a mere conclusion of law and is not admitted by demurrer. Henderson v City of St. Paul, 216 M 122, 11 NW(2d) 791.

On appeal from an order overruling a demurrer to plaintiff's complaint, the facts as alleged in the complaint and as disclosed by the record incorporated in the complaint by reference must be accepted as true. Thiede v Town of Scandia, 217 M 218, 14 NW(2d) 400.

The primary function of a complaint is to state the facts constituting a cause of action so as to apprise dependants of what plaintiff relies upon and intends to prove, and, as against a general demurrer, a complaint must not leave to remote and difficult inference any essential of the cause of action relied upon. Twin Ports v Whiteside, 218 M 78, 15 NW(2d) 125.

9. Not grounds for demurrer

The objection to a complaint that its statements are vague and uncertain, as to their form and manner, and not good on general demurrer. Chouteau v Rice, 1 M 106 (83); Nininger v Board, 10 M 133 (106); Dewey v Leonard, 14 M 153 (120); Spottswood v Herrick, 22 M 548; Clark v Chic. Milwaukee, 28 M 69, 9 NW 75; Curtiss v Livingston, 36 M 380, 31 NW 357; Snowberg v Nelson, 43 M 532, 45 NW 1131; American Book v Kingdom, 71 M 363, 73 NW 1089; Crawford v Lillibridge, 89 M 276, 94 NW 868.

If a pleading set forth a cause of action or defense, it is not obnoxious to a demurrer, though it contain immaterial and redundant statements. To prune the

pleading of such matter, the proper course is by motion to strike out. Loomis v Youle, 1 M 175 (150).

Excess of parties defendant is not ground for demurrer by a party properly sued. A defendant, improperly joined, may demur to the complaint on the ground that no cause of action is stated against him. Lewis v Williams, 3 M 151 (95); Goncelier v Foret, 4 M 13 (1); Nichols v Randall, 5 M 504 (240); Hoard v Clum, 31 M 186, 17 NW 275.

A demurrer does not lie for bringing suit in the wrong county. Tullis v Brawley, 3 M 277 (191); Merrill v Shaw, 5 M 148 (113); Nininger v Board, 10 M 133 (106); Gill v Bradley, 21 M 15; Kipp v Cook, 46 M 535, 49 NW 257; Smith v Barr, 76 M 513, 79 NW 507.

Suing by initials is disapproved, but is no ground for demurrer. Gardner v McClure, 6 M 250 (167).

Demurrer does not lie in case of irrelevancy. Fish v Berkey, 10 M 199 (161).

A complaint which sets up a contract and alleges a breach, although it does not allege any damages, is not demurrable. The plaintiff is entitled to at least nominal damage. Cowley v Davidson, 10 M 392 (314); Partridge v Blanchard, 23 M 69; Steenerson v Gt. Northern, 64 M 216, 66 NW 723.

A demurrer will not lie for a defect in the prayer for relief, the prayer being no part of the cause of action. If a complaint states facts constituting a cause of action entitling the plaintiff to any relief, either legal or equitable, it is not demurrable because it prays for the wrong relief. Connor v Board, 10 M 439 (352); Metzner v Baldwin, 11 M 150 (92); Canty v Latherner, 31 M 239, 17 NW 385; Leuthold v Young, 32 M 122, 19 NW 652; Bohrer v Drake, 33 M 408, 23 NW 840; Dye v Forbes, 34 M 13, 24 NW 309; Third Nat'l v Stillwater, 36 M 75, 30 NW 440; Alworth v Seymour, 42 M 526, 44 NW 1030; Crosby v Timolat, 50 M 171, 52 NW 526; Payne v Loan Co. 54 M 255, 55 NW 1128; Bayview v Myers, 62 M 265, 64 NW 816; Rule v Omega, 64 M 326, 67 NW 60; Morey v City of Duluth, 69 M 5, 71 NW 694; Bell v Mendenhall, 71 M 331, 73 NW 1086; Kenaston v Larig, 81 M 454, 84 NW 323; Albert Lea v Knotvold, 89 M 480, 95 NW 309.

A demurrer does not lie because of a demand for greater relief than the facts alleged warrant. Lockwood v Bigelow, 11 M 113 (70); St. Paul & Pac. v Rice, 25 M 278; Siebert v M. & St. L. 58 M 39, 59 NW 822.

Demurrer does not lie because of a defect in verification. McMath v Parsons, 26 M 246, 2 NW 703.

Nor because two counter-claims are not stated separately. Campbell v Jones, 25 M 155.

Nor for a defective prayer for relief. Colstrum v M. & St. L. 31 M 367, 18 NW 94.

Nor for failure to obtain leave of court to sue. Leuthold v Young, 32 M 122, 19 NW 652; Litchfield v McDonald, 35 M 167, 28 NW 191; McCallister v Bishop, 78 M 228, 80 NW 1118.

The fact that the summons in an action had not been served upon one of several co-defendants affords no ground for another defendant to demur to the complaint. St. P. Land v Dayton, 37 M 364, 34 NW 335.

Nor for failure to state several causes of action separately. Craig v Cook, 28 M 232, 9 NW 712; Newell v Howe, 31 M 235, 17 NW 383; Humphrey v Merriam, 37 M 502, 35 NW 365.

Demurrer does not lie because of non-existence of things and facts alleged. Williams v Langevin, 40 M 180, 41 NW 936; Royal Insurance v Clark, 61 M 476, 63 NW 1029; Stevens v Staples, 64 M 3, 65 NW 959.

A demurrer does not lie because plaintiff's exclusive remedy is in equity. Benson v Silvey, 59 M 73, 60 NW 847; Bell v Mendenhall, 71 M 331, 73 NW 1086.

Failure to allege the incorporation and the corporate powers of the defendant company, in a suit upon a contract, is not ground for demurrer. Klemik v Henricksen, 122 M 380, 142 NW 871.

A demurrer will not lie because it asks for wrong relief, or for a greater than the facts warrant. Oehler v City, 174 M 410, 219 NW 760; Johnson v Independent School, 189 M 293, 249 NW 177.

10. Generally

Rule that on demurrer all facts will be deemed to be alleged which can reasonably be inferred from the allegations expressly made, applied. Preiss v Zins, 122 M 441, 142 NW 822.

A judgment recovered by defendant on demurrer to the complaint because the plaintiff mistook his remedy does not reach the merits of the case, and is not a bar to a new action founded upon the proper remedy. State ex rel v District Court, 136 M 151, 161 NW 388.

The complaint did not state a cause of action, but it is too late to raise the issue at the close of the trial. If the proof did not sustain the allegations of the pleadings, the party should have asked to amend. Stewart v St. Paul Fire, 171 M 363, 214 NW 58.

On demurrer, a pleading is to be construed liberally in favor of the pleader. Lynne v Frazee, 181 M 261, 232 NW 324.

When a complaint states in form a cause of action resting upon a particular statute, the constitutionality of the statute may be raised by demurrer. State ex rel v County, 181 M 427, 232 NW 737.

"We pass upon the allegations of the complaint upon the assumption that they are true, as must be done in case of demurrer." Regan v Babcock, 188 M 195, 247 NW 12.

Where a demurrer is sustained because the complaint alleged in the alternative facts constituting a good cause of action, and facts that did not, the plaintiff is not barred from bringing a new action. Rost v Kroke, 195 M 219, 262 NW 450.

A demurrer admits all material facts well pleaded, including necessary inferences. It raises an issue of law, but no question of fact, or of law and fact. Smith v Smith, 204 M 255, 283 NW 239.

A demurrer to a pleading admits all material facts well pleaded, all inferences of fact which may fairly be made therefrom, and all necessary legal inferences which may arise from the facts pleaded. Harriet Bank v Samels, 164 M 265, 204 NW 938; McCarthy v City, 203 M 427, 281 NW 759; Stark v Equitable, 205 M 138, 285 NW 466; State ex rel v Clausing, 205 M 296, 285 NW 711.

Admission of facts by demurrer does not extend to those of which the court will take judicial notice. State ex rel v Clausing, 205 M 296, 285 NW 711.

In replevin, action removed from state to federal court. Demurrers to counter-claim would be dismissed under rule of civil procedure abolishing demurrers for insufficiency of pleadings in absence of showing that application of federal rule abolishing demurrer would not be feasible, or work injustice. Shell v Stueve, 25 F. Supp. 879.

SUBDIVISION 2. REQUISITES

1. Demurrer to whole pleading

A demurrer may be to the whole complaint or to any of the causes of action stated therein, but if it is made to the whole complaint, it will be overruled if any one of the causes of action therein stated is good. Miller v Rouse, 8 M 124 (97); Armstrong v Hines, 9 M 356 (341); Winona & St. Peter v St. Paul, 26 M 179, 2 NW 489; First Nat'l v How, 28 M 150, 9 NW 626; Steenerson v Waterbury, 52 M 211, 53 NW 1146; Grant v Grant, 53 M 181, 54 NW 1059; Vaule v Steenerson, 63 M 110, 65 NW 257; Gammons v Johnson, 69 M 488, 72 NW 563; Johnson v White, 78 M 48, 80 NW 838.

2. Demurrer to part of pleading

A demurrer will only lie to a whole pleading or to the whole of a single cause of action or defense. It will lie to a single cause of action, although it is not separately stated. Boss v Upton, 1 M 408 (292); Armstrong v Hinds, 9 M 356 (341); Palmer v Smith, 21 M 419; Knoblauch v Fogelsong, 38 M 459, 38 NW 366; Pratt v Sparkman, 42 M 448, 44 NW 663; Dean v Howard, 49 M 350, 51 NW 1102; Anderson v Scandia Bank, 53 M 191, 54 NW 1062; Steenerson v Gt. Northern, 64 M 216, 66 NW 723.

3. Specifying grounds

A party may specify as many of the statutory grounds as he desires, but he is limited to those specified. Seager v Burns, 4 M 141 (93); Dorman v Ames, 9 M 180 (164); Smith v Jordan, 13 M 264 (246); Soule v Thelander, 31 M 227, 17 NW 373; Walsh v Byrnes, 39 M 527, 40 N. W. 831; N.W. v Prior, 68 M 95, 70 NW 869; Bell v Mendenhall, 71 M 331, 73 NW 1086; Rossman v Mitchell, 73 M 198, 75 NW 1053.

A general demurrer to a pleading that it does not state facts sufficient to constitute a cause of action or defense, is sufficient without further specification. Monette v Cratt, 7 M 234 (176).

A demurrer for defect of parties must point out the defect and name the persons omitted. Anderson v Dyer, 94 M 30, 101 NW 1061.

The right of receivers appointed by the district court for the northern district of West Virginia to sue in this state, was properly sustained as against a demurrer. Stevens v Tilden, 122 M 250, 142 NW 315.

Joint demurrer cannot be sustained if complaint is good as against one of the demurring defendants. State v Brooks-Scanlon, 128 M 300, 150 NW 912.

4. Objection by answer

The objection that the plaintiff has not legal capacity to sue is waived unless raised by answer or demurrer. Topley v Topley, 10 M 448 (360).

Where there is a defect of parties plaintiff or defendant, if the defect appears on the face of the complaint, the objection must be taken by demurrer; if the defect does not appear on the face of the complaint, the objection may be taken by answer; and if no such objection is taken either by demurrer or answer, the defendant is deemed to have waived the same. Cover v Town of Baytown, 12 M 124 (71); Lowry v Harris, 12 M 255 (166); Stewart v Erie, 17 M 372 (348); McRoberts v Southern Minnesota, 18 M 108 (97); Miller v Darling, 22 M 303; Blakeley v LeDuc, 22 M 476; Porter v Fletcher, 25 M 493; Baldwin v Canfield, 26 M 43, 1 NW 161; Allis v Ware, 28 M 166, 9 NW 666; Tarbox v Gorman, 31 M 62, 16 NW 466; Jones v City of Mpls. 31 M 230, 17 NW 377; Davis v Chouteau, 32 M 548, 21 NW 748; Sandwich v Herriott, 37 M 214, 33 NW 782; Graham v City of Mpls. 40 M 436, 42 NW 291; N. W. Cement v Norw. Seminary, 43 M 449, 45 NW 868.

Although a complaint is objectionable as containing matter relating to two distinct causes of action improperly joined, it is too late to raise the objection in the appellate court. Gardner v Kellogg, 23 M 463.

If several causes of action are improperly united, or if there be a defect of parties, the objection is deemed waived unless taken by answer or demurrer. The objection cannot be raised by a motion to dismiss. Dinsmore v Shepard, 46 M 54, 48 NW 528, 681; Campbell v Ry. Transfer, 95 M 375, 104 NW 547; Arthur v Williams, 44 M 409, 46 NW 851; Densmore v Shepard, 46 M 54, 48 NW 528, 681; Christian v Bowman, 49 M 99, 51 NW 663; Thurston v Thurston, 58 M 279, 59 NW 1017; Benson v Silvey, 59 M 73, 60 NW 847; Moore v Bevier, 60 M 240, 62 NW 281; Stewart v Gt. Northern, 65 M 515, 68 NW 208; Harper v Carroll, 66 M 487, 69 NW 610, 1069; Bell v Mendenhall, 71 M 331, 73 NW 1086; Mason v St. P. Fire, 82 M 336, 85 NW 13; Budds v Frey, 104 M 481, 117 NW 158.

The failure of a foreign administrator to file a copy of his letters does not appear upon the face of the complaint, and, objection not having been made by answer, the defendant waived it. Pope v Waugh, 94 M 502, 103 NW 500.

Effect of failure of alleged joint tortfeasors to answer specifically. Twitchell v Nelson, 131 M 380, 155 NW 623.

5. Generally

A complaint is sufficient if it states a cause of action either at law or equity, and it is not vitiated because it asks wrong relief. Mannheimer v Phinney, 167 M 279, 209 NW 7; Central Bank v Royal Indemnity, 167 M 500, 210 NW 66.

A pleading first attacked on trial should be liberally construed. Stopf v Wobbrock, 171 M 358, 214 NW 49.

Where a judgment on default is entered on a complaint which fails to state a cause of action, the trial court is justified in opening the judgment and permitting defendant to appear and defend, on motion made for that purpose within the time for appeal from the judgment. Roe v Widme, 191 M 254, 254 NW 274.

Doctrine of aider of pleading. 12 MLR 120.

SUBDIVISION 3. WAIVER

See annotations under section 544.03, subdivision 2, paragraph 4.

A defendant does not by answering waive the objection that the court has not jurisdiction of the subject matter, or that it does not state facts sufficient to constitute a cause of action. Stratton v Allen, 7 M 502 (409).

The want of an essential averment in a complaint is not cured by a verdict for the plaintiff. Lee v Emery, 10 M 187 (151); Smith v Dennett, 15 M 81 (59); Northern Trust v Markell, 61 M 271, 63 NW 735.

The answer in this case set up a counter-claim, but was tried upon the theory it was not, and was at issue without any reply. The counter-claim is not to be taken as admitted. Matthews v Torinus, 22 M 132.

The objection that a cause of action pleaded as a counter-claim is not the proper subject of counter-claim in the particular action is waived if not taken by demurrer. Walker v Johnson, 28 M 147, 9 NW 632; Mississippi v Prince, 34 M 71, 24 NW 344; Lace v Fixen, 39 M 46, 38 NW 762; Warner v Foote, 40 M 176, 41 NW 935; Tolty v Torling, 79 M 386, 82 NW 632.

The objection that the facts set up in the answer as a counter-claim do not constitute a cause of action is not waived. Lace v Fixen, 39 M 46, 38 NW 762; Schurmeier v English, 46 M 306, 48 NW 1112.

Where the answer set up a counter-claim upon a note not due, and no objection was raised, and the case was tried throughout, the plaintiff is deemed to have waived the objection. Stensgaard v St. Paul, 50 M 429, 52 NW 910.

The answer averred that the property mentioned in the counter-claim had been quarried and removed under license from defendant, while the proof showed the plaintiff was simply a trespasser. There was a material variance. Downs v Finnegan, 58 M 112, 59 NW 981.

The complaint was insufficient in that the plaintiff sued as a personal representative, and did not allege his capacity or place or manner of appointment. Hamilton v McIndoo, 81 M 324, 84 NW 118.

In an equitable action to establish an unrecorded deed and cancel subsequent recorded deeds, an objection to a complaint in equity that the plaintiff has an adequate remedy at law must be taken by demurrer, or it is waived. Lloyd v Simons, 97 M 314, 105 NW 902.

Objection not having been taken to the jurisdiction of the court and the sufficiency of the facts to constitute a cause of action may be deemed to have been waived. Eyre v Faribault, 121 M 237, 141 NW 170.

Where the fact that several causes of action are improperly united appears upon the face of the complaint, the objection must be taken by demurrer or it is waived. Stolorow v Nat'l Council, 132 M 27, 155 NW 756.

If the contestee in an election contest wishes to raise the question of the legal capacity of the contestant, he must do so by answer or demurrer, otherwise he is deemed to have waived the objection. Miller v Maier, 136 M 235, 161 NW 515.

Where a want of capacity to sue appears affirmatively upon the face of the complaint, the defendant may demur thereto, and if he does not, the objection is deemed to be waived. Dalsgaard, v Meierding, 140 M 388, 168 NW 584.

Want of capacity to sue in our courts is waived unless objection is taken by answer or demurrer. Brazney v Barnard, 169 M 501, 211 NW 949.

In the instant case it is held that by answering a demurrer to the complaint previously interposed and the order overruling the same are both eliminated from consideration upon an appeal after trial on the merits. Wolfe v Mayer, 171 M 98, 213 NW 549.

The writ, read in connection with the petition, did not state a cause of action and there was no waiver of the defect by an appearance and request for a continuance. Gunther v Bullis, 173 M 198, 217 NW 119.

The objection that a plaintiff claiming to sue on behalf of himself and associates in a joint adventure has no capacity to sue as their representative must be taken by demurrer or answer or it is waived. Crawford v Lugoff, 175 M 235, 220 NW 822.

A misjoinder of parties plaintiff not raised by demurrer or answer, is waived. First Mpls. v Lancaster, 185 M 123, 240 NW 459; Spinner v McDermott, 190 M 390, 251 NW 908.

Defendant did not waive the statute of limitations by pleading guilty after his demurrer had been overruled. State v Tupa, 194 M 492, 260 NW 875.

Defect of parties must be raised by demurrer or answer. Hansen v Bowman, 199 M 74, 271 NW 127.

Where defect of parties is claimed in a cause, objection must be raised either by demurrer or answer. If neither is done, defendant cannot later raise the objection by motion for dismissal, judgment on the pleadings, for direction of verdict, or by objection to the admission of evidence. Serr v Biwabik, 202 M 166, 278 NW 355. The defense that a government instrumentality is immune from suit will be noticed, even if raised for the first time after trial or argument of alternative motion for judgment notwithstanding verdict or new trial. Casper v Regional, 202 M 433, 278 NW 896.

A defendant may file objections to introduction of evidence and an adverse ruling will present proper question for review as to whether the complaint states a cause of action, on appeal from judgment. Weiland v Northwestern, 203 M 600, 281 NW 364.

SUBDIVISION 4. HEARING AND DETERMINATION

See annotations under section 545.02.

After the venue had been changed, it was irregular for the plaintiff to notice a demurrer of the defendant for argument before a judge of the initial court, but the irregularity did not go to the jurisdiction of the court. Flowers v Bartlett, 66 M 213, 68 NW 976.

Objection that the court did not fix the time for argument on a demurrer as provided in this section cannot be raised for the first time on appeal. Fallgather v Lammers, 71 M 238, 73 NW 860.

An issue of law arising on a demurrer may be notice for hearing before the court in the county wherein the action is pending at any time, whether it be a term of court or not. Johnson v Velve, 86 M 46, 90 NW 126.

544.04 CONTENTS OF ANSWER.

HISTORY. R.S. 1851 c. 70 s. 66; 1853 c. 5; P.S. 1858 c. 57 s. 23; P.S. 1858 c. 60 s. 70; G.S. 1866 c. 66 s. 79; G.S. 1878 c. 66 s. 96; G.S. 1894 s. 5236; R.L. 1905 s. 4130; G.S. 1913 s. 7756; G.S. 1923 s. 9253; M.S. 1927 s. 9253.

DENIALS

1. **General denial**
2. **Effect of general denial**
3. **Denials of knowledge or information**
4. **Denial on information and belief**
5. **Specific denials control**
6. **Denials controlled by subsequent admissions**
7. **A denial must not be a negative pregnant**
8. **Argumentative denials**
9. **General denials coupled with admissions**
10. **Non-traversable allegations**
11. **Denials generally**

NEW MATTER CONSTITUTING A DEFENSE

1. **New matter constituting a defense**
2. **Defendant must not be a stranger to new matter**

3. When one of several obligors is sued
4. New matter must be pleaded specially
5. Partial defenses
6. Each defense must be complete in substance and form

EQUITIES

1. Nature of equities, pleadable
2. Need not demand affirmative relief
3. Practice
4. Burden of proof
5. Several defendants
6. Admission of ultimate facts

DENIALS

1. General denials

Denials are either general or specific. They are general when they deny each and every allegation of the complaint; specific when they deny some particular allegation. Although the general denial is not expressly authorized by our statute, its use has been approved. Kingsley v Gilman, 12 M 515 (425); Stone v Quaal, 36 M 46, 29 NW 326.

Forms of general denial held sufficient. Moen v Eldred, 22 M 538, Fogle v Schaeffer, 23 M 304; Stone v Quaal, 36 M 46, 29 NW 326; Peterson v Ruhnke, 46 M 115, 48 NW 768.

Forms of general denial held insufficient. Starbuck v Dunklee, 10 M 168 (136); Montour v Purdy, 11 M 384 (278); Dodge v Chandler, 13 M 114 (105).

2. Effect of general denial

A general denial has the same effect as a specific denial of each allegation. It has as wide a scope as the allegations of the pleadings to which it is directed and puts in issue every material allegation thereof. Fetz v Clark, 7 M 217 (159); Kingsley v Gilman, 12 M 515 (425); Fogle v Schaeffer, 23 M 304; Stone v Quaal, 36 M 46, 29 NW 326; Nunnemacker v Johnson, 38 M 390; 38 NW 351; German-American v White, 38 M 471, 38 NW 361; Hodgson v Mather, 92 M 299, 100 NW 87; Jennings v Rohde, 99 M 335, 109 NW 597.

It puts in issue material allegations of value. German-American v White, 38 M 471, 38 NW 361.

Resume of what may be proved in an action for slander and there is a general denial. Dodge v Gilman, 122 M 177, 142 NW 147; Krulic v Petcoff, 122 M 517, 142 NW 897.

In an action for damages for assault and battery. Evertson v McKay, 124 M 260, 144 NW 950.

In an action for commission for the sale of land. Bentley v Edwards, 125 M 179, 146 NW 347.

Lack of notice of assignment of wages. Fay v Banker's Surety, 125 M 216, 146 NW 359.

Action for wilful trespass to land. Helppic v Northwestern, 127 M 360, 149 NW 461.

Denial of the making of a contract. Lombard v Rahilly, 127 M 449, 149 NW 950.

In suit upon a promissory note. First State Bank v Utman, 136 M 103, 161 NW 398.

Under a general denial, any evidence is admissible which tends directly to controvert the allegations of the complaint. If doubt exists as to whether defensive matter is admissible thereunder, great liberality should be shown in allowing an amendment to render it admissible. Sargeant v Bryan, 160 M 200, 199 NW 737.

Where plaintiff in an action for replevin for mortgaged chattels declares generally as an owner and entitled to possession, the defendant under a general

denial may prove payment of the debt, or that documents under which plaintiff claims are tainted with usury. First Nat'l v Halvorson, 176 M 406, 223 NW 618; Halos v Nachbar, 196 M 387, 265 NW 26.

Where suit is brought on an illegal contract, defense of illegality can be raised under a general denial or by the court on its own motion. Vos v Albany Mutual, 191 M 198, 253 NW 549.

Denial of execution of an instrument puts in issue its making, the genuineness of the signature, and the delivery. O'Hara v Crawball, 201 M 618, 277 NW 232.

Even if not pleaded as a defense, the defendant may take advantage of plaintiff's contributory negligence. Forseth v Duluth-Superior, 202 M 447, 278 NW 904.

Under a general denial, a defendant may submit evidence to show that the contract sued upon was executed and delivered conditionally and that the conditions were not fulfilled so as to make it effective. Benson v Wheaton, 216 M 57, 11 NW(2d) 769.

Denials and alternative defenses. 13 MLR 348.

Availability of defense of contributory negligence disclosed by plaintiff's evidence but not pleaded in the answer. 16 MLR 719.

3. Denials of knowledge or information

If the defendant has no personal knowledge of the facts alleged in the complaint or any of them, or no information regarding them sufficient to form a belief as to their truth or falsity, he may put them in issue by simply denying any knowledge or information sufficient to form a belief. Morton v Jackson, 2 M 219 (180); Mower v Stickney, 5 M 397 (321); Ames v St. P. & Pacific, 12 M 412 (295); Smalley v Isaacson, 40 M 450, 42 NW 352; Schroeder v Capehart, 49 M 525, 52 NW 140.

This form of denial is not permissible where the facts are within the knowledge of the defendant. Morton v Jackson, 2 M 219 (180); Minor v Willoughby, 3 M 225 (154); Starbuck v Dunklee, 10 M 168 (136); Nelson v Richardson, 31 M 267, 17 NW 388; Wheaton v Briggs, 35 M 470, 29 NW 170; Larson v Shook, 68 M 30, 70 NW 775.

But a denial in this form when the facts are within the knowledge of the defendant makes a good issue so long as it remains in the record. The only way to object to it is to move to strike it out as shown before pleading. Smalley v Isaacson, 40 M 450, 42 NW 352; Schroeder v Capehart, 49 M 525, 52 NW 140.

"Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer", was sufficient, where the objection to it was first made after trial and verdict. Trustees v Nesbitt, 65 M 17, 67 NW 652.

4. Denial on information and belief

Denials on information and belief, and affirmative allegations in the same form, are permissible and sufficient in the return to a writ of mandamus. State ex rel v Cooley, 58 M 514, 60 NW 338; Kenny v Duluth Log. Co. 128 M 7, 150 NW 216.

5. Specific denials control

If there is a specific denial and also a general denial in the same answer, the former controls, and if insufficient no issue is made. Pullen v Wright, 34 M 314, 26 NW 394.

The separate answer of one of the copartner defendants contained a general denial. It also contained in connection with allegations of certain transactions between him individually and the plaintiffs, a specific denial that "he" had received such money. This later denial construed as not modifying the effect of the general denial. Brandt v Shepard, 39 M 454, 40 NW 521.

6. Denials controlled by subsequent admissions

If there is a denial, and also an admission, the latter controls. McClung v Bergfield, 4 M 148 (99); Derby v Gallup, 5 M 119 (85); Scott v King, 7 M 494 (402);

Henry v Hinman, 21 M 378; St. Anthony v King, 23 M 186; Lampsen v Brander, 28 M 526, 11 NW 94; Goffney v St. P. & Man. 38 M 111, 35 NW 728; Stadtler v School District, 71 M 311, 73 NW 956.

An admission in an affidavit presented by plaintiff at the hearing on a motion to strike the answer nullified the effect of a general denial in the reply. Menwissen v Westermann, 218 M 477, 16 NW(2d) 546.

7. A denial must not be a negative pregnant

A negative pregnant is a denial which implies an affirmative. It is inherently ambiguous and therefor bad. Frasier v Williams, 15 M 288 (219); McMurphy v Walker, 20 M 382 (334); Paine v Smith, 33 M 495, 24 NW 305; Stone v Quaal, 36 M 46, 29 NW 326; Fredericksen v Singer, 38 M 356, 37 NW 453; German-American v White, 38 M 471, 38 NW 361; Pound v Pound, 60 M 214, 62 NW 264.

The effect of a negative pregnant is the admission of the fact sought to be denied. Paine v Smith, 33 M 495, 24 NW 305; Pullen v Wright, 34 M 314, 26 NW 394; Curtiss v Livingstone, 36 M 312, 30 NW 814; Pound v Pound, 60 M 214, 62 NW 264.

Where several facts are alleged conjunctively, a conjunctive denial is a species of negative pregnant and raises no issue. Pullen v Wright, 34 M 314, 26 NW 394.

A negative pregnant has the effect of an admission of the fact denied, only when the fact denied is a material traversable fact. In actions for unliquidated damages, allegations of value are not traversable; and denials in the form of negative pregnant do not admit the value as alleged. Pullen v Wright, 34 M 314, 26 NW 394; German-American v White, 38 M 471, 38 NW 361.

A general denial can never be construed as a negative pregnant, Stone v Quaal, 36 M 46, 29 NW 326; German-American v White, 38 M 471, 38 NW 361.

8. Argumentative denials

When a contract is alleged in the complaint, and the answer denies it except as therein afterwards admitted, and the answer then alleges one entirely different it makes an issue as to the terms of the contract. Becker v Sweetzer, 15 M 427 (346); Jellett v St. P. Mpls. 30 M 265, 15 NW 237.

9. General denials coupled with admissions

"He denies each and every statement and averment, and every part of the same, in said amended complaint, save as hereinafter admitted or qualified" is sufficient, there being no ambiguity in what is afterwards stated. Kingsley v Gilman, 12 M 551 (425).

Any language in an answer which clearly indicates the allegations to which it is addressed, and denies with certainty the substance of such allegation, is sufficient to put the same in issue. Kingsley v Gilman, 12 M 515 (425); Becker v Sweetzer, 15 M 427 (346); Yeyde v Martin, 16 M 38 (24); Davenport v Ladd, 38 M 545, 38 NW 622; Horn v Butler, 39 M 515, 40 NW 833; Jellison v Halloran, 40 M 485, 42 NW 392; Fegelson v Dickerman, 70 M 471, 73 NW 144; Fitzpatrick v Simonson, 86 M 140, 90 NW 378.

An admission in an answer that the defendant executed a bond sued on, in the form and manner set out in the complaint, carries with it an admission of all that is essential to a valid execution of the bond, with the terms contained therein, including the full authority of the agents by whom it was executed. First State v Stevens, 123 M 218, 143 NW 355; Wadsworth v Walsh, 128 M 241, 150 NW 870.

10. Non-traversable allegations

Denials of immaterial allegations raise no issue. Allegation as to immaterial matters are non-traversable. Freeman v Curran, 1 M 169 (144); Finley v Quirk, 9 M 194 (179); Wilder v City of St. Paul, 12 M 192 (116); Newman v Springfield Fire, 17 M 123 (98); McMurphy v Walker, 20 M 382 (334); Gross v Diller, 33 M 425, 23 NW 837; Dennis v Johnson, 47 M 56, 49 NW 383; First Nat'l v Strait, 71 M 69, 73 NW 645.

A traverse or denial can only be a matter of fact and not of conclusion of law. Finley v Quirk, 9 M 194 (179); Fraser v Williams, 15 M 288 (219); Downer v Read, 17 M 493 (470); Holbrook v Sims, 39 M 122, 39 NW 74, 140.

Prayers for relief are not traversable. Hatch v Coddington, 32 M 92, 19 NW 393.

An allegation of unliquidated damages must be proved notwithstanding an untraversable allegation of damages in a particular sum. Pullen v Wright, 34 M 314, 26 NW 394.

11. Denials generally

The right to a reformation of a note may be shown defensively and, if so shown, the court will treat the defective instrument as reformed. Leach v Leach, 162 M 159, 202 NW 448.

Debtors to an insolvent bank cannot, when sued by the receiver, offset moneys paid by them after the insolvency as sureties on a bond of the bank given to secure the repayment of deposits. Veigel v Converse, 168 M 408, 210 NW 162.

That no leave of court to sue on an official bond has been obtained cannot be raised under a general denial. Mpls. v Hare, 168 M 423, 210 NW 287.

An allegation in the answer denied in the reply cannot be relied upon by plaintiff as establishing the fact alleged. Burghart v Sausele, 169 M 132, 210 NW 869.

NEW MATTER CONSTITUTING A DEFENSE

1. New matter constituting a defense

Compared with denials, new matter constituting a defense is in the nature of a plea of confession and avoidance; and averments in an answer which serve merely to put in issue the allegations of the complaint do not constitute such new matter as requires a reply. Craig v Cook, 28 M 232, 9 NW 712.

The right to a reformation of a note may be shown defensively and, if so shown, the court will treat the defective instrument as so reformed. Leach v Leach, 162 M 159, 202 NW 448.

The defense of modification or cancelation of a prior contract is new matter in the nature of confession and avoidance and must be pleaded specially in order that evidence thereof may be properly admitted. Davis v Reichert, 197 M 287, 266 NW 855.

There being no inconsistency between them in point of fact, defendant in a slander suit may join with his general denial the plea of justification that, whether he did or did not use the words charged, they spoke the truth. Woost v Herberger, 204 M 192, 283 NW 121.

After a decision responsive to all defendants' contentions, it is too late for them to present a new fact issue, unless it relates to jurisdiction, or a determinative contract is shown to be illegal as a matter of law on the evidence already in. Allen v Central Motors, 204 M 295, 283 NW 490.

2. Defendant must not be a stranger to new matter

A defendant answering cannot assert the rights of one who does not answer. Cathcart v Peck, 11 M 45 (24).

One may not defend an action by asserting facts or rights which do not concern him, and in which he has no lawful interest. Herber v Christopherson, 30 M 395, 15 NW 676.

But a grantor of real estate by warranty deeds, sued with his grantees in an action to set aside the title which he assumed to have and to convey, may defend in his own name for the defendants served but not answering. Bausman v Eads, 46 M 148, 48 NW 769.

Lacking the requisite interest, the insurer cannot be heard to question the legality of the permission to Krosch by the county to use its automobile. Schultz v Krosch, 204 M 585, 284 NW 782.

3. When one of several obligors is sued

In an action against one partner alone, on his individual obligation, given for a partnership debt, he may avail himself of any recoupment of which the partners would have a right to avail themselves if the suit were against all of them. McKinnon v Phalen, 62 M 188, 64 NW 387.

In an action brought against one of the makers of a joint and several promissory note, he may interpose, to defeat recovery pro tanto, the defense that there was a partial failure of consideration, arising out of a breach of contract of warranty, entered into with all of said makers, as to a part of the property for which the note was given. Nichols v Soderquist, 77 M 509, 80 NW 630.

A counter-claim good only as against a third party, pleaded in a case where the issue could be determined without the presence of the third party, was properly stricken out on motion. McClearn v Arnold, 173 M 183, 217 NW 106.

4. New matter must be pleaded specially

Matter in the nature of confession and avoidance cannot be proved unless specially pleaded. Finley v Quirk, 9 M 194 (179); Warner v Myrick, 16 M 91 (81); Livingston v Ives, 35 M 55, 27 NW 74; Gaffney v St. P. Mpls. 38 M 111, 35 NW 728; Macfee v Horan, 40 M 30, 41 NW 239; Jackson v Kansas City, 42 M 382, 44 NW 126; Rothschild v Burritt, 47 M 28, 49 NW 393; Kennedy v McQuaid, 56 M 450, 58 NW 35; O'Gorman v Sabin, 62 M 46, 64 NW 84; Iselin v Simon, 62 M 128, 64 NW 143; Roberts v Nelson, 65 M 240, 68 NW 14; Sodini v Gaber, 101 M 155, 111 NW 962.

If the surety could claim a release from the bond because of a ten-day extention of time granted the contractor, such defense, if available at all under the facts, should have been pleaded. Pulaski v Amer. Surety, 123 M 223, 143 NW 715.

Illegality of a lease as contemplating violations of the liquor laws, is not available as a defense in an action thereon, where it neither appeared from the complaint nor was alleged in the answer, and was not litigated by consent. Andrus v Dyckman, 126 M 419, 148 NW 566.

The common law of Wisconsin was not pleaded; but the parties having tried the case upon the theory that the question of liability was determinable by the Wisconsin law it is so considered on appeal. Pickering v Northern Pacific, 132 M 205, 156 NW 3.

Contributory negligence is an affirmative defense and must be pleaded. Elliott v Chic. & St. P. 136 M 138, 161 NW 390.

Assuming that the city may stop the payment of interest by making a tender, the fact and date of the tender must be pleaded and proved. Urban Investment v City of St. Paul, 183 M 499, 237 NW 192.

Statutes and decisions of another state should be pleaded. Smith v Berg, 187 M 220, 244 NW 826.

The discharge of the cause of action by settlement with the receiver was a matter of affirmative defense. The burden was on the defendants both to plead and prove it. Barrett v Shambeau, 187 M 433, 245 NW 830.

The plaintiff failed to specially plead a letter relied upon to tool the statute of limitations, but as the case was tried, and both parties knew of the letter, there was no prejudice to the defendant. Olson v Myrland, 195 M 626, 264 NW 129.

The defense of modification or cancelation of a prior contract is new matter in the nature of confession and avoidance and must be pleaded specially in order that evidence thereof can properly be admitted. Davis v Reichert, 197 M 287, 266 NW 855.

A defense not pleaded is not available. Shanahan v Olmsted Bank, 217 M 454, 14 NW(2d) 433.

A combination of two corporations may result in coalescence or union thereof without extinguishing either, extinction of one corporation and its absorption by the other, which constitutes a "merger" or vital succession or extinction of both corporations, and creation of a new one, which constitutes a "consolidation". United States v Northwestern National, 137 F(2d) 761.

A "set-off" is a partial or entire "defense", within the federal rule requiring all defenses to be presented either by motion, answer or reply. In an action under federal employers' liability act, where defendant's rights if any, to benefit of contributions paid to railroad retirement fund was by way of set-off only, which defendant failed to plead, it could not make proof of the pension on cross-examination in mitigation of damages. Chicago v Peeler, 140 F(2d) 865.

5. Partial defenses

The defendant may plead a partial defense, although not expressly so authorized by statute. Stevens v Johnson, 28 M 172, 9 NW 677; Torinus v Buckham, 29 M 128, 12 NW 348; Durment v Tuttle, 50 M 426, 52 NW 909; Weitzner v Thingstad, 55 M 244, 56 NW 817; Aultman v Torrey, 55 M 492, 57 NW 211; Nichols v Soderquist, 77 M 509, 80 NW 630.

6. Each defense must be complete in substance and form

In denying in an answer any liability for loss under an insurance policy, the insurer does not waive its right to plead in abatement, that, under the terms and conditions of the policy as to payment, the action has been prematurely brought. LaPlant v Firemen's Ins. 68 M 82, 70 NW 856.

EQUITIES

1. Nature of equities pleadable

An equity to be pleadable under this section must be one which, according to the rules governing courts of equity under the former system, would have entitled the defendant to relief, wholly or in part, against the liability set forth in the complaint. An equitable defense should contain in substance, the elements of a bill in equity, and its sufficiency other than as to matters of mere form is to be determined by the application of the rules observed in courts of equity when relief was granted there under the former practice. Gates v Smith, 2 M 31 (21); McClane v White, 5 M 178 (139); Barker v Walbridge, 14 M 469 (351); Birdsall v Fischer, 17 M 100 (76); Wallrich v Hall, 19 M 383 (329); First Nat'l v Kidd, 20 M 234 (212); Williams v Murphy, 21 M 534; Kean v Connelly, 25 M 222; Crockett v Phinney, 33 M 157, 22 NW 292; Knoblauch v Fogelson, 37 M 320, 33 NW 865; Probstfield v Czizek, 37 M 420, 34 NW 896; Thwing v Hall, 40 M 184, 41 NW 815; Becker v Northway, 44 M 61, 46 NW 210; Rogers v Castile, 51 M 428, 53 NW 651; Vaule v Miller, 69 M 440, 72 NW 452; Richardson v Merritt, 74 M 354, 77 NW 234, 407, 968; Deering v Poston, 78 M 29, 80 NW 783; Crosby v Scott, 93 M 475, 101 NW 610.

If the facts giving rise to the equity also constitute a cause of action at law, it must be shown that the remedy at law is inadequate and the answer should allege facts showing their inadequacy. Gates v Smith, 2 M 31 (21); Barker v Wallbridge, 14 M 469 (351); Birdsall v Fischer, 17 M 100 (76); Probstfield v Czizek, 37 M 420, 34 NW 896.

The equity must be perfect at the time it is pleaded and not depend on the happening of a contingent event. Knoblauch v Foglesong, 37 M 320, 34 NW 896.

Where the defendant relies on fraud in procuring execution of the instrument set out in the complaint he must allege facts constituting fraud. Trainor v Schutz, 98 M 213, 107 NW 812.

The question of title by an executed parol gift, as claimed by the defendant, was properly at issue under the pleadings. Hayes v Hayes, 126 M 389, 148 NW 125.

It is not necessary for the defendant, who claims the injury was caused by something independent of the cause alleged by the plaintiff, to plead the cause of it; but in the instant case the suggestion was so remote and indefinite and improbable, though possible, that the court did not err in refusing evidence. Peterson v Chicago, Burlington, 131 M 266, 154 NW 1093.

The equitable cross action of defendant by way of answer asking relief against the maintenance of the retaining wall as it extends eight inches over the street line, has no place in the case. The fact that the wall so encroaches on the street

does not constitute a defense to plaintiff's action for damages, or otherwise bar his right to recover. It is not an equity within the meaning of this section. Berg v Village, 143 M 267, 173 NW 423.

2. Need not demand affirmative relief

A defendant may plead an equity as a defense and without asking for any affirmative relief thereon. Probstfield v Czizek, 37 M 420, 34 NW 896; Rogers v Castle, 51 M 428, 53 NW 651; Travelers v Walker, 77 M 438, 80 NW 618.

3. Practice

When an equity is pleaded in a legal action the issue thereon is to be decided by the court without a jury and should ordinarily be taken up first, as its disposition may make it unnecessary to submit the legal issue to the jury. The order of trial, however, is a matter of discretion with the trial court to be determined by the exigencies of the particular case. Guernsey v Amer. Ins. 17 M 104 (83); Ashton v Thompson, 28 M 330, 9 NW 876; Crosby v Scott, 93 M 475, 101 NW 610.

4. Burden of proof

In an action to recover in several counts the price of goods, an answer admitting several sales, but pleading in bar a recovery as to one of such running sales, is in the nature of a confession and avoidance, and the burden of proof is upon the defendant. American v Thornton, 28 M 418, 10 NW 425.

5. Several defendants

Where several defendants answer separately, a defense interposed by one is not available to a co-defendant where his separate answer does not present it. Skow v Dahl, 129 M 324, 152 NW 755.

6. Admission of ultimate facts

The defendant, having admitted the ultimate facts pleaded in the complaint, cannot insist that the plaintiff must either plead or prove the subsidiary matters which go to make up the ultimate facts. Sclawr v City of St. Paul, 132 M 238, 156 NW 283.

GENERALLY

The defendant was the owner of an overdue note of the bankrupt and another person. In a connected transaction a sum of money was paid to him to be paid to the bankrupt if the stock of goods then sold by the bankrupt should prove to be unencumbered. It was unencumbered, the sale was completed, and the bankrupt became entitled to the money. The defendant was entitled to offset the note against the money. Meighan v Cohen, 161 M 302, 201 NW 431.

There can be no counter-claim against a counter-claim, so a reply may not assert a counter-claim. But as against a counter-claim, the reply may plead recoupment, that is, a claim arising out of the same transaction as the counter-claim and going in direct reduction thereof. Such matter is defensive only, as distinguished from counter-claim which is offensive as well as defensive. Imperial Elevator v Hartford, 163 M 481, 204 NW 531.

An answer of an insurance company alleging that the insured had no insurance with it at the time of loss, and that its purported policies were void, states a conclusion of law, and does not permit a defense of vacancy, want of proof of loss, or over-insurance. Gjerset v Amer. Insurance, 172 M 398, 215 NW 783.

The bar of the statute of limitations is an affirmative defense and must be pleaded by demurrer or answer. Rye v Phillips, 203 M 567, 282 NW 459.

The courts take judicial knowledge of the topography of the state; and a county when it pleads that it did not construct or maintain the dam may avail itself of ultra vires though it does not specifically plead it since the complaint shows on its face that the county was without authority over the level of the lake in question. Erickson v County, 190 M 433, 252 NW 219.

A verdict for defendant was not justified, in this application for replevin where the defendant had given a note and mortgage, plus a down payment and defaulted in his payments. He continued to use the fountain after discovery of the alleged fraud, and has not rescinded in pais, or sued for recission. His only remedy is an action in damages, he having refused to interpose a counterclaim herein. Knight v Dinsberger, 192 M 387, 256 NW 657.

While a judgment is res judicata as to issues between judgment creditor and judgment debtors, it is not so as to those between the latter which were not litigated and so not settled by the judgment. Kemerer v State Farm Mutual, 201 M 239, 276 NW 228.

A bank has a set-off against the deposit of its agent bank for moneys collected by the agent the day it became insolvent. Storing v First Nat'l Bank, 28 F(2d) 587

In federal court an answer was held sufficient though it did not state the names of those making the warranties, where there was no demand for the names, and even if requested could not properly be granted under state practice. Commander v Westinghouse, 70 F(2d) 469.

544.05 REQUISITES OF A COUNTER-CLAIM; PLEADING DOES NOT ADMIT.

HISTORY. R.S. 1851 c. 70 s. 67; P.S. 1858 c. 60 s. 71; G.S. 1866 c. 66 s. 80; G.S. 1878 c. 66 s. 97; 1883 c. 101 s. 1; G.S. 1878 Vol. 2 (1888 Supp.) c. 66 s. 97a; G.S. 1894 ss. 5237, 5238; R.L. 1905 s. 4131; G.S. 1913 s. 7757; G.S. 1923 s. 9254; M.S. 1927 s. 9254.

1. **Nature of counter-claim**
2. **Compared with defense**
3. **Compared with set-off**
4. **Compared with recoupment**
5. **Compared with equitable set-off**
6. **Must be an independent cause of action**
7. **Must exist in favor of the defendant who pleads it**
8. **Must exist against the plaintiff**
9. **Must exist in defendant at commencement of action**
10. **Must exist against plaintiff and in favor of a defendant**
11. **A cause of action "arising out of the contract" alleged**
12. **A cause of action arising out of the "transaction" alleged**
13. **A cause of action "connected with the subject of the action"**
14. **A claim on a contract in an action on a contract**
15. **When a tort may be set up as a counter-claim**
16. **Claim ex contractu in action ex delicto**
17. **Public funds**
18. **Statute liberally construed**
19. **Effect of failure to plead counter-claim**
20. **Rules as to pleading counter-claim**
21. **Mode of objecting to counter-claim**
22. **Relief awarded**
23. **Action by state**
24. **Recoupment**
25. **Counter-claim against counter-claim**

1. Nature of counter-claim

A counter-claim is in the nature of a cross action, and a defendant who pleads one is, as to that, considered as if he had brought his action. Eastman v Linn, 20 M 433; Slocum v Minneapolis, 33 M 438, 23 NW 862; Wilson v Fairchild, 45 M 203, 47 NW 642.

The effect of a counter-claim may be to just balance the claim set up in the complaint, but there is no such thing in law as setting up one right of action as a bar to another right of action. Cooper v Simpson, 41 M 46, 42 NW 601.

There can be no counter-claim to a mere defense; though recoupment may be pleaded against a counter-claim set up in the answer. Townsend v Minneapolis, 46 M 121, 48 NW 682.

An order granting a motion of the plaintiff for judgment on the pleadings is not appealable. Arnoldy v Bank, 142 M 449, 172 NW 699; Supornick v Nat'l Council, 141 M 306, 170 NW 507; County of Renville v Minneapolis, 112 M 487, 128 NW 669; Lowe v Nixon, 170 M 391, 212 NW 896.

Where persons join in a demurrer it must be overruled if the pleading against which it is directed is good as to one of the persons. Wade v Citizens Bank, 158 M 231, 197 NW 277.

In an action to recover for breach of contract to purchase land, the defendant counter-claimed for damages for misrepresentation as to the maturity dates of two mortgages to be assumed. The defendant not having rescinded for fraud, but having refused to perform cannot recover damages. Seerup v Goraczkowski, 159 M 364, 199 NW 94.

The defendant who was the owner of an overdue note of the bankrupt and another person was entitled to offset the note. Meighan v Cohen, 161 M 302, 201 NW 431.

The counter-claim for damages resulting from a breach of the alleged contract obligating plaintiff to furnish cement required to construct a building, was not established by the evidence. Rudd v Anderson, 161 M 353, 201 NW 548.

It was error to dismiss the counter-claim without making findings upon the issues involved. Hirschman v Healy, 162 M 329, 202 NW 734.

The verdict awarding the defendant the amount of his counter-claim is supported by the evidence. Bergren v Nelson, 164 M 414, 205 NW 276.

Sureties who signed a bond for costs to permit a foreign corporation to sue, have no defense to the bond by pleading as a counterclaim the cause of action alleged by the corporation in the action in which the bond was given. Kirkeland v Bruce, 165 M 184, 206 NW 384.

In an action to recover for building material furnished to a contractor, a counter-claim for damages for delay in delivery of the material was insufficient. Jamestown v Fleisher, 165 M 486, 206 NW 445.

The court did not err in refusing to submit to the jury a counter-claim growing out of the conviction of defendant for selling extracts for beverage purposes. Rawleigh v Rutkowski, 168 M 108, 209 NW 625.

Plaintiff's agent collected money for plaintiff depositing in his own name so as to remit by check. The bank cannot appropriate the money to apply on the agent's note. Agard v People's Natl, 169 M 438, 211 NW 825.

In an action by the state to recover on a seed grain note, the defendant is not prevented from asserting that the sale was induced by fraudulent representations of the state's representative, and he may recoup any damages suffered as a result of the misrepresentation. State v Buchholz, 169 M 226, 210 NW 1006.

The debtor of an insolvent bank when sued by its receiver cannot set off his liability as a surety for the bank upon a depository bond. Veigel v Converse, 168 M 408, 210 NW 162; Farmers Bank v Melby, 172 M 80, 214 NW 792; Turner v Anderson, 174 M 102, 218 NW 456.

The estate of a deceased person is not an entity. The personal representatives are officers of the court, not agents of the estate, and have no principal whom they can bind. They cannot set off claims in their favor against a claim which a creditor of the decedent has filed in the probate court. Goetzman v Gozett, 172 M 68, 214 NW 895.

A counter-claim for damages to the business of defendant was properly dismissed where, although defendant may have lost some customers, there was no proof and no offer of proof of loss of profits, proof of nominal damage not being sufficient to compel submission of the question to the jury. Gustafson v Trocke, 174 M 320, 219 NW 159.

Injury to property caused by a servant's negligence in the course of his employment is a proper counter-claim in an action for wages. It is immaterial whether the injury was to the property of the master or the property of another who exacted compensation from the master. Magistad v Schoch, 177 M 453, 225 NW 287.

A deposit in a bank becomes due so as to be available as a set-off when the bank fails; and school district warrants or orders become due when presented to the district treasurer for payment. Bank v Con. District, 184 M 635, 238 NW 634, 240 NW 662.

In an action against an employee to recover for wrongful appropriation of the employer's property, a counter-claim for damages sustained by the employee for a discharge without cause before the expiration of the year for which he was employed may not be stricken as frivolous merely upon the ground that to an attempted counter-claim in the original answer a demurrer had been sustained, the paragraph demurred to have no counter-claim or cause of action. Danube Farmers v Marquardt, 197 M 349, 266 NW 878.

In replevin action removed to federal court, demurrer to counter-claim under the state statute would be treated as a motion for more definite statement of claim where injustice would result if demurrer were dismissed under rule of civil procedure abolishing demurrer for insufficiency of pleadings. Shell v Stueve, 25 F. Supp. 879; American Ins. v. Lucas, 38 F. Supp. 950.

2. Compared with defense

Matter may be of such a nature as to be a defense and also a counter-claim. Eastman v Linn, 20 M 433 (387); Paine v Sherwood, 21 M 225; Griffin v Jorgenson, 22 M 92; Wilson v Fairchild, 45 M 203, 47 NW 642; Townsend v Minneapolis, 46 M 121, 48 NW 682; Germania v Osborne, 81 M 272, 83 NW 1084.

3. Compared with set-off

Counter-claim was designed to enlarge the doctrine of set-off so as to include all causes of action arising ex contractu, whether the damages are liquidated or unliquidated. Morrison v Lovejoy, 6 M 336 (226).

4. Compared with recoupment

Where defendant sets up a counter-claim, he may prove, and be allowed, not merely enough to defeat plaintiff's recovery, but may, if he proves enough, have affirmative judgment against the plaintiff. Mason v Heyward, 3 M 182 (116); Smith v Dukes, 5 M 373 (301).

A defendant may set up as a counter-claim any cause of action arising ex contractu, whether the damages are liquidated or unliquidated. Morrison v Lovejoy, 6 M 319 (224).

In an action upon a non-negotiable instrument for the payment of money defendant may plead as a defense or partial failure of consideration damages for breach of warranty relating to the personal property purchased. Stevens v Johnson, 28 M 172, 9 NW 677; Massachusetts v Welch, 47 M 183, 49 NW 740; Rugland v Thompson, 48 M 539, 51 NW 604.

In an action upon a contract for services, the defendant may plead, by way of recoupment and set-off, damages sustained by him through negligence of plaintiff in performance of the contract, and if a balance be found in his favor, he may have judgment against the plaintiff. Harlan v St. Paul, Mpls. 31 M 427, 18 NW 147.

Where an employee engaged for a definite term is wrongfully discharged, he may recover as damages the amount of wages agreed upon, less what he earned or had an opportunity to earn in other employment. Bennett v Morton, 46 M 113, 48 NW 678.

There can be no counter-claim or set-off to a mere defense; but matter in the reply pleaded as a counter-claim may be available as recoupment or defense. Townsend v Minneapolis, 46 M 121, 48 NW 682.

In an action by an employer for money embezzled by an employee, the employee is not entitled to wages during the month in the way of recoupment. Peterson v Mayer, 46 M 468, 49 NW 245.

Allegations in the answer to a vendor's action to recover an instalment payment on a land contract are insufficient to show the insolvency of the vendor or possible ability of vendor to give marketable deed upon payment of final payment. Duluth Loan v Klovdal, 55 M 341, 56 NW 1119; Abrahamson v Lamberson, 68 M 454, 71 NW 676; 72 M 308, 75 NW 226.

A breach of warranty may be set up as a counter-claim, or set up as a defense by way of recoupment, in an action for the purchase price of property sold with warranty. Aultman v Torrey, 55 M 492, 57 NW 211.

Where the landlord agreed to make improvements for the benefit of the tenant, his failure to do so does not relieve the tenant for liability to pay rent; but the tenant may plead damage to the amount of the difference in rental value. Long v Gieriet, 57 M 278, 59 NW 194; Pioneer Press v Hutchinson, 63 M 481, 65 NW 938.

In a contract in which a water-works company made warranties to the city, and the city accepted the benefits of the contract although the warranties were not fully performed, the city is precluded from insisting on complete performance as a condition precedent; but must rely on its claim for damages as to the part not performed. Sykes v City of St. Cloud, 60 M 442, 62 NW 613.

In an action against one partner alone, on his individual obligation, given for a partnership debt, he may avail himself of any recoupment of which the partners would have a right to avail themselves if the suit were against them all. McKinnon v Palen, 62 M 188, 64 NW 387.

5. Compared with equitable set-off

In the absence of special circumstances, courts of equity follow the statute regulating counter-claims. But the equitable right of set-off was not derived from and is not dependent on such statute. In cases not within the statute, a court of equity will permit an equitable set-off if from the nature of the claim or from the situation of the parties it would be impossible to secure full justice in a cross-action. When such equities exist, a court of equity will set off a separate debt against a joint debt, or conversely, a joint debt against a separate debt. Wallrich v Hall, 19 M 383 (329); Martin v Pillsbury, 23 M 175; Balch v Wilson, 25 M 299; Becker v Northway, 44 M 61, 46 NW 210; Hunt v Conrad, 47 M 557, 50 NW 614; Laybaum v Seymour, 53 M 105, 54 NW 941; Gallagher v Germania, 53 M 214, 54 NW 1115; St. Paul Trust v Leck, 57 M 87, 58 NW 826; Northern Trust v Rogers, 60 M 208, 62 NW 273; Fitzgerald v State Bank, 64 M 469, 67 NW 361; Cosgrove v McKasy, 65 M 426, 68 NW 76; Stolze v Bank, 67 M 172, 69 NW 813; Knutson v N. W. Loan, 67 M 201, 69 NW 889; Sweetser v Peoples Bank, 69 M 196, 71 NW 934; Becker v Seymour, 71 M 394, 73 NW 1096; Richardson v Merritt, 74 M 354, 77 NW 234, 407, 968; Markell v Ray, 75 M 138, 77 NW 788; Barnum v White, 128 M 58, 150 NW 227.

Bank receiver's cause of action against director for making excess loans was barred six years after loans were made, in the absence of circumstances preventing the running of the statute. Defenses and set-offs against assignor are available against assignee. Andresen v Thompson, 56 F(2d) 642.

6. Must be an independent cause of action

A counter-claim must be a complete and independent cause of action, either legal or equitable. It must be something more than a mere equitable defense. The test is, would it authorize an independent action by the defendant against the plaintiff. Culbertson v Lennon, 4 M 51 (26); Swift v Fletcher, 6 M 550 (386); Spencer v Levering, 8 M 461 (410); Englebrecht v Rickert, 14 M 140 (108); Lash v McCormick, 17 M 403 (381); Linn v Rugg, 19 M 181 (145); Bank v Kidd, 20 M 234 (212); Baning v Bradford, 21 M 308; Reed v Newton, 22 M 541; Campbell v Jones, 25 M 155; Sylte v Nelson, 26 M 105, 1 NW 811; Ward v Anderberg, 36 M 300, 30 NW 890; McPherson v Runyon, 41 M 524, 43 NW 392; Lynch v Free, 64 M 277, 66 NW 973; Crosby v Scott, 93 M 475, 101 NW 610.

7. Must exist in favor of the defendant who pleads it

It is the general rule that the defendant cannot set up as a counter-claim a cause of action existing in favor of another person whatever his relations with such person may be. Carpenter v Leonard, 5 M 155 (119).

If a surety is sued alone or together with his principal, he cannot set up as a counter-claim a cause of action existing in favor of his principal, not even one arising out of a contract in suit. But if the principal is a party and insolvent, a court of equity will allow the surety to set off a debt due the principal from the debtor. If the action is brought against the surety alone the principal may be allowed to intervene and set off his claim. Becker v Northway, 44 M 61, 46 NW 210.

In an action against stockholders, a cause of action in favor of the corporation cannot be set up. Mealey v Nickerson, 44 M 430, 46 NW 911.

The demands of stockholders individually cannot be set off in an action against the corporation. Gallagher v Germania, 53 M 214, 54 NW 1115.

If a partner is sued on what is really a partnership obligation, he may avail himself of any recoupment of which the partners would have a right to avail themselves of the suit were against all of them. McKinnon v Palen, 62 M 188, 64 NW 387.

Right of surety to set off principal's claim against creditor. Effect of principal's insolvency. 16 MLR 217.

8. Must exist against the plaintiff

The counter-claim must be a cause of action existing against the plaintiff which would authorize a judgment against him. If A, the assignee of B, sues C, the latter cannot set up as a counter-claim a cause of action against B. Spencer v Leonard, 8 M 461 (410); Linn v Rugg, 19 M 181 (145).

In an action by an undisclosed principal, the defendant may sometimes set off a counter-claim against the agent. Baxter v Sherman, 73 M 434, 76 NW 211.

The name Danielson, Wagner, Shelp Company, signed to the note by McClure was the assumed name of McClure. This action does not involve the marshalling of the partnership assets. It determines only the right of defendant to offset or counter-claim the note upon which McClure is severally liable. Campbell v Bank, 194 M 502, 261 NW 1.

9. Must exist in defendant at commencement of action

A cause of action which is not mature at the commencement of the action cannot be set up as a counter-claim. Milliken v Mannheimer, 49 M 521, 52 NW 139; Stensgaard v St. P. Real Estate, 50 M 429, 52 NW 910.

A party owing an insolvent cannot buy a claim against the insolvent and set it up as a counter-claim in an action brought against him by the assignee or receiver of the insolvent, nor can he buy up such a claim prior to the assignment of the insolvent, if he knew of or had reasonable grounds for believing that an assignment was about to be made. Northern Trust v Rogers, 60 M 208, 62 NW 273; Northern Trust v Healy, 61 M 230, 63 NW 625; Northern Trust v Hiltgem, 62 M 361, 64 NW 909.

A cause of action assigned to the defendant after the commencement of the action cannot be set up. A person who is sued cannot buy up a claim against the plaintiff for the purpose of pleading it as a counter-claim. Northern Trust v Hiltgem, 62 M 361, 64 NW 909.

In an action brought by a judgment debtor against his judgment creditor to offset mutual judgments, the judgment debtor may, without prejudice to an attorney's lien upon the other judgment, offset the mutual judgments, provided the action for that purpose be commenced without notice of the attorney's lien. Morton v Urquhart, 79 M 370, 82 NW 653.

A cause of action for damages for breach of contract, arising simultaneously and concurrently with commencement of action, may be interposed as a counter-claim. Hall v Parsons, 105 M 96, 117 NW 240; Hackner v Fetsch, 123 M 450, 143 NW 1128; Chase v Kelly, 125 M 317, 146 NW 1113; Griffith v Dowd, 133 M 314, 158 NW 420.

In order for defendant bank to set off debt due it from insolvent bank against debt due insolvent bank, debt of the two banks, each to the other, must have existed and been owned by the banks respectively at the time of insolvency. Storing v Bank, 28 F(2d) 587.

10. Must exist against a plaintiff and in favor of a defendant

If A sues B and C on a claim against them jointly neither B nor C can set up an individual claim against A. Cooper v Brewster, 1 M 94 (73); Birdsall v Fischer, 17 M 100 (76); Balch v Wilson, 25 M 299.

If A and B sue C on a joint claim, C cannot set up as a counter-claim a demand against A or B individually. Birdsall v Fischer, 17 M 100 (76); Peck v Snow, 47 M 398, 50 NW 470.

A cause of action which cannot be determined without bringing in new parties cannot be set up as a counter-claim. Campbell v Jones, 25 M 155; Walker v Johnson, 28 M 147, 9 NW 632; Wilcox v Comstock, 37 M 65, 33 NW 42; Little v Simonds, 46 M 380, 49 NW 186; Apelt v Melin, 138 M 269, 164 NW 979.

If A sues B and C on a joint and several liability, B or C may set up as a counter-claim an individual caim against A. Hunt v Conrad, 47 M 557, 50 NW 614.

The rule that a cause of action which cannot be determined without bringing in a new party may not, without more, be set up as a counter-claim, is one for testing the validity of a counter-claim as such. It is not determinative of the right of a counter-claiming defendant to bring in additional parties where they are necessary for the full determination of the controversy. Lamberson v Westerman, 200 M 204, 273 NW 634.

The trial court rightfully sustained the demurrer of the plaintiff to the answer and counter-claim of the defendant and surety. Dewitt v Itasca Ass'n, 215 M 557, 10 NW(2d) 716.

11. A cause of action "arising out of the contract" alleged

A defendant may set up as a counter-claim any cause of action arising ex contractu, whether the damages are liquidated or unliquidated. Morrison v Lovejoy, 6 M 319 (224); Koempel v Shaw, 13 M 488 (451); Schurmeier v English, 46 M 306, 48 NW 1112; Mass. Loan v Welch, 47 M 183, 49 NW 740; Lahiff v Hennepin, 61 M 226, 63 NW 493; Ryan Drug v Rowe, 63 M 481, 65 NW 938; McLane v Kelly, 72 M 395, 75 NW 601; Mohr v Hennepin Auto. 132 M 415, 157 NW 639.

In suit for damages because defendant had plaintiff's name published in the produce exchange as a delinquent debtor, defendant cannot set up his account against plaintiff as a counter-claim. Thomssen v Ertz, 93 M 280, 101 NW 304.

In a suit on a note transferred by the trustee in bankruptcy of the bailee to the plaintiff, the bailor can set off damages sustained through a breach of the contract of bailment, whether the damage occurred while the property was in the possession of the bailee or of his trustee in bankruptcy. Huntoon v Brendemuehl, 124 M 54, 144 NW 426.

The trial court's findings against the plaintiff on the two offsets pleaded are sustained. Gerlich v Thompson, 177 M 428, 225 NW 273.

12. A cause of action arising out of the "transaction" alleged

The term "transaction" means a commercial or business transaction or dealing, or a series of such transactions or dealings. It is broader than the term "contract". The transaction is not necessarily confined to the facts stated in the complaint, but the defendant may set up new facts and show the entire transaction and counter-claim on such statement of facts. Barker v Walbridge, 14 M 469 (351); King v Coe Commission, 93 M 52, 100 NW 667.

In an action to foreclose a mortgage given for purchase money, the mortgagor may plead as a counter-claim damages from breach of the covenents in the deed to him. Lowry v Hurd, 7 M 356 (282).

In an action for the purchase price of goods, the answer denied purchase and claimed to be a sales agent only to sell the goods on commission. This was not a counter-claim. Steele v Etheridge, 15 M 501 (413).

In an action for conversion, a cause of action for malicious prosecution of a previous action for the same cause, is not a counter-claim. Allen v Coates, 29 M 46, 11 NW 132; Schmidt v Birkenbach, 29 M 122, 12 NW 349.

Counter-claim for a tort not allowed in an action on contract. Jones v Swank, 54 M 259, 55 NW 1126.

Counter-claim properly stricken because it neither arose out of the transaction, nor was it in existence at the time of the commencement of the action. Fergus v Board, 60 M 212, 62 NW 272.

Plaintiffs brought an action to reform a mortgage as to amount. Defendants properly set up as a counter-claim the right to reform a second mortgage and also to foreclose as past due. Lahiff v Hennepin Co. 61 M 226, 63 NW 493.

In an action by the vendee for damages for wrongful ouster from the premises, the vendor cannot set up as a counter-claim the use and wrongful trespass on the land by the vendee prior to the making of the contract. McLane v Kelly, 72 M 395, 75 NW 601.

The counter-caim pleaded arose out of the transaction pleaded in the complaint and is connected with the subject of the action. Hackney v Fetsch, 123 M 447, 143 NW 1128.

In an action by the original telephone company against a new company to enjoin it from building lines near those of plaintiff, damages which defendant claims by operation of a temporary restraining order cannot be pleaded as a counter-claim. Blue Earth v Commonwealth, 140 M 198, 167 NW 554.

13. A cause of action "connected with the subject of the action"

Cases holding the counter-claim not to be "connected with the subject of the action". Illingworth v Greenleaf, 11 M 235 (154); Majerus v Hoscheid, 11 M 243 (160); Barker v Walbridge, 14 M 469 (351); Allen v Coates, 29 M 46, 11 NW 132; Schmidt v Birkenbach, 29 M 122, 12 NW 349; Jones v Swank, 54 M 259, 55 NW 1126; McLane v Kelly, 72 M 395, 75 NW 601; Thomsson v Ertz, 93 M 280, 101 NW 304; Wild Rice v Benson, 114 M 92, 130 NW 1.

The meaning of the phrase "subject of the action" is not well defined. The "connection" must be direct and immediate. The counter-claim must have such a relation to and connection with the subject of the action that the determination of plaintiff's cause of action would not do exact justice without at the same time determining defendant's cause of action. Barker v Walbridge, 14 M 469 (351).

Counter-claims held to be "connected with the subject of the action". Eastman v Linn, 20 M 433 (387); Matthews v Torinus, 22 M 132; Goebel v Haugh, 26 M 252, 2 NW 847; Lahiff v Hennepin Co. 61 M 226, 63 NW 493; Pioneer Press v Hutchinson, 63 M 481, 65 NW 938; Vaule v Miller, 69 M 440, 72 NW 452; Hackett v Kanne, 98 M 240, 107 NW 1131; Wild Rice v Benson, 114 M 92, 130 NW 1; Hackney v Filsch, 123 M 450, 143 NW 1128; Kimball v Massey, 126 M 461, 148 NW 307; Bauman v Metzger, 145 M 133, 176 NW 497.

The counter-claim should receive a liberal interpretation and construction. Goebel v Hough, 26 M 252, 2 NW 847; Bauman v Metzger, 145 M 133, 176 NW 497.

In an action ex contractu, a cause of action ex delicto cannot be set up as a counter-claim, unless it arises out of the same transaction or is connected with the subject matter of the action. Jefferson v Hackney, 160 M 445, 200 NW 473.

Plaintiff's contention that no breach of warranty could be shown as against the terms of the note sued upon is not well founded. Lanesboro v Forthun, 218 M 377, 16 NW(2d) 326.

14. A claim on a contract in an action on a contract

See annotations under paragraph (4).

A judgment, whether rendered in an action ex contractu or ex delicto, is a contract within the meaning of the statute. One judgment may be set off against another. Temple v Scott, 3 M 419 (306); Irvine v Myers, 6 M 562 (398); Hunt v Conrad, 47 M 557, 50 NW 614; Midland v Broat, 50 M 562, 52 NW 972; Way v Colyer, 54 M 14, 55 NW 744; Lindholm v Itasca, 64 M 46, 65 NW 931; Lindberg v Davidson, 68 M 328, 71 NW 395, 72 NW 71; Morton v Urquhart, 79 M 390, 82 NW 653.

Under paragraph (2) of the statute ex contractu may be set up as a counter-claim, although wholly unconnected with the cause of action alleged in the complaint. Implied contracts are within the statute and it matters not whether the damages recoverable are liquidated or unliquidated. Morrison v Lovejoy, 6 M 319

(224); Folson v Carli, 6 M 420 (284); Lowry v Hurd, 7 M 356 (282); Bidwell v Madison, 10 M 13 (1); Brody v Brennan, 25 M 210; Burns v Jordan, 43 M 25, 44 NW 523; Midland v Broat, 50 M 562, 52 NW 972; Laybourn v Seymour, 53 M 105, 54 NW 941; Lancoure v Dupre, 53 M 301, 55 NW 129; Downs v Finnegan, 58 M 112, 59 NW 981; Hausman v Mulheran, 68 M 48, 70 NW 866; McLane v Kelly, 72 M 395, 75 NW 601; Crosby v Scott, 93 M 475, 101 NW 610.

Where an injured party may waive the tort and sue on the contract implied by law his demand may be set up as a counter-claim in an action ex contractu, and when he is the plaintiff and sues on the implied contract it may be opposed by a counter-claim arising out of contract. Downs v Finnegan, 58 M 112, 59 NW 981.

In an action for services and conversion, breach of contract may be set up in defense. Ganser v Stopf, 130 M 50, 152 NW 865.

Counter-claim based on contract and not on fraud and deceit, and good. Mohr v Hennepin Auto, 132 M 415, 157 NW 639.

In an action in replevin of a grading contract, a cause of action for wet excavation was a proper counter-claim. Griffith v Dowd, 133 M 314, 158 NW 823.

15. When tort may be set up as a counter-claim

In an action ex contractu a cause of action ex delicto cannot be set up as a counter-claim unless it arises out of the same transaction or is connected with the subject of the action. Steinbart v Pitcher, 20 M 102 (86); Schmidt v Birkenbach, 29 M 122, 13 NW 349; Warner v Foote, 40 M 176, 41 NW 935; Jones v Swank, 54 M 259, 55 NW 1126; McLane v Kelly, 72 M 395, 75 NW 601.

In an action ex delicto another tort cannot be set up as a counter-claim unless it arises out of the same transaction or is connected with the subject of the action. Allen v Coates, 29 M 46, 11 NW 132.

But when the defendant may waive the tort and sue on the contract implied by law, he may set up his claim. Downs v Finnegan, 58 M 112, 59 NW 981; Schick v Suttle, 94 M 135, 102 NW 217.

The rule is that, in an action ex contractu, a cause of action ex delicto cannot be set up as a counter-claim, unless it arises out of the same transaction or is connected with the subject matter. Jefferson v Hackney, 160 M 445, 200 NW 473.

Where the suit is on contract for the recovery of money, the defendant may set up as a counter-claim a claim against the plaintiff for money or property wrongfully obtained or taken from him by the plaintiff. Kubat v Zika, 186 M 122, 242 NW 477.

A counter-claim for damages for fraud in a financial transaction, under the pleadings here presented, does not state a cause of action arising out of the transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, the complaint being one to recover damages for an alleged libel. Habedank v Baker, 187 M 123, 244 NW 546.

In an action to recover damages for an alleged libel, defendant may not counter-claim for an alleged libel, theretofore published, by plaintiff of and concerning defendant, as each libel constituted a separate transaction. Skluzacek v Wilby, 195 M 326, 263 NW 95.

16. Claim ex contractu in action ex delicto

In an action in tort for fraud in board of trade transaction, the defendant may properly set up a counter-claim based on a contract growing out of the trading transaction. King v Coe Commission, 93 M 52, 100 NW 667.

A cause of action cannot be pleaded as a counter-claim in an action ex delicto, unless it arises out of the transaction set forth in the complaint, or is connected with the subject matter of the action. Hanson v Byrnes, 96 M 50, 104 NW 762.

17. Public funds

Where an attorney for a county has collected money on a judgment for delinquent property taxes, he has an equitable lien or set-off, as against the fund so collected to the extent of the reasonable value of his services. Board v Clapp, 83 M 512, 86 NW 775.

18. Statute liberally construed

The statute should be interpreted liberally with a view to sustaining the pleading. Goebel v Hough, 26 M 252, 2 NW 847; Midland v Broat, 50 M 562, 52 NW 972; Meighan v Cohen, 161 M 302, 201 NW 431.

19. Effect of failure to plead counter-claim

The defendant is not bound to plead a counter-claim. He may reserve it for a separate action. Douglas v Bank, 17 M 35 (18); Paine v Sherwood, 21 M 225; Thoreson v Minneapolis, 29 M 341, 13 NW 156; Osborne v Williams, 39 M 353, 40 NW 165; Jordahl v Berry, 72 M 119, 75 NW 10.

A counter-claim or set-off must be pleaded. But if it is such as to constitute a cause of action in favor of a defendant, he may refrain from pleading it and bring suit thereon at a later time. Johnson v Ind. School, 189 M 293, 249 NW 177.

20. Rules as to pleading counter-claim

The defendant must allege all the material facts constituting his cause of action in the same manner as if he were drafting a complaint against the plaintiff and he must likewise demand the relief to which he believes himself entitled. Allegations may be made by reference to the complaint. Holgate v Broome, 8 M 243 (209); Eastman v Linn, 20 M 433 (387); Curtis v Livingston, 36 M 312, 30 NW 814; Wilson v Fairchild, 45 M 203, 47 NW 642.

A counter-claim being "new matter" is admitted if not controverted, but to require a reply it must be pleaded as such. Leyde v Martin, 16 M 38 (24); Linn v Rugg, 19 M 181 (145); Broughton v Sherman, 21 M 431; Griffin v Jorgenson, 22 M 92; Matthews v Torinus, 22 M 132; Cooper v Simpson, 41 M 46, 42 NW 601; Townsend v Minneapolis, 46 M 121, 48 NW 682; Schurmeier v English, 46 M 306, 48 NW 1112; Aultman v Torrey, 55 M 492, 57 NW 211; Farrell v Burbank, 57 M 395, 59 NW 484; Phelps v Compton, 72 M 109, 75 NW 19; Lyford v Martin, 79 M 243, 82 NW 479.

Several counter-claims may be pleaded. Campbell v Jones, 25 M 155.

A defendant may set up any cause of action that would be a proper counter-claim to any cause of action which the plaintiff may prove within the allegations of the complaint, although such cause of action may not be of the precise character indicated by those allegations and although the cause of action might not be a proper counter-claim if all such allegations should be proved. Smalley v Isaacson, 40 M 450, 42 NW 352.

If a counter-claim is pleaded in a reply, it can only be used as a defense. Townsend v Minneapolis, 46 M 121, 48 NW 682.

Matter pleaded expressly as a counter-claim, though not proper as such, may, if it constitute a defense to or claim in the opposite pleading, be available as a defense. Townsend v Minneapolis, 46 M 121, 48 NW 682; Germania v Osborne, 81 M 272, 83 NW 1084.

In an accounting, deductions and set-offs are in order though not pleaded. Pioneer Loan v Cowden, 128 M 307, 150 NW 903.

Counter-claim construed to be for damages for breach of warranty as to quality of the oil sold and not for rescission. Fed. Oil v Peoples Oil, 179 M 467, 229 NW 575.

21. Mode of objecting to counter-claim

The case having been tried below upon the theory that the matter set up in the answer was not a counter-claim, it is not in this instance to be taken as admitted. Matthews v Torinus, 22 M 132.

The only way in which a plaintiff may object that a cause of action pleaded as a counter-claim is not the proper subject of counter-claim in the particular action is by demurrer. If he omits to demur he waives the objection and the cause of action must be tried as though a proper one to plead as a counter-claim. Walker v Johnson, 28 M 147, 9 NW 632; Mississippi v Prince, 34 M 71, 24 NW

344; Lace v Fixen, 39 M 46, 38 NW 762; Tolty v Torling, 79 M 386, 82 NW 632; Warner v Foote, 40 M 176, 41 NW 935; Stensgaard v St. Paul, 50 M 429, 52 NW 910.

The objection that live counter-claims are not stated separately cannot be raised by demurrer. The proper practice is to object by motion before replying. Campbell v Jones, 25 M 155.

That a counter-claim cannot be determined without the presence of other parties may be raised by demurrer. Campbell v Jones, 25 M 155.

The objection that the facts set up in the answer as a counter-claim do not constitute a cause of action is not waived by a failure to demur or reply, but may be taken on the trial by motion for dismissal, or after verdict in arrest of judgment. Lace v Fixen, 39 M 46, 38 NW 762; Schurmeier v English, 46 M 306, 48 NW 1112.

Where an injured party may elect between two forms of action, his demand may be counter-claimed against a plaintiff's cause of action arising out of contract, or, where itself set up by the plaintiff as arising on the implied contract, it may be opposed by a counter-claim arising out of a contract. Downs v Finnegan, 58 M 112, 59 NW 981.

A counter-claim may be stricken as sham. Monitor v Moody, 93 M 232, 100 NW 1104.

The objection that counter-claims are not valid is waived if a settlement is made, and the parties treat the demands upon which the counter-claims were founded as valid. Wildung v Security, 143 M 251, 173 NW 429.

Where a counter-claim states a cause of action against the plaintiff, the objection that it is not a proper counter-claim in the particular case is waived by not raising the objection by demurrer or answer. Pruka v Maroushek, 182 M 421, 234 NW 641.

In this action by the mortgagor to set aside the foreclosure of a mortgage, the mortgagee counter-claimed, alleging a valid foreclosure, no redemption, and the wrongful detention of possession by the mortgagor after the expiration of the period of redemption, and damages for such detention. There was no demurrer, nor did the reply challenge the legal standing of the counter-claim. The objection at the trial to the litigation of the counter-claim was without merit. Morris v Penn Mutual, 196 M 403, 265 NW 278.

22. Relief awarded

When in an answer matter is pleaded as a counter-claim, the defendant must have such relief, though specially demanded in the answer, as the facts proved within its allegations show him entitled to. Wilson v Fairchild, 45 M 203, 47 NW 642; Germania v Osborne, 81 M 272, 83 NW 1084; Crosby v Scott, 93 M 475, 101 NW 610.

Amendment of answer allowed so as to allege a counter-claim to correspond to the proof. Lee v Woolsey, 187 M 659, 246 NW 25.

23. Action by state

In an action by the state, claims arising out of independent transactions cannot, without its consent, be asserted as set-off or counter-claim. State ex rel v Holgate, 107 M 71, 119 NW 792.

24. Recoupment

The plaintiff cannot recover for services other than those stated in the complaint, though the defendant seeks recoupment for the plaintiff's failure strictly to perform the contract sued upon. Blakely v Neils, 121 M 280, 141 NW 179.

There can be no counter-claim against a counter-claim, so a reply may not assert a counter-claim. But as against a counter-claim, the reply may plead recoupment, that is, a claim arising out of the same transaction as the counter-claim and going in direct reduction thereof. Such matter is defensive only, as distinguished from counter-claim which is offensive as well as defensive. Imperial v Hartford, 163 M 481, 204 NW 531.

Recoupment is properly pleaded as a defense and need not be pleaded as a counter-claim. Where the landlord brings suit to recover rent, the tenant may recoup damages caused by a wrongful interference by the landlord with the use or possession of the leased premises, although the tenant has not been evicted and has not surrendered the premises. Hoppman v Persha, 190 M 480, 252 NW 229.

25. Counter-claim against counter-claim

There can be no counter-claim against a counter-claim; but as against a counter-claim the reply may plead recoupment. That is, a claim arising out of the same transaction as the counter-claim and going in direct reduction thereof. Such matter is defensive only, as distinguished from a counter-claim which is offensive as well as defensive. Imperial Elev. v Hartford Accident, 163 M 481, 204 NW 531.

544.06 DEFENSES, HOW PLEADED; ANSWER AND DEMURRER.

HISTORY. R.S. 1851 c. 70 s. 69; P.S. 1858 c. 60 s. 73; G.S. 1866 c. 66 s. 81; G.S. 1878 c. 66 s. 98; G.S. 1894 s. 5239; R.L. 1905 s. 4132; G.S. 1913 s. 7758; G.S. 1923 s. 9255; M.S. 1927 s. 9255.

SEVERAL DEFENSES

1. Each must be complete in substance and form
2. Must be saparately stated and numbered
3. Must be consistent
4. Held consistent
5. Inconsistent
6. Hypothetical admissions
7. Defenses in bar and in abatement

DEMURRER

1. To one or more causes of action

SEVERAL DEFENSES

1. Each must be complete in substance and form

The sufficiency of a paragraph must be determined on the face of its own allegations, and without reference to those not expressly referred to and made a part of it. LaPlant v Fireman's Insurance, 68 M 82, 70 NW 856; Apelt v Melin, 138 M 269, 164 NW 979.

2. Must be separately stated and numbered

See district court rules, Minnesota Statutes, 1945, Page 4195.

The facts relating to each lien was, if good, a distinct defense, and although they were not "separately stated", the plaintiff might demur to one, and reply to the other. Bass v Upton, 1 M 408 (292).

3. Must be consistent

A defendant may plead as many defenses, either legal or equitable, as he may have, provided they are not inconsistent. Separate and distinct defenses are consistent when both may be true and are only held inconsistent when the proof of one necessarily disproves the other. Derby v Gallup, 5 M 119 (85); Conway v Wharton, 13 M 158 (145); Steenerson v Waterbury, 52 M 211, 53 NW 1146.

When inconsistent defenses are pleaded, the remedy is by motion to compel an election. Conway v Wharton, 13 M 158 (145); Cook v Finch, 19 M 407 (350); Osborne v Waller, 73 M 52, 75 NW 732; McAlpin v Fid. & Cas. 134 M 199, 158 NW 968.

It is no test of inconsistency that if one is proved true the other is unnecessary. Gammon v Canfield, 42 M 368, 44 NW 125.

The remedy for inconsistent defenses, pleaded by answer, is by motion to compel an election, not by motion to strike. Woost v Herberger, 204 M 192, 283 NW 121.

Inconsistent defenses require an election, and upon refusal to make it the court was justified in vacating a previous order permitting an amendment which set up a defense inconsistent with the one interposed in the original answer. Schochet v General Ins. 204 M 610, 284 NW 886.

4. Defenses held consistent.

The following citations refer to cases where the defenses have been held to be consistent. Booth v Sherwood, 12 M 426 (310); Conway v Wharton, 13 M 158 (145); Roblee v Secrest, 28 M 43, 8 NW 904; Warner v Lockerly, 31 M 421, 18 NW 145, 821; Branham v Bezanson, 33 M 49, 21 NW 861; First Nat'l v Lincoln, 36 M 132, 30 NW 449; Gammon v Canfield, 42 M 368, 44 NW 125; Brockdahl v Grand Lodge, 46 M 61, 48 NW 454; Mpls. Coop. v Williamson, 51 M 53, 52 NW 986; Steenerson v Waterbury, 52 M 211, 53 NW 1146; Kennedy v McQuaid, 56 M 450, 57 NW 1053; Hausman v Mulheran, 68 M 48, 70 NW 866; LaPlant v Firemans Ins. 68 M 82, 70 NW 856; Osborne v Waller, 73 M 52, 75 NW 732; Bank v Cain, 89 M 473, 95 NW 308; Ferguson v Trovaten, 94 M 209, 102 NW 373; Rees v Storms, 101 M 381, 112 NW 419; McAlpine v Fidelity, 134 M 199, 158 NW 967; Woost v Herberger, 204 M 193, 283 NW 121.

5. Defenses inconsistent

In an action for converting personal property, the answer denied each and every allegation, and a further defense that the goods were the property of a third person, and defendant took them on a writ issued against such third person. The two pleas were inconsistent, and in effect admitted the taking. Derby v Gallup, 5 M 119 (85); Scott v King, 7 M 494 (401); Cook v Finch, 19 M 407 (350); Stadtler v School District, 71 M 311, 73 NW 956.

6. Hypothetical admissions

Hypothetical statements or admissions may be made in an answer for the purpose of enabling a defendant to plead all his defenses. Nunnemacher v Johnson, 38 M 390, 38 NW 351; McKasy v Huber, 65 M 9, 67 NW 650.

7. Defenses in bar and abatement

Defenses in bar and in abatement may be united. Porter v Fletcher, 25 M 493; Page v Mitchell, 37 M 368, 34 NW 896; Somers v Dawson, 86 M 42, 90 NW 119; Corey v Paine, 167 M 32, 208 NW 526.

DEMURRER

1. To one or more causes of action

If any of the counter-claims are sufficient, a demurrer for insufficiency to the whole complaint should be overruled. Johnson v White, 78 M 48, 80 NW 838.

The complaint states a cause of action at least against the defendant auditor, and the joint demurrer of both defendants was properly overruled. Hawley v Scott, 123 M 159, 143 NW 257.

A party cannot both answer and demur at the same time and in the same cause. Smith v Smith, 204 M 255, 283 NW 239.

544.07 JUDGMENT ON DEFENDANT'S DEFAULT.

HISTORY. R.S. 1851 c. 70 s. 64; P.S. 1858 c. 60 s. 68; G.S. 1866 c. 66 s. 77; G.S. 1878 c. 66 s. 94; G.S. 1894 s. 5354; 1895 c. 62; R.L. 1905 s. 4133; G.S. 1913 s. 7759; G.S. 1923 s. 9256; M.S. 1927 s. 9256.

1. Notice
2. Filing proof of service
3. Necessity of proving cause of action
4. Reference
5. Bond
6. Effect of failure to apply to court
7. Unreasonable delay in entering
8. Generally

1. Notice

In an action arising on contract for the payment of money only, where there has been an appearance, but no answer by defendant, he is not entitled to notice of the entry of judgment. Heinrich v Englund, 34 M 395, 26 NW 122; Banning v Sabin, 41 M 477, 43 NW 329.

In an action of tort, the plaintiff is not entitled to proceed under this section to assess his damages, without notice to a defendant who has appeared in the action, and a judgment entered on such assessment is irregular, and will be set aside. Davis v Red River, 61 M 534, 63 NW 1111.

Failure to give defendant notice of the application for an order for judgment is an irregularity which rendered the judgment vulnerable on direct attack. Kemerer v State Farm Mutual, 206 M 328, 288 NW 719.

Vacation of order, and setting aside of judgment because of lack of service of notice. Holmes v Conter, 209 M 144, 295 NW 649.

2. Filing proof of service

Necessity for filing. Cunningham v Water Power Co. 74 M 282, 77 NW 137; Leland v Heiberg, 156 M 30, 194 NW 94.

3. Necessity of proving cause of action

Where, in a complaint, a cause of action in tort is joined with others upon contract, it is error for the clerk, upon default, to enter judgment, including the amount claimed for the tort. See, Whipple v Mahler, 215 M 578, 10 NW(2d) 771; Reynolds v LaCrosse, 10 M 178 (144).

Distinction between actions of possession only and actions tendering a distinct issue as to the fee to the premises. Doyle v Hallam, 21 M 515.

A judgment entered upon default may include relief such as was demanded in a supplemental complaint which had been served. The relief granted being, in substance and effect, such as was prayed. Although not in form the same, will be allowed to stand, no prejudice resulting. Exley v Berryhill, 37 M 182, 33 NW 567.

In the instant case anticipated profits cannot be recovered as damages, and defendant's omission to answer or appear was only an admission of facts properly pleaded. Doud v Duluth, 55 M 53, 56 NW 463.

Certain non-resident creditors were made parties to the action by constructive service of summons, but they made no general appearance and were in default for want of an answer to the merits, but such default did not excuse the plaintiff from sustaining the charge of conspiracy and fraud by a fair preponderance of the evidence. Fowler v Jenks, 90 M 74, 95 NW 887, 96 NW 914, 97 NW 127.

In an action brought to determine an adverse claim made by the defendant to certain tracts of vacant and unoccupied land, the court found that the conveyance to defendant was subsequent to the conveyance to the plaintiff, and that defendant had notice. Beckfelt v Donohue, 90 M 430, 97 NW 127.

An action for goods sold and delivered alleged to be of a stated reasonable value and stipulated at agreed price, is a contract for the recovery of money only within the statute authorizing the entry of judgment by the clerk on default; and proof of a cause of action, or ascertainment of damages, is not necessary. Thomas v McRue, 165 M 460, 206 NW 951; Marthaler v Meyers, 173 M 606, 218 NW 127.

In an action against master and servant for negligence, the servant defaulted. It was not error to admit evidence of the servant's negligence. Hector v Butler, 194 M 310, 260 NW 496.

Irregularity of procedure in the assessment of recovery in the entry of judgment upon default cannot be raised upon appeal to this court, unless the appellant has applied to the trial court for relief against such irregularity, overruling Reynolds v LaCrosse, 10 M 178 (144). Whipple v Mahler, 215 M 585, 10 NW(2d) 771.

4. Reference

The defendant in this action for divorce having defaulted, the appointment of a referee to hear the evidence was authorized by statute. Young v Young, 18 M 90 (72).

5. Bond

Where judgment is entered without personal service of the summons, the roll need not show that security was filed. Shaubhut v Hilton, 7 M 506 (412).

On appeal by the defendant from a judgment rendered against him by default, upon a service by publication, it cannot be assigned for error here that no security for judgment was filed; such appeal bringing into court only the judgment roll, which is not required by law to contain such security. The remedy in such case is by motion to vacate the judgment. Brown v Brown, 28 M 501, 11 NW 64.

The original writ, with the sheriff's certificate of attachment of such property endorsed thereon, is also admissible in evidence at such trial, although the same was not returned and filed with the clerk of the court until long after the entry of judgment. Cousins v Alworth, 44 M 505, 47 NW 169.

6. Effect of failure to apply to court

Where a cause of action in tort is joined with others on contract, it is error for the clerk upon default to enter judgment including the amount claimed for the tort. Reynolds v LaCrosse, 10 M 178 (144).

If the proper judgment is entered, it is immaterial that it was entered by the clerk without an order where regularly an application should have been made to the court. Libby v Mikelborg, 28 M 38, 8 NW 903; Heinrich v Englund, 34 M 395, 26 NW 122; Hersey v Walsh, 38 M 521, 38 NW 613; Hencke v Twomey, 58 M 550, 60 NW 667; Slater v Olson, 83 M 35, 85 NW 825.

In an action against four defendants jointly indebted upon a contract, a judgment on default entered by the clerk against the three only who were served is not void but only irregular. Dillon v Porter, 36 M 341, 31 NW 56.

A cause of action based on a complaint showing on its face that the alleged claim for the reasonable value of services rendered is subject to dispute and that the facts alleged are controverted, is not one wherein a default judgment may be entered by the clerk without an order of the court. High v Supreme Lodge, 207 M 228, 290 NW 425.

7. Unreasonable delay in entering

The doctrine of laches, as pertinent to a failure properly and seasonably to prosecute an action to judgment, applied to a case where the plaintiff, who neglected to enter a default judgment for nearly eight years after service of the summons on the defendant, was not sufficiently diligent, and the judgment was improperly entered. Coleman v Akers, 87 M 492, 92 NW 408.

8. Generally

A default judgment cannot be attacked collaterally because entered for a larger amount than demanded in the summons and complaint. Munson v Bensel, 169 M 434, 211 NW 838.

An order striking out defendant's answer as frivolous, and judgment timely entered thereafter as of default for lack of answer, was proper. Silberman v Niles, 171 M 405, 214 NW 261.

The statutory prohibition against admitting reports into evidence, applies only to those reports submitted to industrial commission, not reports submitted to insurance companies or others. Hector v Butler, 194 M 310, 260 NW 496.

The statute, section 548.01, providing that, "as against a defendant who does not answer, the relief granted to plaintiff shall not exceed that demanded in the complaint," has, by decision law, been so construed as to hold that on default the relief which may be awarded to plaintiff is limited in nature and degree to the relief demanded in the complaint, whether the proof justifies this or greater relief. Pilney v Funk, 212 M 398, 3 NW(2d) 792.

An affidavit of merit is unnecessary if the proposed answer shows merit and is verified on personal knowledge. Peterson v Davis, 216 M 64, 11 NW(2d) 800.

Extension of time as between attorneys should have a liberal construction. When the attorney for plaintiff was apprised of the fact that an answer would be forthcoming, he had an obligation to communicate with defendant's attorney before the default judgment was entered. Cahaley v Cahaley, 216 M 179, 12 NW(2d) 182.

See rules of district court, Minnesota Statutes 1941, Page 3982.

544.08 - DEMURRER OR REPLY TO ANSWER.

HISTORY. R.S. 1851 c. 70 s. 71; 1852 Amend. p. 9; P.S. 1858 c. 60 s. 75; G.S. 1866 c. 66 ss. 83, 85; G.S. 1878 c. 66 ss. 100, 102; 1879 c. 15 s. 1; 1881 c. 44 s. 2; G.S. 1894 ss. 5241, 5243; R.L. 1905 s. 4134; 1913 c. 54 s. 1; G.S. 1913 s. 7760; G.S. 1923 s. 9257; M.S. 1927 s. 9257.

1. Demurrer to answer
2. Reply to answer; departure
3. Counter-claim in reply
4. Waiver of reply
5. Demurrer to reply

1. Demurrer to answer

There is only one statutory ground of demurrer to an answer but under it the objection may be raised that a counter-claim cannot be determined without the presence of other parties. Campbell v Jones, 25 M 155.

That a cause of action pleaded is not a proper subject for a counter-claim is ground for demurrer. Campbell v Jones, 25 M 155; Walker v Johnson, 28 M 147, 9 NW 632; Lace v Fixen, 39 M 46, 38 NW 762.

An answer not containing new matter but consisting only of denials of denials of what is alleged in the complaint, is not subject to demurrer. Nelson v Pelan, 34 M 243, 25 NW 406.

The cause of action pleaded as the second counter-claim was not an existing cause of action at the time the suit was commenced, and, therefore, could not be pleaded as a counter-claim. Griffith v Dowd, 133 M 305, 158 NW 420.

The demurrer was not bad as being to a part only of a defense. Sandberg v Clausen, 134 M 321, 159 NW 752.

A claim for attorney's fees for the prosecution and collection of a note is not a part of the cause of action on the note; and a denial in the answer of the value thereof alleged in the complaint does not raise an issue which prevents the plaintiff testing by demurrer the sufficiency of the answer as a defense to the note. Bank v Utman, 136 M 103, 161 NW 398.

Where persons join in a demurrer it must be overruled if the pleading against which it is directed is good as to one of the persons. Wade v Citizens Bank, 158 M 231, 197 NW 277.

A demurrer admits traversable facts, but not conclusions of law. An allegation that the employer's insurer is the real party in interest and that plaintiff has no interest in the cause of action is in the nature of a conclusion of law. McGuigan v Allen, 165 M 390, 206 NW 714.

If the preliminary contracts were against public policy and void, as plaintiff claims, there was a subsequent and substituted one, in the nature of a settlement,

which cannot be declared void, on the pleadings as they stand, and so appears to be a good defense. Hence a general demurrer to the answer was on that ground alone properly overruled. Modern Life v Todd, 184 M 36, 237 NW 686.

Where a demurrer to an answer is overruled, plaintiff replies, and the case is tried. Plaintiff cannot assert error in the overruling of the demurrer; but he may in the course of the trial contest the sufficiency of the facts alleged or proved. Wismo v Martin, 186 M 593, 244 NW 76.

In quo warranto improper motives may lead to denial of relief even though the relator be the attorney general; so that defense may not be disposed of by demurrer. State ex rel v Crookston Trust, 203 M 517, 282 NW 138.

2. Reply to answer; departure

The plaintiff must recover if at all upon the cause of action set out in his complaint. The complaint cannot be aided by the reply. The office of a reply is to meet the allegations of the answer and not to change the character of the action or enlarge the rights and remedies of the plaintiff; a defective complaint cannot be cured by a reply. Bernheimer v Marshall, 2 M 78 (61); Tullis v Orthwein, 5 M 377 (305); Webb v Bidwell, 15 M 479 (394); Hatch v Coddington, 33 M 92, 19 NW 393; Bausman v Woodman, 33 M 512, 24 NW 198; Trainor v Worman, 34 M 237, 25 NW 401; Boon v State Insurance, 37 M 426, 34 NW 902; Townsend v Mpls. 46 M 121, 48 NW 682; James v City of St. Paul, 72 M 138, 75 NW 5; Strauch v Flynn, 108 M 313, 122 NW 320.

Although a distinct cause of action or ground for relief cannot be set up in the reply, allegations which explain or fortify the complaint or controvert or avoid the matter set up in the answer, are permissible. A more particular and exact statement of facts constituting the cause of action is not a departure. Estes v Farnham, 11 M 423 (312); Larson v Schmaus, 31 M 410, 18 NW 273; Trainor v Worman, 34 M 237, 25 NW 401; Johnson v Hillstrom, 37 M 122, 33 NW 547; Rosby v St. Paul, 37 M 171, 33 NW 698; Bishop v Travis, 51 M 183, 53 NW 461; Mpls. & St. P. v Home Ins. 64 M 61, 66 NW 132.

There is a departure when a party quits or departs from the case or defense which he first made and has recourse to another. Estes v Farnham, 11 M 423 (312); Trainor v Worman, 34 M 237, 25 NW 401; Mosness v German-American, 50 M 341, 52 NW 932; Bishop v Travis, 51 M 183, 53 NW 461; Hoxie v Kempton, 77 M 462, 80 NW 353; Chgo. Bridge v Olson, 80 M 533, 83 NW 461.

The test of departure is, could evidence of the facts alleged in the reply be received under the allegations of the complaint. If not, there is a departure. Estes v Farnham, 11 M 423 (312); Trainor v Worman, 34 M 237, 25 NW 401; Mosness v German-American, 50 M 341, 52 NW 932.

A departure is a defect of substance which may be taken advantage of by motion for judgment on the pleadings. Webb v Bidwell, 15 M 479 (394); Townsend v Minneapolis, 46 M 121, 48 NW 682; Hoxie v Kempton, 77 M 462, 80 NW 353.

Or by demurrer. Bausman v Woodman, 33 M 512, 24 NW 198; Bishop v Travis, 51 M 183, 53 NW 461; James v City of St. Paul, 72 M 138, 75 NW 5.

Or by motion to strike out. Bausman v Woodman, 33 M 512, 24 NW 198; James v City of St. Paul, 72 M 138, 75 NW 5.

By request for instructions. Trainor v Worman, 34 M 237, 25 NW 401.

Objection to departure must be taken before verdict or it will be deemed waived. Abraham v Holloway, 41 M 163, 42 NW 870; Whitney v Nat'l Masonic, 57 M 472, 59 NW 943.

A variance or inconsistency between the reply and complaint on immaterial matter does not constitute a departure. Bishop v Travis, 51 M 183, 53 NW 461.

It is discretionary with the court to allow an amendment to correct a departure. Hoxie v Kempton, 77 M 463, 80 NW 353.

Reply being by confession and avoidance of new matter is not a departure. Niebels v Howland, 97 M 209, 106 NW 337.

On a motion for judgment on the pleadings, construing the allegations of the complaint as required by Revised Laws 1905, Section 4143 (section 544.16), no

reply was necessary. McLaughlin v City of Breckenridge, 122 M 154, 141 NW 1134, 142 NW 134.

Defendant notified deceased that she was expelled from membership and her certificate canceled. The burden is on the defendant to prove that its repudiation of the contract was rightful. Marcus v Nat'l Council, 127 M 198, 149 NW 197.

The allegations of the reply were sufficient to raise the question of the jurisdiction of the probate court. Bombolis v M. & St. L. 128 M 112, 150 NW 385.

An allegation in the reply construed and held not to be an admission that the insured had failed to pay assessments and dues. Rosenthal v Supreme Ruling, 129 M 214, 152 NW 404.

The reply construed as admitting the rendition in a competent court in Iowa, having jurisdiction of the parties and of the cause of action of a judgment against defendant for the wrongful death of plaintiff's decedent which raises a bar to the instant action, unless there is allegation of fraud and conspiracy set out in reply and proof of same. Schendel v Chicago, Milwaukee, 168 M 152, 210 NW 70.

Plaintiff sued in replevin for shares of stock. Defendant by counter-claim claimed a lien for loans made and asked foreclosure of the lien. Plaintiff dismissed its complaint and in its reply asserted a statutory lien on the stock. Held, although the reply would have been a departure had the complaint remained in the case, it is now admissible as a defense to the counter-claim. Hormel v Bank, 171 M 65, 212 NW 738.

In a mandamus proceeding the allegations of the answer stand as if denied without reply. State ex rel v Youngquist, 178 M 442, 227 NW 891.

In an action to determine adverse claims to real estate, the reply was not a departure, and it was not necessary in this case where appellant's mortgage is set up as a counter-claim to plaintiff's admitted title to have a reformation of the mortgage before relief could be had against it in this action. Bank v N.W. Trust, 181 M 115, 231 NW 790.

In an action on contract for feeding lambs, where defendant alleged that contract had been assigned to bank, reply admitting the assignment but alleging that assignment was to secure collateral loan, and that loan had been repaid before the commencement of the action, is not a departure from the complaint. It merely meets a defense in the answer. Stebbins v Frind, 193 M 446, 258 NW 824.

3. Counter-claim in reply

A counter-claim as such canot be set up in a reply. There can be no counter-claim or set-off to a mere defense. If it constitutes a defense to a claim set out in the opposite pleadings, it is available by way of recoupment or defense. Townsend v Mpls. 46 M 121, 48 NW 682.

There can be no counter-claim against a counter-claim, so a reply may not assert a counter-claim. To do so would be a departure. But as against a counter-claim, the reply may plead recoupment. Imperial v Hartford, 163 M 481, 204 NW 531.

In an action by an employee to recover damages for injuries, where the statute of limitations has been set up in bar of a right of action, and the plea has been traversed, the statute is generally considered an affirmative defense, and the burden of proof is on those seeking to avail themselves of its benefit to show that the cause of action has been barred thereby. Where part of plaintiff's demand is barred and part is not, the defendant is obliged to prove specifically the part that falls within the protection of the statute. Golden v Lerch, 203 M 211, 281 NW 249.

In replevin action removed to federal court, demurrer to counter-claim under state statute would be treated as motion for more definite statement of claim where injustice would result if demurrer were dismissed under rule of civil procedure abolishing demurrer for insufficiency of pleading. Shell v Stueve, 25 F. Supp. 879.

4. Waiver of reply

When a reply should have been made to matter in an answer but such matter is treated on the trial as controverted without a reply, the want of a reply will

be deemed waived. Matthews v Torinus, 22 M 132; Lyons v Red Wing, 76 M 20, 78 NW 868; Mchts. Bank v Barlow, 79 M 234, 82 NW 364; Lyford v Martin, 79 M 243, 82 NW 479.

5. Demurrer to reply

The provision for a demurrer to a reply is omitted in the section as amended by Laws 1913, Chapter 54, Section 1. Bausman v Woodman, 33 M 512, 24 NW 198.

Demurrer to a reply having been abolished, an appeal from an order overruling such a demurrer presents no question for review. Sutton v Books, 180 M 417, 231 NW 10.

544.09 FAILURE TO REPLY; JUDGMENT.

HISTORY. R.S. 1851 c. 70 s. 71; 1852 Amend. p. 9; P.S. 1858 c. 60 s. 75; G.S. 1866 c. 66 s. 84; G.S. 1878 c. 66 s. 101; 1881 c. 44 s. 1; G.S. 1894 s. 5242; R.L. 1905 s. 4135; G.S. 1913 s. 7761; G.S. 1923 s. 9258; M.S. 1927 s. 9258.

1. Admission of counter-claim by failure to reply
2. Admission of defensive matter by failure to reply
3. Failure to demur
4. Judgment on the pleadings

1. Admission of counter-claim by failure to reply

The reply denied each and every statement, matter, thing and similar, in the answer "save as hereafter stated, admitted, or qualified, and save as stated in his amended complaint," and then admitted some of the items in part, and denied them in part, denied others entirely, and omitted to reply to others. Held, the items not referred to stand admitted. Leyde v Martin, 16 M 38 (24).

A counter-claim, which requires a reply, must contain the substance nceessary to sustain a separate action in favor of defendant against the plaintiff. Linn v Rugg, 19 M 181 (145).

The facts set up did not constitute a counter-claim, and therefore were not admitted by a failure to reply to the same. First Nat'l v Kidd, 20 M 234 (212).

The case having been tried below upon the theory that the matter set up in the answer was not a counter-claim, but was in issue without a reply, the counter-claim is not to be taken as admitted. Matthews v Torinus, 22 M 132.

In an action of ejectment, allegations in the answer, that defendant entered under an official deed, has had no notice of any defects in validating deed, and has made improvements and paid taxes, are not admitted by failure to reply. Reed v Newton, 22 M 541.

The objection that the facts set up as a counter-claim do not constitute a cause of action, is not waived by a failure to reply. Schurmeier v English, 46 M 306, 48 NW 1112.

2. Admission of defensive matter by failure to reply

Affirmative matter in the answer which merely tends to deny the allegations of the complaint is not new matter requiring a reply. New defensive matter to require a reply must be in the nature of confession and avoidance. McArdle v McArdle, 12 M 98 (53); Reed v Newton, 22 M 541; Craig v Cook, 28 M 232, 9 NW 712; Williams v Matthews, 30 M 131, 14 NW 577; Conway v Elgin, 38 M 469, 38 NW 370; Pinger v Pinger, 40 M 417, 42 NW 289; Engel v Bugbee, 40 M 492, 42 NW 351; Olson v Tvete, 46 M 225, 48 NW 914; West v Hennessey, 58 M 133, 59 NW 984; Lyons v City of Red Wing, 76 M 20, 78 NW 868; Lyford v Martin, 79 M 243, 82 NW 479; King v Burnham, 93 M 288, 101 NW 302.

3. Failure to demur

The objection that the facts set up in the answer by way of counter-claim do not constitute a cause of action is not waived by a failure to demur but may

be raised on the trial by a motion for dismissal. Lace v Fixen, 39 M 46, 38 NW 762; Schurmeier v English, 46 M 306, 48 NW 1112.

Where the answer set up a counter-claim upon a note of the plaintiff not due at the time of the trial, and no objection is made that it is premature, but the case is tried throughout, including the charge of the court, not excepted to, on the theory that it is a proper counter-claim, the plaintiff must be held to have waived the objection that the note was not yet due. Stensgaard v St. Paul, 50 M 429, 52 NW 910.

The objection that the facts set up in the answer do not constitute a defense is not waived by failure to demur but may be raised on the trial by objection to the introduction of any evidence. Aultman v Falkum, 51 M 562, 53 NW 875; Larson v Shook, 68 M 30, 70 NW 775.

4. Judgment on the pleadings

Within proper restrictions, a trial court, deeming a verdict so excessive as to evince passion or prejudice on the part of the jury, may refuse a new trial upon condition of the prevailing party reducing the verdict by a remittitur to such sum as shall be deemed by the court not excessive. Craig v Cook, 28 M 232, 9 NW 712.

Judgment on the pleadings may be ordered when the reply admits or fails to deny the defense set up in the answer. Goffney v St. P. Mpls. 38 M 111, 35 NW 728; McAllister v Welker, 39 M 535, 41 NW 107.

Or when the reply admits or fails to deny the counter-claim set up in the answer. Schurmeier v English, 46 M 306, 48 NW 1112.

An allegation of payment in the answer, to which no reply was interposed, is held presumptively to have been litigated by consent, and that the findings of the court are construed as negativing such defense. Betcher v City of Hastings, 131 M 249, 154 NW 1072.

Where facts appearing from the complaint, supplemented by the more detailed narrative of opening statement to jury, so require, judgment upon the pleadings and statement may be ordered against plaintiff. Plotkin v Northland, 204 M 422, 283 NW 758.

544.10 SHAM AND FRIVOLOUS PLEADINGS.

HISTORY. R.S. 1851 c. 70 s. 70; 1852 Amend. p. 9; P.S. 1858 c. 60 s. 74; G.S. 1866 c. 66 s. 82; G.S. 1878 c. 66 s. 99; 1881 c. 49 s. 1; G.S. 1894 s. 5240; R.L. 1905 s. 4136; G.S. 1913 s. 7762; G.S. 1923 s. 9259; M.S. 1927 s. 9259.

SHAM PLEADINGS

1. **Defined**
2. **Verified pleading may be stricken out**
3. **Denials may be stricken out**
4. **Counter-claims may be stricken out**
5. **When part only is sham**
6. **Power to strike out to be exercised sparingly**
7. **Time of making motion**
8. **Affidavits on motion**
9. **Amendment**
10. **Motion to strike out granted**
11. **Motion to strike out denied**

IRRELEVANT PLEADINGS

1. **Defined**
2. **Cases containing irrelevant allegations**
3. **Remedy**
4. **Power to strike out to be exercised sparingly**

FRIVOLOUS PLEADINGS

1. Frivolous answer to reply
2. Frivolous demurrer

GENERALLY

SHAM PLEADING

1. Defined

A sham pleading is one clearly and undisputedly false. Morton v Jackson, 2 M 219 (180); Barker v Foster, 29 M 166, 12 NW 460; Segerstrom v Holland Piano, 160 M 95, 199 NW 897; Neefus v Neefus, 209 M 495, 296 NW 579; Menwissen v Westermann, 218 M 477, 16 NW (2nd) 546.

An answer is sham when so clearly false that it tenders no real issue. Nelson v Ind. Fruit, 176 M 468, 223 NW 767.

A sham answer is a false answer. It cannot be stricken as sham unless it is clearly false. Pederson v Eppard, 181 M 47, 231 NW 393.

Under this section, a complaint cannot be stricken as sham. Long v Mut. Trust, 191 M 163, 253 NW 762.

2. Verified pleading may be stricken out

An answer may be stricken out as sham notwithstanding its verification. Conway v Wharton, 13 M 158 (145); Hayward v Grant, 13 M 165 (154); Barker v Foster, 29 M 166, 12 NW 460; Nelson v Richardson, 31 M 267, 17 NW 388; Wheaton v Briggs, 35 M 470, 29 NW 170; Stevens v McMillin, 37 M 509, 35 NW 372; Dobson v Hallowell, 53 M 98, 54 NW 939; White v Moquist, 61 M 103, 63 NW 255; Pfaender v Winona & St. P. 84 M 224, 87 NW 618; Fisher v Wellworth Mills, 133 M 240, 158 NW 239.

The averment in the answer was in the nature of a negative pregnant and did not put in issue the expiration of the lien right and was properly stricken as irrelevant. Fogerstrom v Rappaport, 176 M 254, 223 NW 142.

From the pleadings, the charge of the court, and the verdict, it conclusively appears that the judgment in suit was for obtaining property by false pretenses actively participated in by appellant; hence her answer that it was for breach of contract was properly stricken as sham. Becker v Brecht, 180 M 482, 231 NW 220.

It was error to strike out as irrelevant and immaterial certain paragraphs of a complaint since with them in the complaint it stated a cause of action, but with them stricken it did not. Sneve v First Nat'd, 192 M 355 ,256 NW 730.

A complaint alleging in the alternate that one or the other of two defendants is liable, but that plaintiff is unable to determine which one, states no cause of action against either. Pilney v Funk, 212 M 398, 3 NW(2d) 792.

3. Denials may be stricken out

A denial in the answer to the writ of any knowledge or information sufficient to form a belief as to whether the relator had received the certificate of election will not be struck out as sham. State ex rel v Sherwood, 15 M 221 (172); Smalley v Isaacson, 40 M 450, 42 NW 352.

An answer containing only general denials may be struck out as sham. Nelson v Richardson, 31 M 267, 17 NW 388; Wheaton v Briggs, 35 M 470, 29 NW 170; Stevens v McMillin, 37 M 509, 35 NW 372; Bardwell v Brown, 57 M 140, 58 NW 872; Larson v Shook, 68 M 30, 70 NW 775; Saunderson v Haas, 190 M 431, 252 NW 83.

A verified answer should be stricken out as sham and false only when its falsity is clear and indisputable, when it is evident that it was interposed as a mere pretense, in bad faith, and without color of fact. The burden is upon the moving party to show the falsity, from a showing of which follows an inference of bad faith. Pfaender v Win. & St. P. 84 M 224, 87 NW 618; First Nat'l v Lang, 94 M 261, 102 NW 700.

In an action on a contract for the payment of money, a general denial was properly stricken from the answer when it appeared that the execution of the contract and the defendant's failure to make the stipulated payments were conceded. Cairns v Lewis, 169 M 156, 210 NW 885.

The affidavit supporting the motion to strike out the reply made a convincing showing that the trust company was under the acts as alleged in the answer. McGrath v N. W. Trust, 178 M 47, 225 NW 901.

4. Counter-claims may be stricken out

An answer consisting of a counter-claim may be stricken out as sham and frivolous. Monitor Drill v Moody, 93 M 232, 100 NW 1104; Bettingen v Moshier, 180 M 356, 230 NW 811.

A counter-claim for fraud in a financial transaction did not state a cause of action because not connected with the subject of the action. Hadabank v Baker, 187 M 123, 244 NW 546.

5. When part only is sham

Where part of an answer is sham and frivolous, but another part is good, and puts in issue material allegations of the complaint, the court cannot strike out the whole and order judgment for the plaintiff notwithstanding the answer. Schmidt v Cassilius, 31 M 7, 16 NW 453.

6. Power to strike out to be exercised sparingly

To justify a court in striking out a pleading as sham its falsity must be clear and indisputable. Barker v Foster, 29 M 166, 12 NW 460; White v Moquist, 61 M 103, 63 NW 255; Pfaender v Win. & St. P. 84 M 224, 87 NW 618; First Nat'l v Lang, 94 M 261, 102 NW 700.

When allegations of an answer or defense are fairly supported by the affidavits of the defendant and other persons, against like affidavits on behalf of the plaintiff, such answer or defense should not, unless in very extraordinary circumstances, be stricken out as sham. Wright v Jewell, 33 M 505, 24 NW 299.

An answer alleging a material fact constituting a defense, and verified by the defendant, should not be struck out as sham upon an affidavit of the plaintiff simply denying the fact alleged. City Bank v Doll, 33 M 507, 24 NW 300.

A sham answer may be stricken out when its falsity is clearly shown, even though interposed in the belief of its truth and in good faith. State ex rel v Weber, 96 M 422, 105 NW 105.

A motion seeking to vacate an order striking out an answer and permitting the filing of an amended answer is addressed to the discretion of the court. United States v Melin, 160 M 530, 200 NW 807.

Falsity of pleading must be indisputable to justify striking it out as sham. Western Gravel v Nolan, 174 M 315, 219 NW 148.

The court erred in striking out the answer as sham and frivolous. The defense stated in the answer does not appear frivolous from a mere inspection and whether true and adequate should be determined upon a trial and not upon conflicting affidavits. Zinsmaster v Commander, 200 M 128, 273 NW 673.

7. Time of making motion

The district court may, in its discretion, entertain such motion at any time before trial. Barker v Foster, 29 M 166, 12 NW 460.

8. Affidavits on motion

Whether a pleading is sham or not may be determined by inspection alone, but resort may be had to documentary evidence and affidavits of the parties or third persons. Barker v Foster, 29 M 166, 12 NW 460; Dobson v Hallowell, 53 M 98, 54 NW 939; Fletcher v Byers, 55 M 419, 57 NW 139; Sandwich v Earl, 56 M

390, 57 NW 938; Bardwell v Brown, 57 M 140, 58 NW 872; White v Moquist, 61 M 103, 63 NW 255.

Where affidavits in support of the motion make out a clear prima facie case of falsity they will be taken as true for the purposes of the motion if not met by counter affidavits, and the motion granted. Barker v Foster, 29 M 166, 12 NW 460; City Bank v Doll, 33 M 507, 24 NW 300; Van Loon v Griffin, 34 M 444, 26 NW 601; Dobson v Hallowell, 53 M 98, 54 NW 939; White v Moquist, 61 M 103, 63 NW 255.

The court may take into consideration the quibbling and evasive character of defendant's counter affidavits. Thul v Ochseureiter, 72 M 111, 75 NW 4; Hertz v Hartmann, 74 M 320, 77 NW 232.

It is the duty of the court on motion to strike a sham pleading. Segerstrom v Holland Piano, 160 M 95, 199 NW 897.

The opposing affidavit merely reiterated the allegations of the answer without any showing as to what the representations were or how made. The answer is properly stricken as sham. Maestor's v Bohanon, 168 M 471, 210 NW 590.

The answer was properly stricken for failure of defendants to meet plaintiff's showing that it was sham. Aitkin Lodge v Trappman, 179 M 349, 229 NW 312.

The answer was properly stricken as sham when the only defensive matter pleaded was shown to be false. Simmons v Schwartz, 197 M 160, 266 NW 444.

In an action to recover damages for failure to furnish a title to certain real estate according to agreement, plaintiffs by unverified replies denied generally matters of public record set up in the answers. The allegations of the answers, unless avoided, pleaded a complete defense. Such replies may be stricken and judgment ordered for the defendants on a showing, by affidavits, that the allegations therein were sham. Berger v First Nat'l, 198 M 513, 270 NW 589.

A conflicting or inconsistent affidavit nullifies the effect of a general denial. Menwissen v Westermann, 218 M 477, 16 NW(2d) 546.

9. Amendment

It is discretionary with the court to order judgment as for want of an answer or to allow an amendment. Hertz v Hartmann, 74 M 320, 77 NW 232; First Nat'l v Lang, 94 M 261, 102 NW 700.

Where a party, to whose pleading a general demurrer is interposed and sustained, again proposes the same pleading, or one with changes which are clearly immaterial, thereby making unfair use of his leave to amend, such amended pleading may be stricken out as frivolous. Clark v Wilder, 157 M 449, 196 NW 563.

10. Motion to strike out granted

In the following cases the pleading, on motion, was stricken out. Hayward v Grant, 13 M 165 (154); Barker v Foster, 29 M 166, 12 NW 460; Schmidt v Cassilius, 31 M 7, 16 NW 53; Nelson v Richardson, 31 M 267, 17 NW 388; Van Loon v Griffen, 34 M 444, 26 NW 601; Wheaton v Briggs, 35 M 470, 29 NW 170; Stevens v McMillin, 37 M 509, 35 NW 372; Smally v Isaacson, 40 M 450, 42 NW 352; Dobson v Hallowell, 53 M 98, 54 NW 939; Dennis v Nelson, 55 M 144, 56 NW 589; Fletcher v Byers, 55 M 419, 57 NW 139; Sandwich v Earl, 56 M 390, 57 NW 938; Bardwell v Brown, 57 M 140, 58 NW 872; White v Moquist, 61 M 103, 63 NW 255; Larson v Shook, 68 M 30, 70 NW 775; Thul v Ochseureiter, 72 M 111, 75 NW 4; Hertz v Hartmann, 74 M 320, 77 NW 232; Monitor Drill v Moody, 93 M 232, 100 NW 1104; First Nat'l v Lang, 94 M 261, 102 NW 700; Brown v Peterson, 101 M 53, 111 NW 733; Friend v Friend, 158 M 31, 196 NW 814; Knudsen v Pederson, 166 M 360, 208 NW 8; Stein v Kelly, 173 M 613, 216 NW 792; Washington v Amer. Sales, 174 M 496, 219 NW 764; Kirk v Welch, 212 M 300, 3 NW(2d) 426; Nelson v Auman, 216 M 407, 13 NW(2d) 38; Simons v Cowan, 217 M 317, 14 NW(2d) 356.

Frivolous or sham reply stricken out on motion. Sheets v Ramer, 125 M 100, 145 NW 787; Fisher v Wellworth Mills, 133 M 240, 158 NW 239; Krahn v Owens, 136 M 53, 161 NW 257.

Allegation of a non-existent statute may be stricken. Moe v Shaffer, 150 M 118, 184 NW 785.

An answer consisting of a general denial does not raise an issue as to the plaintiff being the real party in interest, and, where it is shown that defendant executed the note and that it is past due and has not been paid, the answer may be struck out as sham. Independant Silo v Hanson, 156 M 335, 194 NW 879.

Where, in support of a motion to strike out an answer as sham and frivolous, the showing is that defendant has repeatedly made unqualified admissions of the liability sought to be enforced, and there is no explanation or denial of such admissions, an order granting the motion will not be reversed. Koehig v Wenzel, 157 M 88, 195 NW 769.

An answer by way of general denial was properly stricken out as sham where its showing was evasive and not at all responsive to that of the plaintiff in support of the motion. Deckert v Schwartz, 163 M 424, 204 NW 164.

The debt secured by a mortgage is the primary obligation, and the notes securing it only an evidence of debt. Rule applied where in procuring judgment on an interest coupon a portion of that note was voluntarily remitted in order to give the court jurisdiction. In a subsequent foreclosure action an allegation to that effect and no more did not raise an issue as to the amount of the mortgage debt. Hancock v Meester, 173 M 18, 216 NW 329.

The answer setting up usury, a matter that had been compromised and settled prior to the bringing of the action, may be stricken. King v Smith, 173 M 524, 218 NW 102.

Plaintiff's reply was stricken, and judgment properly entered for defendant. Westphal v Midway, 174 M 111, 218 NW 459.

Where the reply set up incompetency of plaintiff as a ground for avoiding a release, it was not error to strike the reply as sham. Hanson v Northern States, 198 M 24, 268 NW 642.

The paragraph stricken from plaintiff's replies were palpably sham, presenting no grounds for avoiding the release pleaded as a defense. Ahlsted v Hart, 201 M 82, 275 NW 404.

11. Motion to strike out denied

In the following cases the motion to strike out was denied. Morton v Jackson, 2 M 219 (180); Conway-v Wharton, 13 M 158 (145); State ex rel v Sherwood, 15 M 221 (172); Roblee v Secrest, 28 M 43, 8 NW 904; Wright v Jewell, 33 M 505, 24 NW 299; City Bank v Doll, 33 M 507, 24 NW 300; Smith v Betcher, 34 M 218, 25 NW 347; McDermott v Deither, 40 M 86, 41 NW 544; Smith v Mussetter, 58 M 159, 59 NW 995; Pfaender v Win. & St. P. 84 M 224, 87 NW 618; Beckwith v Golden Rule, 108 M 89, 121 NW 427.

The answer put in issue the allegations of the complaint that defendant had not a proper assignment of vendor's contract when he assigned the same to plaintiff, hence it was error to grant the motion for judgment on the pleadings. Cathaway v Seaton, 156 M 224, 194 NW 622.

It is a question of law whether at the close of the evidence there is sufficient proof of plaintiff's cause of action to take the case to the jury. Kasal v Picha, 156 M 446, 195 NW 280.

The answer should not be stricken as sham on a showing that the defendant bought the grain outright and owed an admitted balance on the purchase price, as he had the right to refute the charge of misconduct. Sweeney v Abbey, 163 M 357, 204 NW 24.

In an action on an injunction bond, to recover damages for the improvident issuance of the injunction, it was improper to strike the whole answer as sham where it contained a qualified general denial and no specific allegation which took the question of damages out of the general denial. Lund v Gillman, 205 M 242, 285 NW 534.

IRRELEVANT PLEADINGS

1. Defined

A frivolous answer is one, the insufficiency of which is so glaring that the court can determine it upon a bare inspection without argument. Morton v Jackson, 2 M 219 (180).

2. Cases containing irrelevant allegations

The following cases contained pleadings held to be irrelevant, redundant or repugnant. Lovejoy v Morrison, 10 M 136 (108); Berkey v Judd, 12 M 52 (23); Hayward v Grant, 13 M 165 (154); Washburn v Sharpe, 15 M 63 (43); Clague v Hodgson, 16 M 329 (291); Winona & St. P. v St. P. & S. C. 23 M 359; State ex rel v City of Lake City, 25 M 404; Jellett v St. P. M. & Man. 30 M 265, 15 NW 237; Quinby v Minn. Tribune, 38 M 528, 38 NW 623; Stewart v Minn. Tribune, 41 M 71, 42 NW 787; Henry v Bruns, 43 M 296, 45 NW 444; Oleson v Journal Prtg. Co. 47 M 300, 50 NW 80; Haug v Haugan, 51 M 558, 53 NW 874; Pye v Bakke, 54 M 107, 55 NW 904; Dennis v Nelson, 55 M 144, 56 NW 589; Wheeler v Winnebago, 62 M 429, 64 NW 920; Harbo v Board, 63 M 238, 65 NW 457; Oliver Mining v Clark, 65 M 277, 68 NW 23; Sec. Bank v Holmes, 68 M 538, 71 NW 699; James v City of St. P. 72 M 138, 75 NW 5; Mullen v Devenney, 136 M 343, 162 NW 448.

3. Remedy

The exclusive remedy is a motion to strike out. Starbuck v Dunklee, 10 M 168 (139); Russell v Chambers, 31 M 54, 16 NW 458.

4. Power to strike out to be exercised sparingly

It is only when matter is clearly and indisputedly irrelevant that an order striking it out is justifiable. Hansen v St. P. Gas Light Co. 82 M 84, 84 NW 727.

FRIVOLOUS PLEADINGS

1. Frivolous answer or reply

A frivolous answer is one, the insufficiency of which is so glaring that the court can determine it upon a bare inspection, without argument. Morton v Jackson, 2 M 219 (180); Neefus v Neefus, 209 M 495, 296 NW 579.

The allegation of the defense that the trees were raised in Mankato while they were sold as having been raised in Lake City indicated an inconsiderable difference, but sufficient so the answer cannot be stricken. Roblee v Secrest, 28 M 43, 8 NW 904.

An answer setting forth only conclusions of law may be treated as sham and irrelevant, and may be struck out on motion. Dennis v Nelson, 55 M 144, 56 NW 589.

When a complaint declares on a promissory note and the answer contains a general denial and new matter not a defense at law, the answer may be stricken out on motion, as sham and frivolous, if it appears from defendant's own letters that he did execute and promise to pay the note. First Nat'l v Lang, 94 M 261, 102 NW 700.

A frivolous reply is one that does not in any view of the facts pleaded, present a defense to the matters pleaded in the answer. Sheets v Ramer, 125 M 100, 145 NW 787.

From defendant's correspondence concerning the controversy it clearly appears that the answer is sham in respect to the denials and matters alleged in defense of the action. Fisher v Wellworth Mills, 133 M 240, 158 NW 239.

The new evidence alleged for the purpose of reopening the judgment, and obtaining a new trial of an issue formerly litigated was of such nature as to be properly stricken out as sham and frivolous. Krohn v Owens, 136 M 53, 161 NW 257.

An answer is frivolous when its insufficiency is determinable immediately upon inspection. Bronzin v McGee, 166 M 129, 207 NW 199.

An order striking out defendant's answer as frivolous, with leave to defendants to file and serve an amended answer within ten days upon payment of $10.00 as costs, was justified, and judgment thereafter entered on default of an answer was proper. Silberman v Niles, 171 M 405, 214 NW 261 .

An answer is frivolous when its insufficiency appears upon mere inspection. Nelson v Ind. Fruit, 176 M 468, 223 NW 767.

It was error for the trial court to strike out as frivolous, defendant's answer alleging assumption of risk. Wickstrom v Thornton, 191 M 327, 254 NW 1.

The paragraphs stricken clearly stated a cause of action for breach of the contract of employment and damages resulting therefrom and should not have been stricken. Danube v Marquardt, 197 M 349, 266 NW 878.

2. Frivolous demurrer

It is not ground of demurrer that there is no allegation of partnership in the body of a complaint in the title of which plaintiffs are named as partners. Jaeger v Hartman, 13 M 55 (50).

If from a mere inspection of them it can be determined that the pleading demurred to is good, the demurrer will be regarded as frivolous and stricken out. Hurlburt v Schulenburg, 17 M 22 (5); Perry v Reynolds, 40 M 499, 42 NW 471.

A demurrer will not lie to a complaint on the ground that it appears from it that the plaintiff has not legal capacity to sue, unless the want of legal capacity appears affirmatively from the complaint. Wisconsin v Torinus, 22 M 272.

The demurrer is clearly frivolous. Quinn v Shortall, 29 M 106, 12 NW 153; Nelson v Nugent, 62 M 203, 64 NW 392.

A demurrer should not be struck out as frivolous unless it be manifest from mere inspection, and without argument, that there is no reasonable ground for interposing it, and hence that it was presumably put in in bad faith, for mere purposes of delay. Hatch v Schusler, 46 M 207, 48 NW 782; Olson v Cloquet Lbr. 61 M 17, 63 NW 95.

If a demurrer is bad, but not frivolous, and the court erroneously strikes it out as frivolous, but grants the party leave to plead over, it is error without prejudice, and on appeal the order striking out the demurrer will not be reversed. Friesenhahn v Merrill, 52 M 55, 53 NW 1024.

GENERALLY

An order striking out an answer as sham and frivolous and granting a plaintiff judgment is appealable only as to that part which eliminates the pleading. Weisman v Cohen, 160 M 440, 200 NW 636; Bronzin v Larson, 163 M 98, 203 NW 446; Beacon Lamp v Lombard, 165 M 480, 205 NW 889; Johnson v Kruse, 205 M 237, 285 NW 715.

Upon a motion to strike out a pleading as sham, it is the duty of the court to determine whether there is an issue to try, not to try the issue. Hasse v Victoria, 208 M 457, 294 NW 475.

In an action to recover reasonable value of labor and material where the defense was recoupment and a counter-claim alleging breaches of warranty, the allegations were amply sufficient to apprise plaintiff of the nature of the defense and were not indisputedly false, lacking insubstantial relations to the controversy, obscure, or mere conclusions of law. Commander v Westinghouse Elec. Co. 70 F(2d) 469.

544.11 SUPPLEMENTAL PLEADINGS.

HISTORY. R.S. 1851 c. 70 s. 93; P.S. 1858 c. 60 s. 97; G.S. 1866 c. 66 s. 108; G.S. 1878 c. 66 s. 128; G.S. 1894 s. 5270; R.L. 1905 s. 4137; G.S. 1913 s. 7763; G.S. 1923 s. 9260; M.S. 1927 s. 9260.

1. Compared with amendment
2. How far a matter of right; diligence
3. Supplemental complaint
4. Supplemental answers
5. Allowable after verdict or judgment
6. Objection to

1. Compared with amendment

The court did not err or abuse its discretion in refusing leave to amend the answer by setting up facts which arose after the service of the original answer,

as such facts should have been set up in a supplemental answer. Guptil v City of Red Wing, 76 M 129, 78 NW 970.

A supplemental answer may be allowed after judgment as well as before. State ex rel v District Court, 91 M 161, 97 NW 581.

2. How far a matter of right; diligence

A former appeal resulted in a judgment being docketed in the trial court agreeably to the mandate of the supreme court. Defendants again appealed from the judgment, "In the nature of a motion for a re-argument based upon the ground that upon a former examination of the case the supreme court fell into error of fact." If such error was committed, the proper remedy was by appeal to the supreme court to re-argue. Lough v Bragg, 19 M 357 (309); Stickney v Jordain, 50 M 258, 52 NW 861.

A former adjudication, not pleaded, cannot be set up by motion after trial and verdict; neither can a motion be allowed to set aside the verdict, and for leave to interpose a supplemental pleading alleging a former adjudication. Reilly v Bader, 50 M 199, 52 NW 522.

A refusal to open a judgment so that a supplemental answer might be filed, setting up a substantial counter-claim, sustained. Voak v Nat'l Investment, 51 M 450, 53 NW 708.

It is not res judicata by the judgment in a former action for the same relief that the plaintiff is not now entitled to it except upon the condition then imposed, where, during he intervening time, the situation has been materially changed; as for example, by the long lapse of time during which a lost stock certificate has not been heard of. Guilford v Western Union, 59 M 332, 61 NW 324.

When, subsequent to the party's last pleading, facts have transpired which are material to his case, and of which he can only avail himself by supplemental pleading, if he makes a proper showing, and is not guilty of unreasonable delay in moving for leave to serve and file such pleading, the court has no discretion, but it is its duty to grant such leave. Malmsten v Berryhill, 63 M 1, 65 NW 88.

3. Supplemental complaint

While a party cannot set up a title acquired since the commencement of the action he may allege facts strengthening his title. If in his original complaint he alleges an equitable title, he may by supplemental complaint set up a legal title subsequently acquired. The function of a supplemental complaint is to strengthen the plaintiff's cause of action by alleging material facts occurring subsequent to the commencement of the action. Facts may be thus alleged which may enlarge or change the kind of relief to which the plaintiff is entitled. Chouteau v Rice, 1 M 106 (83); Payson v Everett, 12 M 225 (166); Meyer v Berlandi, 39 M 438, 40 NW 513; Todd v Johnson, 56 M 60, 57 NW 320; Hall v Sauntry, 80 M 348, 83 NW 156; Melberg v Wild Rice Lbr. 127 M 524, 149 NW 1069.

A supplemental complaint cannot be set up as a distinct cause of action accruing subsequent to the service of the original complaint. Eastman v St. Anthony Falls, 17 M 48 (31); Meyer v Berlandi, 39 M 438, 40 NW 513.

A party cannot sue on an unripe claim and afterwards by supplemental complaint set up the fact of the maturity of the claim. A party must recover on a right existing at the commencement of the action. Eide v Clarke, 65 M 466, 68 NW 98.

4. Supplemental answers

Far greater liberality is shown in allowing supplemental answers than complaints. Any material matter of defense, either complete or partial, arising since the original answer may be set up by supplemental answer. Harrington v St. Paul & S. C. 17 M 215 (188); Hursh v First Div. 17 M 439 (417); Guptil v Red Wing, 76 M 129, 78 NW 970; Poehler v Reese, 78 M 71, 80 NW 847; Sodini v Sodini, 96 M 329, 104 NW 976.

The supplemental answer is often resorted to in actions in ejectment. Edwards v Smith, 124 M 538, 144 NW 1090.

The cause of action pleaded as the second counter-claim was not an existing cause of action at the time the suit was commenced, and therefore, could not be pleaded as a counter-claim. As the action had been dismissed, the cause of action cannot be considered as one set up by supplemental answer by way of set-off or recoupment. Griffith v Dowd, 133 M 316, 158 NW 420.

5. Allowable after verdict or judgment

In an action to foreclose a mechanic's lien, the property being sold pendente lite, the court, in accordance with a general principle of equity, should treat the lien, when it was discharged from the land by the sale under a power paramount to the lien, as being transferred to the proceeds of the sale in the hands of the devisee. Ness v Davidson, 49 M 469, 52 NW 46.

A supplemental answer may be allowed after judgment as well as before. State ex rel v Dist. Court, 91 M 161, 97 NW 581.

Where new matter of independent defense arises after verdict, the remedy is not a motion for a new trial on the ground of newly discovered evidence, but by a motion to be permitted to make a supplemental answer with stay of proceedings until the new issue be tried. Bandler v Bradley, 110 M 66, 124 NW 644.

6. Objection to

If an original bill is wholly defective and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill founded upon matters which have subsequently taken place, but if the original bill is sustainable, and the supplemental bill only enlarges the extent and changes the kind of relief, the latter may be sustained. Objection to a supplemental complaint cannot be made on the trial. Lowry v Harris, 12 M 255 (166).

544.12 INTERPLEADER.

HISTORY. R.S. 1851 c. 70 s. 35; P.S. 1858 c. 60 s. 35; G.S. 1866 c. 66 s. 111; 1876 c. 50 s. 1; G.S. 1878 c. 66 s. 131; G.S. 1894 s. 5273; R.L. 1905 s. 4138; G.S. 1913 s. 7764; G.S. 1923 s. 9261; M.S. 1927 s. 9261.

The maker of a promissory note, when two plaintiffs claim same demand in different suits, may compel them to interplead under this section. Rohrer v Turrill, 4 M 407 (309).

Defendant issued a certificate of deposit payable to Jerry Cassidy, or order, on return of the certificate properly endorsed. The money belonged to plaintiff and was delivered to her immediately upon its issue, but without endorsement. It was held that plaintiff may maintain an action in her own name. Ann Cassidy v First National, 30 M 86, 14 NW 363.

Plaintiff commenced this action against the bank who claimed no interest but alleged it was claimed by one Balch. Before answer the defendant obtained an order of interpleader, and had same served upon Balch. As Balch did not appear, the court released the defendant from all obligation on turning the property over to plaintiff. Hooper v Balch, 31 M 276, 17 NW 617.

Where a carload of wheat was consigned by plaintiff to defendant and sold, and an action brought to recover the price, a laborer claiming a lien under the North Dakota law on the grain was properly interpleaded, and he rightfully fully recovered. Schuler v McCord, 79 M 39, 81 NW 547; Schuler v Wood, 81 M 372, 84 NW 21; Slimmer v State Bank, 122 M 187, 142 NW 144.

When the beneficiary under a policy of insurance died before the certificate holder, the brothers of the decedent took as beneficiaries, and not by descent from their brother. Devaney v A.O.H. Life Fund, 122 M 221, 142 NW 316.

An order of interpleader made under this section, making appellant a party to the action and requiring her to present her claim to the fund brought into court to await an award to rival claimants, and restraining appellant from prosecuting an action in North Dakota, is justified by the facts in the instant case. Wilser v Wilser, 132 M 167, 156 NW 271.

Where a party is ordered to interplead and his right to a fund paid into court by a defendant depends upon the power of the court to relieve him from the legal consequences of an accepted bid, he is not entitled to a jury trial. St. Nicholas v Kropp, 135 M 115, 160 NW 500.

There can be no interpleader under section 544.12, or at common law, except where there are rival claimants to the subject matter in litigation, each asserting an interest in the property or fund, of which the person seeking the relief is th indifferent holder. Alton v Merritt, 145 M 428, 177 NW 770.

The remedy of interpleader is aviliable to a defendant sued in the municipal court of Minneapolis. Metropolitan v Hen. County, 149 M 367, 183 NW 821.

A deposit in court in proceedings in the nature of interpleader is in the custody of the law. The court in which the proceedings are pending alone has authority over it which should be exercised by appropriate procedure in the pending causes. Midland v Hendrickson, 159 M 355, 200 NW 17; State ex rel v Dist. Court, 192 M 602, 258 NW 7.

Since the association is powerless to waive the statute in regard to the beneficiary, a rightful claimant may successfully contest the right of the beneficiary named in the certificate to the fund, even though the association does not question such right. Modern Bro. v Quady, 175 M 467, 221 NW 721.

Where the same debt claimed by plaintiff is also claimed by another, an order permitting defendant to pay the amount into court and directing that the other claimant be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. Seeling v Deposit Bank, 176 M 13, 222 NW 295.

It is not error for the court to grant defendant's motion to have another interpleaded and substituted as the defendant with directions that appropriate pleadings be made. Burt v Clague, 183 M 109, 235 NW 620.

In an action against an issuing bank by the named payee to recover on a cashier's check issued for a special purpose and subject to a contract between the payee and the purchaser by which the check was used as an earnest money deposit, and, by the terms of the contract, was to be returned to the purchaser in the event the payee could not perform his contract, the trial court was justified in interpleading the purchaser of the check and discharging the bank as defendant. Deones v Zeches, 212 M 260, 3 NW(2d) 432.

Rquirement of identity of claim. 23 MLR 232.

544.13 INTERVENTION.

HISTORY. R.S. 1851 c. 70 s. 35; P.S. 1858 c. 60 s. 35; G.S. 1866 c. 66 s. 111; 1876 c. 50 s. 1; G.S. 1878 c. 66 s. 131; G.S. 1894 s. 5273; R.L. 1905 s. 4140; G.S. 1913 s. 7766; G.S. 1923 s. 9263; M.S. 1927 s. 9263.

1. Origin of statute

The doctrine of intervention, as embodied in the statute, originated in this country in the civil code of Louisiana. The leading case is Gasquet v Johnson, 1 La. 425, 431. Louisiana was followed by California and Iowa whose statute was followed by us in the identical language. Bennett v Whitcomb, 25 M 152; Lewis v Harwood, 28 M 428, 10 NW 586; McAllen v Hodge, 92 M 68, 99 NW 424.

2. Interest entitling a party to intervene

To entitle a party to intervene his interest must be in the matter of litigation in the action as originally brought and of such a direct and immediate character that he would either gain or lose by the direct legal operation and effect of the judgment. Bennett v Whitcomb, 25 M 148; Mann v Flower, 26 M 479, 5 NW 365; Lewis v Harwood, 28 M 428, 10 NW 586; Shepard v Murray, 33 M 519, 24 NW 291; Wohlwend v Case, 42 M 500, 44 NW 517; Becker v Northway, 44 M 61, 46 NW 210; Dennis v Spencer, 51 M 259, 53 NW 631; Maxcy v New Hampshire, 54 M 272, 55 NW 1130; Steenerson v Gt. Northern, 60 M 461, 62 NW 826; Masterman v Lumbermans Bank, 61 M 299, 63 NW 723; Larson v Nichols, 62 M 256, 64 NW 553; Smith v City of St. Paul, 65 M 295, 68 NW 32, 69 M 276, 72 NW 104, 210; Bank v Davidson, 69 M 319, 72 NW 129; Holcombe v Stretch, 74 M 234, 76 NW 1132; Johnson v White, 78 M 48, 80 NW 838; Schuler v McCord, 79 M 39, 81 NW 547; Cone v Wald, 85 M 302, 88 NW 977; Smith v City of St. P. 111 F 308.

The intervenor's interest need not necessarily be of a pecuniary nature. McAllen v Hodge, 92 M 68, 99 NW 424.

Where, pending action to set aside a deed for fraud, plaintiff conveyed, grantee had a right to intervene. Walker v Sanders, 103 M 124, 114 NW 649.

Previous decisions do not compel a construction of this section that the right to intervene exists only where the party applying for leave to intervene would necessarily gain or lose by the direct legal effect of the judgment therein if he did not become a party to the action. The statute is to be liberally construed in the interest of good practice, with due reference to its terms and to the nature of the issues involved, so as to effectuate the legislative intention by avoiding formalism of remedy, circuity of action, multiplicity of suits, and so as to conduce to the speedy and simple administration of justice. The fact that a person seeking to intervene might protect his interests in some other way does not render the grant of his application improper. Faricy v St. P. Investment, 110 M 311, 125 NW 676.

An insurance agent, to whom policies were intrusted for delivery to an applicant for insurance on payment of the first premium in cash, disobeyed instructions, delivered the policies, and took applicant's notes payable to the applicant and endorsed in blank. An assignee of the notes after maturity sued on them. The insurance company had a right to claim the notes as its own and intervene. Hoidale v Cooley, 143 M 430, 174 NW 413.

Neither section 540.16, nor section 544.13, curtails the inherent power of the court to bring before it persons who are not parties to an action whenever for the complete administration of justice, it is necessary to bring them in as parties. Webster v Beckman, 162 M 132, 202 NW 482.

A third party, having levied under execution upon the property claimed to be involved in garnishment proceedings, has such an interest in the matter in litigation that she may lose by the direct legal effect of the judgment therein, and she should therefore be permitted to intervene. Bank v West, 185 M 225, 240 NW 892.

Intervention is not available after the closing of condemnation proceedings. That remedy is purely statutory and available only during the pendency of the proceedings. The final certificate was intended to be, and in fact took the place of, a final decree applicable under section 117.17. State ex rel v Hall, 195 M 79, 261 NW 874.

The suit was brought under the declaratory judgments act for the determination of the status of certain accounts of the association in valuing its stock for repurchase. The intervenors requested an accounting and distribution of the association profits. Held, the intervenors may not introduce new issues foreign to those joined by the original parties. Twin City Milk v Oase, 199 M 124, 271 NW 253.

A highway condemnation proceeding is in rem. No question of jurisdiction is presented if, without formal intervention under the statute, taxpayers are permitted to appear and to apply for and procure injunctional relief. State ex rel v Werder, 200 M 148, 273 NW 714.

One adjudged to be beneficial owner of vendee's rights under a contract for a deed has sufficient interest in the subject matter of a suit seeking to cancel the

interest of the vendee, so that he may intervene. Veranth v Moravitz, 205 M 24, 284 NW 849.

Where, as here, governmental agencies seek intervention to the end that their proper administration of congressional acts may be made effective, it is not necessary to their right of intervention that they shall suffer pecuniary loss by plaintiff's fraud, but only that their legitimate official action will be, or is likely to be defeated thereby. Kniefel v Kellar, 207 M 109, 290 NW 218.

Where in a garnishment the garnishee summons is served on the garnishee before the summons in the main action is issued and delivered to the officer for service and a subsequent garnishment is regularly and lawfully made by a third party before the defect in the first garnishment is waived, the plaintiff in the second garnishment is entitled to intervene in the first and claim right of precedence in the fund sequestered. Nash v Braham, 210 M 203, 297 NW 755.

A parent foreign corporation having no license under sections 56.01 to 56.26, but owning all the stock of defendant, has no right to intervene in the instant action; and plaintiff's demurrer to intervenor's complaint should have been sustained. Personal Loan v Personal Finance, 212 M 600, 5 NW(2d) 61.

A person whose lands are actually taken, although not described in the condemnation proceeding, has such an interest in the proceedings that he will either gain or lose by the direct legal effect of judgment therein so as to permit him under this section to intervene in the proceedings. State v Bentley, 216 M 146, 12 NW(2d) 348.

Where lands are damaged or taken in construction of a public project and are not included in condemnation proceedings, the aggrieved owners of such omitted lands may compel condemnation of them by an action in mandamus. State v Peterson, 220 M —, 19 NW(2d) 70.

Respective rights of owner and possessor when the property is converted by a third party. 22 MLR 875.

Right of attorney to intervene for the sole purpose of protecting his reputation. 24 MLR 881.

Participation in railroad and warehouse commission proceedings as a basis for right to appeal. 25 MLR 938.

Procedure for compensation. 29 MLR 214.

3. Complaint

A complaint in intervention may be demurred to for its failure to state a cause of action or ground of intervention, as the case may be. Shepard v Co. of Murray, 33 M 519, 24 NW 291.

Where an intervenor claiming a lien on property for negligent loss on which the action is brought, reiterates the allegations of the complaint and becomes practically a co-plaintiff, he is liable, upon the setting aside of separate judgments in their favor, to costs. McKinley v Nat'l Citizens, 127 M 212, 149 NW 295; Hoidale v Cooley, 143 M 430, 174 NW 413.

The trial court did not err in granting leave to file a supplemental complaint in intervention as against the contention of the receiver for the copartnership that the original complaint did not state a cause of action; nor because the cause of action stated in the supplemental complaint was to recover the unpaid portion of the purchase price of land under a contract of sale, when at the time of the receivership and the filing of the original complaint the intervenor had not complied with the contract by tendering deeds. Zuelke v Papke, 185 M 457, 241 NW 577.

In suits by employers to enjoin enforcement of an order of the industrial commission of Minnesota establishing minimum wages for women and minors employed in industry, application of other employees for leave to intervene as plaintiffs may be granted, their position being similar to plaintiff's; and the application of the Minnesota state federation of labor would be granted on condition it conform its intervention to the equity rule regarding interventions. Western Union v Indust. Comm. 24 F. Supp. 370.

One claiming ownership of the land in question may intervene in an action to recover rent from a tenant thereon. Scott v Van Sant, 193 M 465, 258 NW 817.

4. Demurrer

An intervention complaint may be demurred to for its failure to state a cause of action or ground of intervention, as the case may be. Shepard v Murray, 33 M 519, 24 NW 291.

5. Answer

Where the money or property in the hands of a garnishee is claimed by a person not a party to the action, the affirmative in maintaining his right to the property is on the claimant, who must serve the first pleading in the nature of a complaint, setting up his claim, to which the plaintiff may answer. Smith v Barclay, 54 M 47, 55 NW 827; Pierce v Wagner, 64 M 268, 66 NW 977, 67 NW 537.

6. Order of court unnecessary

The statute does not contemplate the necessity of obtaining any prior leave of court to serve and file a complaint, in order to become a party intervenor in an action. Bennett v Whitcomb, 25 M 148, Scott v Van Sant, 193 M 466, 258 NW 817.

7. Remedy for wrong intervention

The objection that the intervenor has no right to intervene may be raised by demurrer. Shepard v Co. of Murray, 33 M 519, 24 NW 291; Siebert v M. & St. L. 52 M 148, 53 NW 1134;

Or for motion for dismissal on the trial. Lewis v Harwood, 28 M 428, 10 NW 586;

Or by motion to strike out the complaint. Dennis v Spencer, 51 M 259, 53 NW 631.

The attempted dismissal of the action by plaintiff, after the complaint in intervention had been served, did not affect the intervenor's rights. Scott v Van Sant, 193 M 466, 258 NW 817.

8. Waiver of objection to intervention

Herring and Briggs came into an action as intervenors, each by a separate pleading, claiming for himself the property the subject of the action, but tendering the same issue as to the facts which constituted plaintiff's alleged cause of action. The deposition taken on the application of Herring, and upon interrogatories propounded by him, and cross-interrogatories propounded by the plaintiff, bearing exclusively upon such issue, was admissible as evidence in favor of Briggs as well as Herring. Lougee v Bray, 42 M 323, 44 NW 194.

In an action to determine adverse claims to real estate the plaintiff claimed under a deed from the defendant while the intervenor claimed under a tax title. In his application for leave to defend the action, the defendant alleged as to plaintiff that he never executed the deed, but did not state a defense as to the tax title. There was no error in the trial court's refusal to allow defendant to defend the action. Holcomb v Stretch, 74 M 234, 76 NW 1132.

The intervenor was permitted to participate in the trial of the action without objection, and no objection was raised by plaintiff for six months, and not until a new trial had been granted, and the cause came on for its second trial. It is held that all objections had been waived. Boxell v Robinson, 82 M 26, 84 NW 635.

The trial court in its discretion properly denied plaintiff's motion for leave to open the judgment for the purpose of answering intervenor's complaint. Scott v Van Sant, 193 M 466, 258 NW 817.

9. Intervenor cannot stop action

An injunction may issue in one equitable action to restrain proceedings in another equitable action in the same court. In an action where the matter in litigation is a fund brought into court to abide the event, a person intervening does not by such action have an adequate remedy that will prevent him from bringing a new action to restrain the withdrawal of the fund from the court. An injunction

in such case, restraining all proceedings in the first action, is too broad. It should only restrain the withdrawal of the fund. Main v Flower, 26 M 479, 5 NW 365.

A person cannot be allowed to make himself a party on paper, to an action pending against others, for the purpose of objecting to a trial thereof or moving to dismiss. Hunt v O'Leary, 84 M 200, 87 NW 611.

An order permitting the debtor to pay into court money claimed by the plaintiff and another is not appealable. Seeling v Deposit Bank, 176 M 11, 222 NW 295.

10. Intervenor liable for statutory costs

An intervenor may be held liable for statutory costs. McKinley v Nat'l Bank, 127 M 212, 149 NW 295; Thief River v Bank, 131 M 193, 154 NW 953.

The state by intervening subjects itself to the jurisdiction of the court, and may be required out of the amount saved to the state to pay certain costs and attorney's fees. Regan v Babcock, 196 M 243, 264 NW 803.

544.14 DEPOSIT WHEN NO ACTION IS BROUGHT.

HISTORY. 1895 c. 329; R.L. 1905 s. 4139; G.S. 1913 s. 7765; G.S. 1923 s. 9262; M.S. 1927 s. 9262.

Where a statute, either in direct terms or from its general tenor, imposes the duty upon a public officer to pay over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one, unless it is limited by the statute imposing the duty, or the conditions of his official bond. In respect to such liability there is no distinction between public and private funds. Northern Pacific v Owens, 86 M 188, 90 NW 371.

Where two or more persons, adverse to each other, make claim to property in possession of a bailee, he may deposit such property with the clerk of the court where the action is pending and if he makes no claim to the money or property he is relieved from further liability. Austin v March, 86 M 232, 90 NW 384.

Plaintiff town voted to deliver its bonds to a railroad company upon condition it would, within a limited time, build a road, ready for passage of its cars to, into, and through the town. It completed its road into but not through the town, within the time limit. Held, not a compliance within the meaning of the rule. Town v Bank, 86 M 385, 90 NW 789.

Before the time for answering expired the defendant bank which had certified the check obtained and served on plaintiff's attorney an order to show cause why defendant should not be allowed to pay the money into court and be dismissed, and the payee of the check, who asserted ownership, be subsituted as defendant. There being no stay of proceedings plaintiff entered judgment by default. The court properly vacated the judgment, permitted defendant to pay the money into court, and directed the payee of the check to plead. Mt. Bank v Hennepin Co. 149 M 367, 183 NW 821.

Garnishment of vendee is not a defense to an action for possession. If the defendant fears danger of double payment, he should petition to deposit the property with the clerk and be dismissed. Lilienthal v Tordoff, 154 M 230, 191 NW 823.

The statute providing that all actions not enumerated in certain sections shall be tried "in the county in which one or more of the defendants reside when the action was begun" does not apply to the special statutory proceeding provided by General Statutes 1913, Section 7765 (Section 544.14), wherein normally there can be no defendants. Midland Nat'l v Hendrickson, 159 M 355, 200 NW 17.

A defeated plaintiff in a replevin action, who has taken the property under his writ and given bond for its return, cannot escape liability on the bond by procuring an ex parte order permitting him to deliver the property into court. Hausen v Thomas, 171 M 101, 213 NW 378.

544.15 SUBSCRIPTION AND VERIFICATION.

HISTORY. R.S. 1851 c. 70 s. 73; 1856 c. 3; P.S. 1858 c. 60 s. 77; G.S. 1866 c. 66 ss. 86, 87; G.S. 1878 c. 66 ss. 103, 104; G.S. 1894 ss. 5244, 5245; R.L. 1905 s. 4142; G.S. 1913 s. 7768; G.S. 1923 s. 9265; M.S. 1927 s. 9265.

See district court rules, Minnesota Statutes 1941, Page 3982.

A pleading not properly verified may be treated as not verified at all. Smith v Mulliken, 2 M 319 (273).

The exclusive remedy for a defective verification or for a failure to verify, is a prompt return of the pleading. Smith v Mulliken, 2 M 319 (273); Folsom v Carli, 5 M 333 (264); Hayward v Grant, 13 M 165 (154); Taylor v Parker, 17 M 469 (447); McMath v Parsons, 26 M 246, 2 NW 703.

The verification may be made before an attorney in the action if he is a notary. Young v Young, 18 M 90 (72).

The court may allow a pleading to be amended by inserting a verification. State ex rel v Cooley, 58 M 514, 60 NW 338; State v Ward, 79 M 362, 82 NW 686.

Admiralty procedure by "libel in rem" is akin to the civil writ of attachment. A libel in rem filed by the United States attorney for seizure and confiscation of alleged adulterated food in interstate commerce requires no verification, in view of the admiralty rule excepting the United States from requirement of verification of pleadings. United States v 935 Cases, 136 F(2d) 523.

544.16 PLEADINGS LIBERALLY CONSTRUED.

HISTORY. R.S. 1851 c. 70 s. 75; P.S. 1858 c. 60 s. 79; G.S. 1866 c. 66 s. 89; G.S. 1878 c. 66 s. 106; G.S. 1894 s. 5247; R.L. 1905 s. 4143; G.S. 1913 s. 7769; G.S. 1923 s. 9266; M.S. 1927 s. 9266.

The allegation that plaintiff "duly assigned" a promissory note to defendant, imports that plaintiff delivered such note to defendant, actually or constructively, and that such assignment was accepted by defendant. Hoag v Mendenhall, 19 M 335 (289).

"Liberally construed with a view to substantial justice between the parties", as against any right acquired under any deed executed before the passage of Laws 1858, Chapter 52, a purchaser at an execution sale acquires only the real interest of the judgment debtor at the time of such sale. Johnson v Robinson, 20 M 189 (169).

Denials on information and belief, and affirmative allegations in the same form are permissible and sufficient in the return to a writ of mandamus. State ex rel v Cooley, 58 M 514, 60 NW 338.

Notwithstanding a liberal interpretation, the complaint in the instant case fails to state a cause of action. Moon v Allen, 82 M 89, 84 NW 654.

The complaint herein alleges facts sufficient to constitute a cause of action, and several causes are not improperly united. Redner v N. Y. Fire, 92 M 306, 99 NW 886.

Where a complaint by its allegation presents two apparent theories of plaintiff's cause of action, one sufficiently, and the other insufficiently, pleaded, the court in construing it on demurrer will adopt the theory which will sustain the action, rather than the one which will defeat it. Casey v American Bridge, 95 M 11, 103 NW 623.

The rule that a pleading, when assailed on general demurrer, is entitled to a liberal construction, applied. Warren v King, 96 M 190, 104 NW 816; Chamber v Wells, 96 M 492, 105 NW 1124.

On a motion for judgment on the pleadings, made at trial, by plaintiff, the allegations of the answer will be liberally construed. Roebuck v Wick, 98 M 130, 107 NW 1054.

The plaintiff's reply, in an action on a death benefit certificate issued by the defendant, a fraternal aid association, considered, and held when liberally construed as required by Revised Laws 1905, Section 4143 (Section 544.16), and in connection with the complaint, not to admit the allegations of the answer as to the non-payment of assessments. Strand v Loyal Americans, 122 M 118, 142 NW 10.

Construing the allegations of the complaint as required by Revised Laws 1905, Section 4143 (Section 544.16), no reply was necessary. McLaughlin v Breckenridge, 122 M 154, 141 NW 1134, 142 NW 134.

On motion for judgment on the pleadings they are to be construed favorably to the party against whom judgment is asked. Homan v Barber, 149 M 421, 184 NW 19.

544.17 IRRELEVANT, REDUNDANT, AND INDEFINITE PLEADINGS.

HISTORY. R.S. 1851 c. 70 s. 76; 1852 Amend. p. 9; P.S. 1858 c. 60 s. 80; G.S. 1866 c. 66 s. 90; G.S. 1878 c. 66 s. 107; G.S. 1894 s. 5248; R.L. 1905 s. 4144; G.S. 1913 s. 7770; G.S. 1923 s. 9267; M.S. 1927 s. 9267.

REDUNDANT PLEADINGS

1. Cases containing redundant matter
2. Remedy

INDEFINITE PLEADINGS

1. General rule
2. Defect must appear on face of pleading
3. Motion papers
4. Remedy
5. Order
6. Action of trial court generally final
7. Motion granted
8. Motion denied

REDUNDANT PLEADINGS

1. Cases containing redundant matter

Redundant matter stricken out on motion. State ex rel v City of Lawe City, 25 M 421; Pye v Bakke, 54 M 107, 55 NW 904; Oliver v Clark, 65 M 277, 68 NW 23; Security Bank v Holmes, 68 M 538, 71 NW 699; Young v Lindquist, 126 M 414, 148 NW 455.

Error to strike out all or part of pleadings. Fraker v St. P. Mpls. 30 M 103, 14 NW 366; Jellett v St. P. Mpls. 30 M 265, 15 NW 237; West v Eureka, 40 M 394, 42 NW 87.

In an action to recover damages for fraud in inducing plaintiffs to enter into a lease of an apartment hotel, allegations as to the insolvency of defendants, followed by a prayer that the money judgment be impressed as a specific lien upon the property, is redundant. Henvit v Keller, 218 M 299, 15 NW(2d) 780.

2. Remedy

The exclusive remedy for redundancy is a motion to strike out made before pleading. Loomis v Youle, 1 M 175 (150); Fish v Berkey, 10 M 199 (161); Cathcart v Peck, 11 M 45 (24).

The refusal of the court to strike out matter alleged to be redundant or irrelevant at the trial is not ground for exception. The motion for such relief should be made before answering. Russell v Chambers, 31 M 54, 16 NW 458.

INDEFINITE PLEADINGS

1. General Rule

No general rule can be laid down except that a pleading is subject to a motion to make more definite and certain only where its allegations are so indefinite that the precise nature of the charge or defense is not apparent. Whelan v Board, 28 M 80, 9 NW 175; Fraker v St. P. Mpls. 30 M 103, 14 NW 306; Freeman v Freeman, 39 M 370, 40 NW 167; Orth v St. P. Mpls. 43 M 208, 45 NW 151; Bowers v Schuler, 54 M 99, 55 NW 817; Schofield v National, 64 M 527, 67 NW 645; Amer. Book v Kingdom, 71 M 363, 73 NW 1089.

A motion to make more definite and certain or to strike out cannot be allowed to take the place of a demurrer. Whelan v Board, 28 M 80, 9 NW 175; Truesdell v Hull, 35 M 468, 29 NW 72; King v Nichols, 53 M 453, 55 NW 604; Amer. Book v Kingdom, 71 M 363, 73 NW 1089.

This complaint contains more than one cause of action not separately stated; and does not conform to the statute in that it is indefinite and uncertain and contains irrelevant matter. Erspamer v Oliver Iron, 179 M 475, 229 NW 583.

The defendant made no motion before the trial to require the complaint to be made more definite and certain, and it is too late to raise it in the appellate court. Conley v Multiscope, 216 F 895.

In action for labor and material furnished in repair of turbine, recoupment defense and counter-claim alleging that turbine was of plaintiff's manufacture, that plaintiff assured defendant turbine was adequate and would function properly with repairs, but that turbine as repaired proved worthless, was sufficient to show nature of defense, and was not objectionable as being indisputedly false, irrelevant, obscure, or conclusions of law. Commander v Westinghouse, 70 F(2d) 469.

2. Defect must appear on face of pleading

The indefiniteness or uncertainty to be relieved against on motion is only such as appears on the face of the pleading itself and not an uncertainty arising from extrinsic facts as to what particular evidence may be produced to support it. Lee v M. & St. L. 34 M 225, 35 NW 399; Todd v. M. & St. L. 37 M 358, 35 NW 5; Bowers v Schuler, 54 M 99, 55 NW 817.

3. Motion papers

The particular allegations objected to should be specifically pointed out in the motion papers. Truesdell v Hull, 35 M 468, 29 NW 72.

The court ordered certain allegations stricken and ordered others "made more definite by specifying and identifying whatever is referred to as either latent or hidden defects, by specifying and identifying with particularity the precise defects claimed in each of the plumbing, elevator, and similar specifications, and also date of discovery of the alleged defects". Henvit v Keller, 218 M 303, 15 NW(2d) 780.

4. Remedy

The objection to a bill that its statements are vague and uncertain, is to their form and manner; and not good on general demurrer. Choteau v Rice, 1 M 106 (83); Mininger v Board, 10 M 133 (106); Dewey v Leonard, 14 M 153 (120); Spottswood v Herrick, 22 M 548; Clark v Chic. Milwaukee, 28 M 69, 9 NW 75; Curtiss v Livingston, 36 M 380, 31 NW 357; Snowberg v Nelson, 43 M 532, 45 NW 1131; Amer. Book v Kingdom, 71 M 363, 73 NW 1089; Crawford v Lillibridge, 89 M 276, 94 NW 868; Smith v Smith, 204 M 255, 283 NW 239.

The exclusive remedy for indefiniteness is by motion to strike out or to make more definite and certain, before pleading. (See district court rules, Minnesota Statutes 1941, Page 3982. While the court may entertain such a motion on the trial, it is then a mere matter of favor and is usually denied. Stickney v Smith, 5 M 486 (390); Barnsback v Reiner, 8 M 59 (37); Cathcart v Peck, 11 M 45 (24); Clark v Chi. Milwaukee, 28 M 69, 9 NW 75; Pugh v Win. & St. P. 29 M 390, 13 NW 189; Madden v M. & St. L. 30 M 453, 16 NW 263; Guthrie v Olson, 32 M 465, 21 NW 557; Peterson v Ruhnke, 46 M 115, 48 NW 768; King v Nichols, 53 M 453, 55 NW 604; Dean v Goddard, 55 M 290, 56 NW 1060.

The objection cannot be raised by request for instruction to disregard. Barnsback v Reiner, 8 M 59 (37);

Nor for motion for judgment on the pleadings. Webb v Bidwell, 15 M 479 (394); Stewart v Erie, 17 M 372 (348); Malone v Minn. Stone, 36 M 325, 31 NW 170;

Nor by objection to the admission of evidence. Allis v Day, 14 M 516 (388); Pugh v Win. & St. P. 29 M 390, 13 NW 189; Peterson v Ruhnke, 46 M 115, 48 NW 768; St. P. Trust v St. P. Chamber, 70 M 486, 73 NW 408.

The objection cannot be raised the first time on appeal. Slater v Olson, 83 M 35, 85 NW 825.

In the absence of statute or rule of court, trial court may, after pleading has been sustained on demurrer, and before answer, entertain motion to make more definite. Lovering v Webb, 108 M 201, 120 NW 688, 121 NW 911.

Where the general allegation of permanent injury, resulting from an assault, is deemed insufficient, the proper practice is to move the court for more specific allegations. Evertson v McKay, 124 M 260, 144 NW 950.

The paragraphs of the complaint were properly stricken since with the exhibits to the complaint and plaintiff's written admissions before the court, no element of a cause of action was stated. Hayward v Union Savings, 194 M 473, 260 NW 868.

5. Order

The order should specify wherein the pleading is to be made more definite and certain and it may direct that the pleading be stricken out without leave to amend being first given. Colter v Greenhagen, 3 M 126 (74); Cathcart v Peck, 11 M 45 (24); Pugh v Win. & St. P. 29 M 390, 13 NW 189.

6. Action of trial court generally final

It is in the discretion of the court to order a pleading made more definite and certain, and unless abused it will not be reviewed. Cathcart v Peck, 11 M 45 (24); Fraker v St. P. & Mpls. 30 M 103, 14 NW 366; Madden v M. & St. L. 30 M 453, 16 NW 263; Lehnertz v M. & St. L. 31 M 219, 17 NW 376; Tierney v M. & St. L. 31 M 234, 17 NW 377; Amer. Book v Kingdom, 71 M 363, 73 NW 1089.

7. Motion granted

A motion to make more definite and certain was granted in the following cases. Colter v Greenhagen, 3 M 126 (74); Cathcart v Peck, 11 M 45 (24); Pugh v Win. & St. P. 29 M 390, 13 NW 89; Madden v M. & St. L. 30 M 453, 16 NW 263; Freeman v Freeman, 39 M 370, 40 NW 167; Young v Young, 126 M 414, 148 NW 455.

The complaint alleged a wanton, wilful and malicious conversion of a tractor and other farm machinery. Allegations stating the circumstances of the conversion, evidentiary of the character of it, were properly stricken as redundant. Halin v Dahlgren, 157 M 100, 195 NW 765.

The order striking out the plaintiff's complaint and disallowing his claim in a mechanic's lien action because of his failure to file a bill of particulars as directed by the court, is sustained. Engebo v Lucius, 160 M 479, 200 NW 637.

8. Motion Denied

A motion to strike out, or to make more definite and certain was denied in the following cases: Whalen v Board, 28 M 80, 9 NW 175; Fraker v St. P. Mpls. 30 M 103, 14 NW 366; Lehnertz v M. & St. L. 31 M 219, 17 NW 376; Tierney v M. & St. L. 34 M 225, 35 NW 399; Truesdell v Hull, 35 M 468, 29 NW 72; Todd v M. & St. L. 37 M 358, 35 NW 5; Orth v St. P & M. 43 M 208, 45 NW 151; Bowers v Schuler, 54 M 99, 55 NW 817; Cullen v Pearson, 191 M 136, 253 NW 117, 254 NW 631.

In the matter of removal to the federal court, the state court has the right to inquire into the existence of facts alleged in the petition in order to determine whether the cause is within the removal statute. Dunn v Burlington, 35 M 73, 27 NW 448.

In an action for an injury to the person, an allegation that plaintiff has been sick, lame, sore and unfitted for manual labor, and has suffered great pain of body and mind, is sufficient to admit evidence that the injury caused "nervous prostration", "spinal irritation", and "torpidity of the liver". Babcock v St. P. Mpls. 36 M 147, 30 NW 449.

The remedy for inconsistent defenses, pleaded by answer, is by motion to compel an election, not by motion to strike. Woost v Herberger, 204 M 192, 283 NW 121.

544.18 AVERMENTS, WHEN DEEMED ADMITTED.

HISTORY. R.S. 1851 c. 70 s. 84; P.S. 1858 c. 60 s. 88; G.S. 1866 c. 66 s. 99; G.S. 1878 c. 66 s. 119; 1881 c. 44 s. 3; G.S. 1894 s. 5261; R.L. 1905 s. 4145; G.S. 1913 s. 7771; G.S. 1923 s. 9268; M.S. 1927 s. 9268.

A defendant, who omits to plead and prove a partial payment of an amount when sued, is concluded by the judgment and cannot thereafter maintain an action to recover such payment. Harbek v Carpenter, 123 M 389, 143 NW 916.

The answer in the instant case does not admit the cause of action alleged in the complaint. Kulberg v Supreme Ruling, 126 M 494, 148 NW 299.

The reply, in averring payment of monthly assessments and refusal of defendant to accept them, admitted the allegations of the answer that monthly payments were not made during the time in question. Abramovitz v Nat'l Council, 134 M 302, 159 NW 624.

Demurrer to a reply having been abolished, an appeal from an order overruling such a demurrer presents no question for review. Sutton v Books, 180 M 417, 231 NW 10.

One of the primary rules of pleading is that where there is a material averment, which is traversable, but which is not traversed by the other party, it is admitted. Pursuant to this principle, if a fact is admitted in the pleadings on which the case is tried, it is, in general, assumed without other evidence to be conclusively established for the purposes of the trial, because a party is estopped by the allegations of his own pleading. Fortune v First Trust, 200 M 367, 274 NW 524.

On defendant's motion for judgment on the pleadings, allegations of complaint and reply are deemed true. Vogt v Ganlisle, 217 M 601, 15 NW(2d) 91.

544.19 JUDGMENT, HOW PLEADED; PROOF.

HISTORY. R.S. 1851 c. 70 s. 77; P.S. 1858 c. 60 s. 81; G.S. 1866 c. 66 s. 91; 1868 c. 83 s. 1; G.S. 1878 c. 66 s. 108; G.S. 1894 s. 5249; R.L. 1905 s. 4146; G.S. 1913 s. 7772; G.S. 1923 s. 9269; M.S. 1927 s. 9269.

The property through foreclosure under power was sold for $2,197.90. The amount actually due was $1,505. The mortgagor may recover the excess. Bailey v Merritt, 7 M 159 (102).

A judgment of a foreign court, complete and regular on its face, is prima facie valid; and may be proved by a copy thereof, duly authenticated by the duly authenticated certificate. A complaint upon such judgment need not allege that the court by which it was rendered had jurisdiction either of the cause or of the parties. Gunn v Peakes, 51 M 536, 53 NW 799.

The defendants in Backus v Burke, before it was decided, brought this action to remove the cloud of a mortgage foreclosure. The district court in Backus v Burke made findings for the defendant, but after the decision in Backus v Burke, on motion, amended its findings and ordered judgment in favor of plaintiffs. Judgment being so entered, defendants appeal. In this appeal, Backus v Burke is adhered to. Backus v Burke, 48 M 260, 51 NW 284; Burke v Backus, 51 M 174, 53 NW 458.

544.20 ORDINANCES AND LOCAL STATUTES.

HISTORY. R.S. 1851 c. 70 s. 79; P.S. 1858 c. 60 s. 83; G.S. 1866 c. 60 s. 93; G.S. 1878 c. 66 s. 110; Ex. 1881 c. 59; G.S. 1878 Vol. 2 (1888 Supp.) c. 66 s. 110; G.S. 1894 ss. 5251, 5252; R.L. 1905 s. 4147; G.S. 1913 s. 7773; G.S. 1923 s. 9270; M.S. 1927 s. 9270.

In a complaint charging violation of a village ordinance it was sufficient if the ordinance was described by its title and date of passage. Fairmont v Meyer, 83 M 456, 86 NW 457.

The defendant was convicted in Minneapolis for selling malt liquors without a license. It was not necessary to allege in the complaint that the malt liquor was intoxicating, or to plead the ordinance, or to conclude the complaint "contrary to the statute". State v Gill, 89 M 502, 95 NW 449.

In a criminal prosecution for violation of a village ordinance, the complaint is sufficient if it refers to the ordinance by number, chapter or section, and it is not necessary to introduce the ordinance in evidence. Minneota v Martin, 124 M 498, 145 NW 383.

In this action for malicious prosecution under an ordinance, plaintiff failed to show probable cause, and the court did not err in granting defendant's motion for a dismissal. Bubner v Reusse, 144 M 450, 175 NW 1005.

Judicial notice will not be taken that a county has, by an election, come under the county local option statute. State v Kusick, 148 M 3, 180 NW 1021.

In a prosecution for the violation of an ordinance relating to location of lumber yards, whatever may be available in correction of alleged arbitrary discrimination, it is not found in defiance of the law by a commission of the prohibited act. State v Rosenstein, 148 M 129, 181 NW 107.

A complaint for violating city ordinance may be made orally and entered in the court record. State v Tworuk, 172 M 130, 214 NW 778.

The allegation that the driver negligently ran the car upon and against the plaintiff is a sufficient charge of actionable negligence in the absence of any motion to make the complaint more definite and certain. The courts take judicial notice of the statutes as well as the common law. Saunders v Yellow Cab, 182 M 62, 233 NW 599.

The district court will take judicial notice of the provisions of the ordinances of the city of St. Paul. St. Paul v Twin City Motor, 189 M 612, 250 NW 572.

An ordinance, being an evidentiary fact in a negligence case, may be proved without having been pleaded. Larson v Lowden, 204 M 80, 282 NW 669.

One appointed and commissioned by the commissioner of public safety of St. Paul as a special police officer, at the request of a justice of the peace to serve process issued out of his court, is entitled to recover fees prescribed by law, and in bringing the action need not plead the ordinance. Russ v Kane, 205 M 187, 285 NW 572.

Failure of the trial judge to admit into evidence a certain ordinance was not erroneous. It being a criminal ordinance there is doubt if it is applicable in the instant case, and, moreover from the manner in which it was pleaded the court knew of its existence by judicial notice. Jedneok v Mpls. General Electric, 212 M 233, 4 NW(2d) 326.

Violation of statute or ordinance as negligence or evidence of negligence. 19 MLR 676.

544.21 INCORPORATION, PLEADING AND PROOF.

HISTORY. R.S. 1851 c. 76 s. 7; P.S. 1858 c. 66 s. 7; G.S. 1866 c. 66 s. 94; 1876 c. 32 s. 1; 1877 c. 25 s. 1; G.S. 1878 c. 66 ss. 111, 112; G.S. 1894 ss. 5253, 5254; R.L. 1905 s. 4148; G.S. 1913 s. 7774; G.S. 1923 s. 9271; M.S. 1927 s. 9271.

This section was designed to simplify the form of pleading when an averment of incorporation is necessary. Dodge v Minn. Plastic, 14 M 49 (39); Howland v Jeuel, 55 M 102, 56 NW 581.

In the following cases the allegation of incorporation was held sufficient. Dodge v Minn. Plastic, 14 M 49 (39); Northern Trust v Jackson, 60 M 116, 61 NW 908.

In the instant case the answer admitted the incorporation. Woodson v Milw. & St. P. 21 M 60.

A denial of incorporation must be specific. Bank v Loyhed, 28 M 396, 10 NW 421; State ex rel v Ames, 31 M 440, 18 NW 277.

Upon the hearing of a petition for the appointment of commissioners to determine the compensation for taking lands for railroad purposes, it is for the petitioner to prove its incorporation. Chicago v Porter, 43 M 527, 46 NW 475.

An affidavit for garnishment need not state that the garnishee is a corporation. Howland v Jeuel, 55 M 102, 56 NW 581.

In an action by or against a corporation, it is not necessary to allege that it is a corporation except in cases where the fact of corporate existence enters into and constitutes a part of the cause of action. Holden v Gt. Western, 69 M 527, 72 NW 805; Hollister v U. S. F. & G. 84 M 254, 87 NW 776.

Failure to allege incorporation is not demurrable. Klemik v Henricksen, 122 M 380, 142 NW 871; Mpls. Plumbing v Arcade, 124 M 317, 145 NW 37; Finch v LeSueur, 128 M 73, 150 NW 226.

In an action on account the fact of incorporation of the defendant is not a material allegation and need not be proved. Morman v Haack, 135 M 126, 160 NW 258; Licensed Dealers v Denton, 144 M 81, 174 NW 526.

General denials of corporate existence. 1 MLR 181.

Proof of corporate existence; best evidence rule. 5 MLR 475.

544.22 PARTNERSHIPS; PROOF AS TO MEMBERS.

HISTORY. 1876 c. 32 ss. 2, 4; G.S. 1878 c. 66 ss. 113, 114; G.S. 1894 ss. 5255, 5256; R.L. 1905 s. 4149; G.S. 1913 s. 7775; G.S. 1923 s. 9272; M.S. 1927 s. 9272.

When one partner purchases real estate with partnership funds, and takes the title in his own name, he will be deemed a trustee holding such title for the benefit of the partnership, and the burden is on him to show why it should not be treated as partnership assets. Hardin v Jamison, 60 M 348, 62 NW 394.

The answer does not admit an allegation in the complaint that the defendants were partners; and under the pleadings and the evidence, the defendants are entitled to have the question of the execution of the contract by them submitted to the jury. McKasy v Huber, 65 M 9, 67 NW 650.

A complaint alleging that three defendants contracted to pay a debt of plaintiff to a third party, which also alleges that one of the defendants had previously contracted to make such payment and had failed to do so, does not improperly unite two causes of action. Klemik v Hendricksen, 122 M 380, 142 NW 871.

544.23 CONDITIONS PRECEDENT.

HISTORY. R.S. 1851 c. 70 s. 78; P.S. 1858 c. 60 s. 82; G.S. 1866 c. 66 s. 92; G.S. 1878 c. 66 s. 109; G.S. 1894 s. 5250; R.L. 1905 s. 4150; G.S. 1913 s. 7776; G.S. 1923 s. 9273; M.S. 1927 s. 9273.

This section is not applicable in case of performance by a stranger. Johnson v Howard, 20 M 370 (322).

An allegation in the complaint that plaintiff "has fully performed all the terms and conditions of said contract to be done and performed by him in accordance therewith", is a sufficient averment of the doing of the things required to render the promise obligatory. Andreas v Holmcombe, 22 M 339; Mosness v German-American, 50 M 341, 52 NW 932; Wood v Robbins, 56 M 48, 57 NW 317; Taylor v Marcum, 60 M 292, 62 NW 330.

This section applies only to the performance of contracts. Biron v Board, 41 M 519, 43 NW 482.

One who makes an absolute guaranty of commercial paper is not relieved because the holder fails to exercise diligence in collecting from the maker or others. Marquette v Doyle, 176 M 529, 224 NW 149.

In a suit upon an express contract to purchase merchandise under an agreement that plaintiff was to have exclusive sales rights, and for an accounting of commissions on sales made by defendant, the trial court was justified in finding no substantial performance on plaintiff's part and hence that it was not entitled to recover commission or damages. Universal v Reel Mop Co. 212 M 473, 4 NW(2d) 86.

Plaintiff in his demand for specific performance alleges full compliance on his part, but further alleges "he has demanded an accounting in order that he might fulfill the terms of the contract". As specific allegations prevail and are controlling over general ones, his petition must be denied. Vogt v Ganlisle, 217 M 606, 15 NW(2d) 91.

Alleging performance of conditions precedent. 5 MLR 147.

544.24 ITEMS OF ACCOUNT, HOW PLEADED.

HISTORY. R.S. 1851 c. 70 s. 74; P.S. 1858 c. 60 s. 78; G.S. 1866 c. 66 s. 88; G.S. 1878 c. 66 s. 105; G.S. 1894 s. 5246; R.L. 1905 s. 4151; G.S. 1913 s. 7777; G.S. 1923 s. 9274; M.S. 1927 s. 9274.

A bill of particulars may be demanded only in actions on an account. In other cases, if a party wishes a more particular statement of the cause of action, he must resort to a motion to make the pleading more definite and certain. Under the code, there is no such general right to demand a bill of particulars as existed under the former system. Board v Smith, 22 M 97; Jones v Northern Trust, 67 M

410, 69 NW 1108; Board v Amer. Loan, 75 M 489, 78 NW 113; Calhoun v Akeley, 82 M 354, 85 NW 170.

The objection that a bill of particulars has not been furnished cannot be raised by answer. The proper remedy for a failure to furnish is to bring to the attention of the court on the trial the fact of the demand having been properly made, and object to the admission of evidence of the account. Tuttle v Wilson, 42 M 233, 44 NW 10; Henry v Bruns, 43 M 295, 45 NW 444; Lonsdale v Oltman, 50 M 52, 52 NW 131; Jones v North. Trust, 67 M 410, 69 NW 1108; Davis v Johnson, 96 M 130, 104 NW 766.

A stipulation to furnish a bill of particulars within a certain time waives the necessity of making the statutory demand and has the same effect. Tuttle v Wilson, 42 M 233, 44 NW 10; Behrens v Kruse, 121 M 90, 140 NW 339.

To bring the account within the statute, it is not necessary that the plaintiff should have entered the items in a book. Lonsdale v Oltman, 50 M 52, 52 NW 131.

Objection to the sufficiency of a bill of particulars cannot be made on the trial. The exclusive remedy is a motion, before trial, for a more specific bill. Mpls. Envelope v Vanstrum, 51 M 512, 53 NW 768; Davis v Johnson, 96 M 130, 104 NW 766.

The term "account" means items of work and labor, of goods sold and delivered, and the like. Jones v Northern Trust, 67 M 410, 69 NW 1108.

A bill of particulars may be demanded in an action for professional services. Davis v Johnson, 96 M 130, 104 NW 766.

Evidence will not be excluded because a bill of particulars is verified by counsel. McGaughey v Wilson, 130 M 196, 153 NW 310.

Where a complaint in an action for board and lodgings sets out the dates between which the same were furnished, the number of meals and the number of lodgings, and the value of each, the failure of plaintiff to furnish a bill on demand, is not presumptively prejudicial to defendant, where such demand does not indicate what information, further than that given by the complaint, defendant desires. Ewing v Kirtland, 132 M 8, 155 NW 617.

Failure to serve a bill of particulars, though demanded, does not defeat a recovery upon an account stated, where the only defense is a general denial. Kelly v Merritt, 147 M 153, 179 NW 897.

The court did not exceed its discretion in permitting plaintiffs to prove their claim for services, although they had been four days late in serving their bill of particulars, nor in refusing to permit defendant to examine plaintiff's accounts with other clients. Selaver v Hedwall, 149 M 304, 184 NW 180.

The right to demand a bill of particulars is limited to suits on account and even in such suits the trial court has some discretion in admitting or excluding evidence for the failure to furnish a bill of particulars. Anderson v Burg, 170 M 53, 212 NW 9.

544.25 PLEADINGS IN SLANDER AND LIBEL.

HISTORY. R.S. 1851 c. 70 ss. 80, 81; P.S. 1858 c. 60 ss. 84, 85; G.S. 1866 c. 66 ss. 95, 96; G.S. 1878 c. 66 ss. 115, 116; G.S. 1894 ss. 5257, 5258; R.L. 1905 s. 4152; G.S. 1913 s. 7778; G.S. 1923 s. 9275; M.S. 1927 s. 9275.

1. Allegation of extinsic facts
2. Mitigating circumstances
3. Generally

1. Allegation of extrinsic facts

The actionable quality of the words, as respects the plaintiff, must be made to appear. Gove v Blethen, 21 M 80; Smith v Coe, 22 M 276; Petsch v Dispatch, 40 M 291, 41 NW 1034; Carlson v Minn. Tribune, 47 M 337, 50 NW 229.

Where the language of a libel as pleaded shows on its face that it was used "of and concerning the plaintiff" in an official capacity or special character, an express averment that it was so used is not necessary. Gove v Blethen, 21 M 80; Stoll v Houde, 34 M 193, 25 NW 63.

This section does not obviate the necessity of alleging that the defamatory words were spoken or published of and concerning the plaintiff. Warner v Lockerby, 28 M 28, 8 NW 879; Carlson v Minn. Tribune, 47 M 337, 50 NW 229.

Where the words amount to a libelous charge against some person, but it is left uncertain as to the application thereof to the plaintiff, such application may be shown by proof of extrinsic facts, and under this section it is not necessary to allege them. Petsch v Dispatch, 47 M 291, 41 NW 1034; Palmerlee v Nottage, 119 M 351, 138 NW 312.

The complaint in the instant case does not negative the averments that the plaintiff was the person intended by it. Cady v Mpls. Times, 58 M 329, 59 NW 1040; Knox v Meehan, 64 M 280, 66 NW 974, 1149.

This section merely dispenses with an inducement to show the application of the language to the plaintiff. It does not dispense with the necessity of averments of extrinsic facts to show the meaning of ambiguous language, and what it was understood to mean. Richmond v Post, 69 M 457, 72 NW 704.

While the party is not required to plead extrinsic facts to show the application to the plaintiff, yet if he does so, and the facts thus pleaded show that it applied to some one else, and not to him, the special allegation controls the general allegation and the complaint is bad. Bank v Day, 73 M 195, 75 NW 1115.

Although a defamatory article appears on its face to refer to the managing agent of a corporation individually, it may be shown by extrinsic facts that it was published of and concerning the corporation. Bank v Day, 73 M 195, 75 NW 1115; Realty Rev. v Farm Stock & Home, 79 M 465, 82 NW 857.

Complaint construed to present by proper allegations two separate causes of action, at least two theories upon which plaintiff might be entitled to relief, and since there was no election at the trial upon which theory plaintiff would proceed he was entitled to recover on either. Bouck v Shere, 125 M 122, 145 NW 808.

Distinguishing Schaefer v Schoenborn, 101 M 67, 111 NW 843, in the instant case it is held that spoken words directly disparaging a person in his calling or employment are slanderous and are actionable per se, and in charging the use of such words special damages need not be alleged. Beek v Nelson, 126 M 10, 147 NW 668.

Where a single injury is suffered in consequence of the wrongful acts of several persons, all who contribute directly to cause the injury, though there was no conspiracy or joint concert of action between them, are jointly or severally liable. Twitchell v Glenwood, 131 M 375, 155 NW 621.

In determining whether allegations in a pleading are privileged as against a claim that they are libelous, the test is whether they are so palpably wanting in relation to the subject matter of the controversy that no reasonable man would doubt their irrelevancy and impropriety. Burgess v Turle, 155 M 479, 193 NW 945; Rolfe v Noyes, 157 M 443, 196 NW 481.

A newspaper article which is not self-evidently defamatory is not libelous per se; and the complaint on such article is defection because it does not plead any extrinsic circumstances showing that the article is libelous in fact. Ten Broeck v Journal, 166 M 173, 207 NW 497.

On demurrer to a complaint for libel, where the publication is not libelous per se and innuendo is resorted to for the purpose of making it appear so in fact, it is for the court to determine whether the construction put forward by the innuendo is permissible. If it is not, if it is forced and unnatural, the demurrer should be sustained. Cleary v Webster, 170 M 420, 212 NW 898.

The allegations in the complaint by way of innuendo and inducement were proper and did not place an unreasonable, forced, or unnatural construction on the language used in the publication. Rudawsky v N. W. Jobbers, 183 M 21, 235 NW 523.

Extrinsic facts necessary to render words libelous. 13 MLR 26.

2. Mitigating circumstances

Prior to the enactment of this statute there was much uncertainty as to when the defendant might prove mitigating circumstances. Hewitt v Pioneer Press, 23 M 178.

Under the statute it is necessary to plead mitigating circumstances in order to prove them. Hewitt v Pioneer Press, 23 M 178; Dennis v Johnson, 47 M 56, 49 NW 383.

A plea in mitigation is not inconsistent with a general denial. Warner v Lockerby, 31 M 421, 18 NW 145, 821.

Order striking out of the answer in an action for libel, as irrelevant, a part of the defense of justification, and the whole of the matter set up in mitigation, affirmed as to the former, and refused as to the latter. Stewart v Minn. Tribune, 41 M 71, 42 NW 787.

It was prejudicial error to exclude evidence of the bad reputation of plaintiff for honesty and integrity prior to the speaking of the slanderous words, but the error in excluding evidence to show defendant's good faith and the absence of malice was not prejudicial, the recovery being limited by the charge of compensatory damages. Dodge v Gilman, 122 M 177, 142 NW 147.

In an action for slander, defendant, under a general denial, may show in diminution of damages that plaintiff's reputation was bad, but this must be shown by evidence of his common repute in the local community and not by specific acts of wrong-doing. Krulic v Petcoff, 122 M 517, 142 NW 897.

3. Generally

In an action to recover damages for an alleged libel, defendant may not counter-claim for an alleged libel, theretofore published by plaintiff of and concerning defendant, as each action is a separate transaction and a separate tort. Skluzacek v Wilby, 195 M 326, 263 NW 95.

There being no inconsistency between them in point of fact, defendant in a slander suit may join with his general denial the plea in justification that, whether he did or did not use the words charged, they spoke the truth. Woost v Herberger, 204 M 192, 283 NW 121.

544.26 ANSWER IN ACTION FOR DISTRAINED ANIMALS.

HISTORY. R.S. 1851 c. 70 s. 82; P.S. 1858 c. 60 s. 86; G.S. 1866 c. 66 s. 97; G.S. 1878 c. 66 s. 117; G.S. 1894 s. 5259; R.L. 1905 s. 4153; G.S. 1913 s. 7779; G.S. 1923 s. 9276; M.S. 1927 s. 9276.

544.27 JOINDER OF CAUSES OF ACTION.

HISTORY. R.S. 1851 c. 70 s. 83; 1853 c. 11 s. 4; P.S. 1858 c. 60 s. 87; G.S. 1866 c. 66 s. 98; G.S. 1878 c. 66 s. 118; G.S. 1894 s. 5260; R.L. 1905 s. 4154; G.S. 1913 s. 7780; G.S. 1923 s. 9277; M.S. 1927 s. 9277.

STATUTORY

1. **Same transaction**
2. **Contracts**
3. **Injuries to person or property**
4. **Injuries to reputation**
5. **Recovery of real property**
6. **Recovery of personal property**
7. **Claim against a trustee**

PRACTICE GENERALLY

1. **Must affect all parties**
2. **Must be consistent**
3. **In equity**
4. **Pleading**
5. **Remedy**
6. **Items not constituting separate causes of action**
7. **Splitting a cause of action**

STATUTORY

1. Same transaction

Subject to the provisos stated in this section, the following causes of action may be united in one pleading:

An action for the sale of mortgaged premises, surrender of a quitclaim deed, and personal judgment against the maker of note for any deficiency. Nichols v Randall, 5 M 304 (240);

An action for the recovery of the amount due on a note and for delivery and canceling a note and mortgage forming a part of the same transaction. Montgomery v McEwen, 7 M 351 (276);

An action against a trustee as such and against him personally. Fish v Berkey, 10 M 199 (161);

An action for an accounting, the appointing of a receiver, and to set aside a conveyance. Palmer v Tyler, 15 M 106 (81);

An action for the possession of a railroad, the appointment of a receiver, the payment of money, and an accounting. First Div. v Rice, 25 M 278;

A cause of action for tort and a cause of action on contract arising out of the same transaction or connected with the same subject of action. Gertler v Jackson, 26 M 82, 1 NW 579; Humphrey v Merriam, 37 M 502, 35 NW 365; Northwestern v Prior, 68 M 95, 70 NW 869;

An action to compel conveyance from legal to equitable owner and for an accounting. Win. & St. P. v St. P. & S. C. 26 M 179, 2 NW 489;

An action by a principal against his agent for conversion and an accounting. Greenleaf v Egan, 30 M 316, 15 NW 254;

An action to foreclose and for an accounting. Churchill v Proctor, 31 M 129, 16 NW 694;

An action for several acts of conspiracy. Jones v Morrison, 31 M 140, 16 NW 854;

An action for an injunction and for damages. Little v Millford, 31 M 173, 17 NW 282;

An action by a parent for damages resulting from injury to child with claim for sickness and suffering of child. Mulvehill v Bates, 31 M 364, 17 NW 959;

An action for money wrongfully withheld and for money wrongfully or fraudulently exacted and paid. Kraemer v Deustermann, 37 M 469, 35 NW 276;

An action for an accounting and to wind up a copartnership. Shackleton v Kneisley, 48 M 451, 51 NW 470;

An action for reformation and for specific performance. Ham v Johnson, 51 M 105, 52 NW 1080;

An action for injuries from noxious vapors from a cesspool in an excavation and for damages from depositing dirt from such excavation. Aldrich v Wetmore, 56 M 20, 57 NW 221;

An action for the appointment of a receiver, collection of rents, and the application of same on a personal judgment. Whiting v Clugston, 73 M 6, 75 NW 759;

An action by a trustee in bankruptcy to set aside a preferential payment and a fraudulent transfer of property by the bankrupt. French v Smith, 81 M 341, 84 NW 44;

An action to abate a nuisance and for an injunction. Albert Lea v Knotvold, 89 M 480, 95 NW 309;

A cause of action to bring certain tracts of defendant's property, said to have been fraudulently conveyed, within reach of the judgment, and for the purpose of satisfying it, and also to bring a part of an alleged homestead within reach of the same judgment. Hunt v Dean, 91 M 96, 97 NW 574;

An action for the recovery of money lost at a game of cards. Parsons v Wilson, 94 M 416, 103 NW 163.

When several acts of negligence occur in giving rise to a single right of action, they may be united in the same complaint. Mayberry v Northern Pacific, 100 M 79, 110 NW 356.

A cause of action for unpaid rent under a lease, and one for damages by act of tenant in setting fire to building in violation of covenants, may be united. Ree v Bernstein, 103 M 66, 114 NW 261.

Several causes of action arising out of the same contract or transaction and not inconsistent, may be united where they affect all parties to the action, though all be not affected alike. Pleins v Wachenheimer, 108 M 342, 122 NW 166.

An action to recover for damages caused by concurrent negligence of two defendants. Petcoff v St. P. City Ry. 124 M 531, 144 NW 474; Price v Minn. Dakota & Western, 130 M 229, 153 NW 532.

Cases where causes of action were improperly joined. Moriarty v Almich, 141 M 247, 169 NW 798; State v Randall, 143 M 203, 173 NW 425.

If a complaint states several causes of action not inconsistent with each other, but improperly joined contrary to the provision of General Statutes 1913, Section 7780 (section 544.27), defendant can take advantage of such misjoinder only by demurrer or answer. Canellos v Zatalis, 145 M 292, 177 NW 133.

A complaint against two defendants, alleging that their negligence caused an injury to plaintiff, is bad as against a demurrer for misjoinder of causes, where it appears upon the face of the pleading that the acts of negligence were separate torts, not concurrent in point of time or effect. *McGannon v C. & N. W.* 160 M 145, 199 NW 894.

All the officers concerned in the illegal expenditure of money and the sureties on their official bonds may be joined as parties defendant. Although the cause of action against the officers sounds in tort, and against the sureties based on contract, both spring from the same transaction and may be united. Burns v Van Buskirk, 163 M 48, 203 NW 608.

An automobile owner and insurer cannot be joined in a single action where the policy is the ordinary liability policy. Charlton v Van Etten, 55 F(2d) 418.

There was but one equitable cause of action where stockholders sued to annul an unlawful stock issue, through which was made an unlawful sale of assets. The test in an equitable action is whether they could have been united in one bill under the old practice. Bacich v Northland, 173 M 538, 217 NW 930.

While the interests of a contractor, and an assignee of part of the earnings in a contract for drilling are distinct and severable, still both are concerned in the breach of the same contract, and may be joint plaintiffs. Johnson v Wright, 175 M 236, 220 NW 946.

The owner of a hardware store and an occupant of a homestead join in this action to uncover damages caused by explosion of dynamite by defendant. Held, the complaint contained more than one cause of action not separately stated, and did not otherwise conform to the statute. Erspamer v Oliver Iron, 179 M 475, 229 NW 583.

In an unlawful detainer action defendant gave two appeal and stay bonds, one on appeal from the justice court, and the other on appeal to the supreme court. The two sets of sureties were so affected as to justify a joinder of the obligee's causes of action in one suit. Roehrs v Thompson, 185 M 154, 240 NW 111.

Trial court did not err in consolidating action for cancelation of contract brought by appellant and actions to enjoin cancelation proceedings, and for specific performance brought by respondents. Union Central v Schultz, 199 M 131, 271 NW 249.

Cause of action for damages arising out of a breach of statute intended for benefit of plaintiff against local brokerage association and one copartnership are properly joined with action against a second copartnership on its undertaking to account to plaintiff for stocks and money delivered by plaintiff to association in part payment of bucketed orders and delivered to second copartnership on transfer of association's account from first copartnership, received by second copartnership with full knowledge. Kaiser v Butchart, 200 M 545, 274 NW 680.

It was not error to permit the amendment of the complaint by the addition of two causes of action for conversion of corporate property by officers who were already defendants and who were accused in the original complaint of converting corporate assets by means of excessive salaries. Keough v St. P. Milk, 205 M 111, 285 NW 809.

In equity causes of action may be joined if they might have been included in a bill in equity under the old practice without making them multifarious. A bill in equity is not multifarious where one general right only is claimed by it, though the defendants have only separate interests, indistinct questions which arise out of or are connected with such right. Lind v Johnson, 204 M 30, 282 NW 661.

Where two causes of action are pleaded but the facts in each are the same there is only one cause to be heard and determined. Smith v Smith, 204 M 255, 283 NW 239.

2. Contracts

Where it is admitted that plaintiff is entitled to compensation for services, and the controversy is as to whether the amount has been fixed by contract, and, if not so fixed, as to the reasonable value of such services, it would not be error to deny a motion that plaintiff be required to elect, as it is desirable to settle the entire controversy in one action. Wetmore v Thurman, 121 M 352, 141 NW 481.

A complaint alleging that three defendants contracted to pay a debt of plaintiff to a third party, which also alleges that one of the defendants had previously contracted to make such payment and failed to do so, does not improperly unite two causes of action. Klemik v Henricksen, 122 M 380, 142 NW 871.

In a proper case, the plaintiff may declare on an express contract and also in a second cause of action on a subsequent, different contract covering the same claim or transaction and implied as of fact. Benedict v Pfunder, 183 M 396, 237 NW 2.

3. Injuries to persons or property

Where several causes of action, which may be properly joined, are united in a complaint, and are not stated separately, the remedy is not by motion to require to elect upon which of the several causes he will rely, but by motion to make definite and certain, or by motion to compel a separate statement of the several causes of action. Craig v Cook, 28 M 232, 9 NW 712.

A charge against the defendant for negligence in throwing a belt may be properly united with a charge of negligence against the owner of the machinery for failure to guard as required by statute. Jackson v Orth, 121 M 461, 141 NW 518.

A complaint against two defendants, alleging that their concurrent negligence caused an injury to the plaintiff, is good against a demurrer for misjoinder of causes, though the liability of one defendant rests upon federal employers liability act, and the other upon the common law. Doyle v St. P. Union, 134 M 461, 159 NW 1081.

A demurrer for misjoinder was properly sustained to a complaint by husband and wife, joint owners of a home, to recover for depreciation of the value of the use thereof by defendant's wrongful maintenance of a nuisance upon adjacent property, and by the husband alone to recover damages sustained by his family from the noxious odors the members thereof were subjected to from the same nuisance. King v Socony, 207 M 573, 292 NW 198.

Where the record does not clearly disclose whether the decision of the industrial commission was based upon a misapplication of the law to undisputed facts or upon inference drawn from circumstances casting doubt upon otherwise undisputed facts, the case must be remanded for hearing de novo. Caddy v Maturi, 217 M 207, 14 NW(2d) 393.

4. Injuries to reputation

5. Recovery of real property

A cause of action to recover possession of real estate, and a cause of action to recover the value of the use while occupied by defendant, may be united in the same action. Armstrong v Hinds, 8 M 254 (221); Merrill v Dearing, 22 M 376; Lord v Dearing, 24 M 110.

A cause of action for damages for withholding one piece of real estate cannot be united with a cause of action to recover possession of another, with damages for detaining the same. Holmes v Williams, 16 M 164 (146).

A recovery for use and occupation, in an action to recover the possession of real property, is a bar to a subsequent action for injury to the estate during the same period of occupation. Pierro v St. P. & N. 37 M 314, 34 NW 38.

6. Recovery of personal property

7. Claim against a trustee

A cause of action against a trustee, as such, may be joined with one against him personally, if they relate to the same transaction, or transactions, connected with the same subject of action. Fish v Berkey, 10 M 199 (161).

PRACTICE GENERALLY

1. Must affect all parties

Where a conveyance absolute on its face is given as security, and a quitclaim deed back placed in escrow to be delivered to the mortgagor on payment of a stipulated account; upon default an action will lie against both the maker of the note and the escrow agent. Nichols v Randall, 5 M 304 (240).

A cause of action against a defendant for the value of goods sold, and a cause of action against a third person on a promise to pay said debt to the plaintiffs, are improperly joined. Sanders v Clason, 13 M 379 (352).

A person making an excavation and the city of St. Paul under its charter may each be liable to plaintiff for an injury, yet they are not jointly liable. Trowbridge v Forepaugh, 14 M 133 (100); Berg v Stanhope, 43 M 176, 45 NW 15; Langevin v City of St. P. 49 M 189, 51 NW 817.

In an action by a husband and wife to avoid usurious securities given by them upon a loan made to the wife, it is improper to join a cause of action by the wife alone to recover back money paid by her upon the usurious contract. Andreson v Scandia Bank, 53 M 191, 54 NW 1062.

The complaint is not demurrable on the ground that the different causes of action are improperly united, merely because it sets out the collateral note of the mortgagor, which was assigned to the plaintiff, and also the note of the principal debtor held by plaintiff, and demands relief against both. Bank v Lambert, 63 M 263, 65 NW 451.

A cause of action against the officers of the corporation for their fraud, unfaithfulness, or dishonesty, resulting in loss to the particular creditor, cannot properly be joined in an action to enforce the constitutional liability of stockholders. Sturdevant v Mast, 66 M 437, 69 NW 324.

The case of one may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness cannot be allowed to prevail. Foster v Landon, 71 M 494, 74 NW 281.

Although the numerous purchasers suffered the same fraud, the causes of action are improperly joined. Hanna v Duxbury, 94 M 8, 101 NW 971.

The test in an equitable action, whether several causes of action are improperly united, is whether all matters alleged therein could have been included in a bill in equity under the old practice without making it multifarious. State ex rel v Knife Falls, 96 M 194, 104 NW 817; Lind v Johnson, 204 M 30, 282 NW 661.

All persons whose property is affected by a nuisance, though they own the property in severalty, may unite in an action to abate the nuisance; but they cannot join with a cause of action for that relief. Their several claims for damages. Following Grant v Schmidt, 22 M 1, and distinguishing Gilbert v Book, 86 M 365, 90 NW 767. Nahte v Hansen, 106 M 365, 119 NW 55.

The parties need not all be affected alike. Pleins v Wachenheimer, 108 M 342, 122 NW 166.

A cause of action against one in his representative capacity cannot be joined in the same complaint with one against him in his individual capacity. Jewell v Jewell, 215 M 190, 9 NW(2d) 513.

In a representative suit for conspiracy to defraud corporation wherein first cause of action could not affect two particular defendants, and second and third

cause of action could not affect a third defendant there was a misjoinder. Holtman v Crookston Milling Co. 217 M 303, 14 NW(2d) 470.

2. Must be consistent

Where, in a suit for services, the complaint sets up a special contract as to price, and also alleges the value, it is in the sound discretion of the court to require the plaintiff to elect under which allegation he will proceed. Plummer v Mold, 22 M 15; Wagner v Nagel, 33 M 348, 23 NW 308.

Where one cause of action is for an accounting of rents and profits between tenants in common, and another cause is for rental at an agreed price, the plaintiff is properly compelled to elect. Hause v Hause, 29 M 252, 13 NW 43.

A recovery of a judgment by default by the vendor against the vendee, upon notes given for the price of property, is not an adjudication upon the issue of breach of warranty and does not bar recovery. Thoreson v Minnepolis, 29 M 341, 13 NW 156.

Where inconsistent causes of action are joined, and the court finds in plaintiff's favor on one cause, ignoring the other, it will be presumed that there was an election. Davis v Severance, 49 M 528, 52 NW 140.

Although separately stated causes of action may arise out of transactions connected with the same subject of action, they cannot be united in the complaint, if inconsistent. Vaule v Steenerson, 63 M 110, 65 NW 257.

In a complaint where equitable jurisdiction is invoked, to which incidental claims are subsidiary, although the latter may disclose separate and distinct causes of action, they are not improperly joined. Anderson v Dyer, 94 M 30, 101 NW 1061.

3. In equity

In a complaint in which equitable jurisdiction is invoked, to which incidental claims are subsidiary, although the latter may disclose separate and distinct causes of action, they are not improperly joined. Anderson v Dyer, 94 M 30, 101 NW 1061.

Plaintiff having six policies of insurance in as many companies, sustained a partial loss. He may properly join them all in one action and have the liability of each determined. Fegelson v Niagara Fire, 94 M 486, 103 NW 495.

An equity bill is not multifarious where one general right only is claimed by it, although the defendants have only separate interests in distinct questions which arise out of, or are connected with, such right. State ex rel v Knife Falls, 96 M 194, 104 NW 817.

In the instant case, an action for relief on account of alleged fraud in connection with a contract for the purchase of land, the several causes of action were not improperly united. Wilson v Youngman, 96 M 288, 104 NW 946.

Where a state bank has become insolvent and taken charge of by the superintendment of banks, his procedure furnishes an adequate remedy at law, so that a suit in equity by 193 depositors for the benefit of themselves and all others, to recover against the directors for malfeasance, will not be entertained. Frederic v McRae, 157 M 366, 196 NW 270.

4. Pleading

Where one of two causes of action is sufficiently pleaded, and the other not, there is no misjoinder. Howe v Coats, 90 M 508, 97 NW 129.

In slander action against principal and agent, plaintiff is entitled to allege composite ultimate facts containing elements of fact and law. Simon v Stangl, 54 F(2d) 74.

Recovery upon either general statute or railway statute under one complaint. 10 MLR 422.

5. Remedy

When the objection is raised for the first time on the trial, it is discretionary with the court to compel an election, Hawley v Wilkinson, 18 M 525 (468); Plummer v Mold, 22 M 15; Wagner v Nagel, 33 M 348, 23 NW 308; Rhodes v Pray, 36 M 392, 32 NW 86; Davis v Severance, 49 M 528, 52 NW 140.

Objection to a complaint for misjoinder of causes of action is waived unless taken by demurrer or answer. Gardner v Kellogg, 23 M 463; James v Wilder, 25 M 305; Mulvehill v Bates, 31 M 364, 17 NW 959; Densmore v Shepard, 46 M 54, 48 NW 528, 681; Campbell v Ry. Transfer, 95 M 375, 104 NW 547.

6. Items not constituting separate causes of action

An action to recover damages arising from the negligence of an expert employed to audit certain accounts is founded on breach of contract, and not tort. The cause of action is the breach of the contract, and the different items of damage resulting do not constitute separate causes of action. City of East Grand Forks v Steele, 121 M 296, 141 NW 181.

The refusal to require plaintiff to elect between different causes of action which in fact were tried as one, even if error, was without prejudice to the defendant. Johnson v Wild Rice, 127 M 490, 150 NW 218.

Where the fact that several causes of action are improperly united appears upon the face of the complaint, the objection must be taken by demurrer or it is waived. Stolorow v Nat'l Council, 132 M 27, 155 NW 756.

7. Splitting a cause of action

An issue as to negligence having been tried and determined in a previous damage suit, under the facts here it was res judicata, and the court properly withdrew that question from the jury. There was no splitting of a cause of action. Adams v City of Duluth, 175 M 247, 221 NW 8.

A single cause of action cannot be split or divided and independent actions brought upon each part. All items of damage resulting from a single tort from an indivisible cause of action must be included in one suit. Myhre v Park, 193 M 290, 258 NW 515.

If for the same wrong one is liable both for breach of contract and for conversion, the injured party may elect his remedy. If he sues for tort and there have been successive and distinct conversions, he has the right to sue upon them separately as independent causes of action. Lloyd v Farmers Coop. 197 M 387, 267 NW 204.

544.28 UNKNOWN DEFENDANT, HOW DESIGNATED.

HISTORY. R.S. 1851 c. 70 s. 91; P.S. 1858 c. 60 s. 95; G.S. 1866 c. 66 s. 106; G.S. 1878 c. 66 s. 126; G.S. 1894 s. 5268; R.L. 1905 s. 4155; G.S. 1913 s. 7781; G.S. 1923 s. 9278; M.S. 1927 s. 9278.

In an action against associates in business by common name under which they transact such business, an individual judgment against the associates personally served with the summons is not void for want of jurisdiction. Gale v Townsend, 45 M 357, 47 NW 1064.

In law, a married woman's name consists of her Christian name and her husband's surname, the prefix "Mrs." being a mere title. If ignorant of her name, the plaintiff in an action should allege that fact, and, when her true name is ascertained, it should be substituted. Brown v Reinke, 159 M 458, 199 NW 235.

544.29 AMENDMENTS OF COURSE, AND AFTER DEMURRER.

HISTORY. R.S. 1851 c. 70 s. 89; 1852 Amend. p. 9; P.S. 1858 c. 60 s. 93; G.S. 1866 c. 66 s. 103; 1867 c. 62 s. 6; G.S. 1878 c. 66 s. 123; G.S. 1894 s. 5265; R.L. 1905 s. 4156; G.S. 1913 s. 7782; G.S. 1923 s. 9279; M.S. 1927 s. 9279.

1. Amendment and amendment of course

2. Pleading over

3. Amendment after demurrer

1. Amendment and amendment of course

Notice of trial was not avoided by a subsequent amendment of the pleadings, but the case stood for trial, subject to the power of the court to continue for cause. Griggs v Edelbrock, 59 M 486, 61 NW 555.

In an action for services the answer put in issue the value of the work. Within 20 days the plaintiff, by permission of the court, amended by setting up three separate causes of action amounting to the amount claimed in the original complaint. There was no error. Swank v Barnum, 63 M 447, 65 NW 722.

Where a new complaint is filed amending the original complaint, after answer, the answer may stand as the answer to the amended complaint, and the defendant will not be in default except as to new matter not put in the previous answer. Kelly v Anderson, 156 M 71, 194 NW 102.

An amended pleading takes the place of the original. Bohr v Union Fire, 167 M 479, 209 NW 490.

2. Pleading over

A defendant by answering, after his demurrer to the complaint is overruled, waives his exception to the decision on his demurrer. Coit v Waples, 1 M 134 (110); Thompson v Ellenz, 58 M 301, 59 NW 1023; Cook v Kittson, 68 M 474, 71 NW 670.

The court may impose terms. Denton v Scully, 26 M 325, 4 NW 41; Flaherty v M. & St. L. 39 M 328, 40 NW 160.

It is discretionary with the court to allow a party to withdraw his demurrer and plead over. It should ordinarily be allowed as a matter of course. Flaherty v M. & St. L. 39 M 328, 40 NW 160; Potter v Holmes, 74 M 508, 77 NW 416.

If the demurrant desires to plead over, he should ask leave. Potter v Holmes, 72 M 153, 75 NW 591.

3. Amendment after demurrer

By amending his pleading after demurrer, a party waives his exception to the decision on demurrer. Becker v Sandusky, 1 M 311 (243).

The supreme court will rarely allow an amendment upon sustaining a demurrer, but will leave it to the trial court to grant or refuse leave to amend after the cause is remanded. Farley v Kittson, 27 M 102, 6 NW 450, 7 NW 267; Haven v Place, 28 M 551, 11 NW 117.

Unless the decision on demurrer involves plaintiff's right of action under any complaint which the facts would warrant, it is ordinarily advisable for him to amend his complaint to conform to the views of the court rather than to appeal. Benton v Schulte, 31 M 312, 17 NW 621.

The right to amend a pleading after demurrer thereto has been determined is vested in the discretion of the trial court. There has been no abuse of that discretion. Ferrier v McCabe, 129 M 342, 152 NW 734.

544.30 AMENDMENT BY ORDER.

HISTORY. R.S. 1851 c. 70 s. 90; P.S. 1858 c. 60 s. 94; G.S. 1866 c. 66 s. 104; G.S. 1878 c. 66 s. 124; G.S. 1894 s. 5266; R.L. 1905 s. 4157; G.S. 1913 s. 7783; G.S. 1923 s. 9280; M.S. 1927 s. 9280.

1. **Matter of discretion**
2. **Amendments on trial**
3. **Amendments before trial**
4. **Amendments after trial**
5. **Amendments conforming pleadings to the proof**
6. **Construed and applied liberally**
7. **In furtherance of justice**
8. **Must be material**
9. **Terms**
10. **Motion**
11. **Service of order**
12. **Allowable amendment of complaint**
13. **Allowable amendment of answer**

14. Changing action ex contractu to ex delicto
15. Amendment of parties
16. Amendment increasing damages
17. Amendment after verdict
18. Amendment after judgment
19. Amendment after appeal
20. Application of statute
21. Amendment to an answer

1. Matter of discretion

The amendment of pleadings is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion manifestly prejudicial to the appellant. Fowler v Atkinson, 5 M 505 (399); White v Culver, 10 M 192 (155); Holmes v Campbell, 13 M 66 (58); City of Winona v Minn. Ry. 29 M 68, 11 NW 228; Marshall v Hintz, 156 M 301, 194 NW 772; Schultz v Thompson, 156 M 357, 194 NW 884; Barrett v Smith, 183 M 431, 237 NW 15; Agric. Credit v Scandia Bank, 184 M 68, 237 NW 823; Bowen v Bankers Life, 185 M 35, 239 NW 774; Mpls. Svgs. v Yolton, 193 M 632, 259 NW 382.

The correspondence between the parties established a contract of agency, and the trial court erred in denying the defendant's application to amend the answer. Rice v Longfellow, 78 M 394, 81 NW 207.

It is within the jurisdiction of the court to direct that the reply to an answer shall stand as reply to an amended answer which defendant was granted leave to serve. Manufacturers v Moshier, 177 M 388, 225 NW 283.

Mandamus is not the proper remedy to review an order of the trial court denying a motion to amend a pleading. Desjardins v Emeralite, 189 M 356, 249 NW 576.

The court did not abuse judicial discretion in refusing plaintiff leave to amend the complaint by alleging a new ground of liability, especially since such ground is without merit. Abar v Ramsey Motor, 195 M 597, 263 NW 917.

An order amending the complaint so as to make the city a party plaintiff instead of a party defendant was not an order involving the merits of the cause of action and is not appealable; neither is the order denying the motion to vacate the order granting the amendment. Gilmore v City of Mankato, 198 M 148, 269 NW 113.

Amendment of pleadings on the trial is a matter of discretion with the trial court, and the party objecting has the burden of proving he has been prejudiced, and the action of the trial court will not be reversed on appeal except for a clear abuse of discretion. Raspler v Seng, 215 M 596, 11 NW(2d) 440.

A contract is sufficiently certain so that it may be enforced if it can be made certain by reformation; and reformation and specific performance may be had in the same action. In the instant case the discretion of the court in allowing the amendments was not abused. Pettyjohn v Bowler, 219 M 55, 17 NW(2d) 83.

Amendment under wrongful death statutes. 10 MLR 424.

Amendment and aider of pleadings. 12 MLR 97, 103.

Amendments in cases relating to the obtaining of goods under false pretenses. 25 MLR 791.

2. Amendments on trial

An application at the trial to amend an answer so as to lay the foundation for reformation of the written contract sued on, is in the discretion of the court; and will not be reviewed on appeal if there is no abuse of discretion. Morrison v Lovejoy, 6 M 319 (224); Brazil v Moran, 8 M 236 (205); Butler v Paine, 8 M 324 (284); White v Culver, 10 M 192 (155); Rau v Minn. Valley, 13 M 442 (407); Kiefer v Rogers, 19 M 32 (14); Osborne v Williams, 37 M 507, 35 NW 371; Iltis v Chic. Milw. 40 M 273, 41 NW 1040; Bitzer v Campbell, 47 M 221, 49 NW 691; Stensgaard v St. P. Real Estate, 50 M 429, 52 NW 910; Kennedy v McQuaid, 56 M 450, 58 NW

35; Trainor v Sieloff, 62 M 420, 64 NW 915; Luse v Reed, 63 M 5, 65 NW 91; Niven v Craig, 63 M 20, 65 NW 86; St. P. Trust v St. P. Chamber, 70 M 486, 73 NW 408; Boen v Evans, 72 M 169, 75 NW 116; Fidelity Mut. v Germania, 74 M 154, 76 NW 968; Board v Amer. Loan, 75 M 489, 78 NW 113; Porter v Win. & Dakota, 78 M 210, 80 NW 965; Dennis v Pabst, 80 M 15, 82 NW 978; Brown v Radabaugh, 84 M 347, 87 NW 937; Bayard v Palace, 85 M 363, 88 NW 998; Davis v Hamilton, 88 M 64, 92 NW 512; Foster v Gordon, 96 M 142, 104 NW 765; Gracz v Anderson, 104 M 476, 116 NW 1116; Klaus v Thompson, 131 M 10, 154 NW 508; Strand v Chic. Gt. Western, 147 M 1, 179 NW 369; Johnson v Elmborg, 165 M 67, 205 NW 628.

When, in the course of trial, court grants motion to amend complaint, by tendering new issues, defendant cannot be required to disclose by affidavit names of witnesses nor what evidence he desires to produce, as a condition to continuance. Dispatch v Employers Liability, 105 M 384, 117 NW 506, 118 NW 152.

There was no abuse of discretion in allowing an amendment of the complaint at the time of trial. Klaysmot v Village of Hibbing, 172 M 524, 215 NW 851; Peterson v Parviaineu, 174 M 297, 219 NW 180; Greenwood v Jack, 175 M 216, 220 NW 565; Garedply v Chic. Milwau. 176 M 331, 223 NW 605; Sigvertsen v Manley, 182 M 387, 234 NW 688; Nygaard v Moeser, 183 M 388, 237 NW 7; Gilmore v Douglas County, 187 M 132, 244 NW 557.

Failure to plead as affirmative defense of settlement and release until the trial was well advanced, is disapproved, but the allowance of the amendment presents no abuse of discretion. Barrett v Shambeau, 187 M 430, 245 NW 830 .

Any error in permitting an amendment to a complaint is eliminated by subsequently striking out the amendment and taking from the jury all matters embraced in it. Baker v City of So. St. Paul, 202 M 491, 279 NW 211.

Just before the case was closed, plaintiff made a motion for an amendment, which in its discretion the court granted. Testimony under the amendment was prejudicial and a new trial granted. Ross v Duluth, Missabe, 203 M 312, 281 NW 76, 271.

Inconsistent defenses sought to be interposed by a defendant require an election, and upon refusal to make such election the court was justified in vacating a previous order permitting an amendment which sought to set up a defense inconsistent with the one interposed in the original answer. Schochet v General Insurance, 204 M 610, 284 NW 886.

3. Amendments before trial

Application for amendment of pleadings are addressed to the discretion of the court. The question whether the court has abused its discretion in allowing amendments before trial may be reviewed upon appeal from the judgment. Fowler v Atkinson, 5 M 505 (399); Win. v Minn. Ry. 29 M 68, 11 NW 228.

The trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint, and for leave to bring in a third party as defendant. Boen v Evans, 72 M 169, 75 NW 116.

4. Amendment after trial

The court may in its discretion permit an amendment after trial. City of Winona v Minn. Ry. 29 M 68, 11 NW 228; Burke v Baldwin, 54 M 514, 56 NW 173; Nichols v Dedrick, 61 M 513, 63 NW 1110; Lamm v Armstrong, 95 M 434, 104 NW 304; Wasser v Western Land, 97 M 460, 107 NW 160; Myrick v Purcell, 99 M 457, 109 NW 995; Hall v Skahen, 101 M 460, 112 NW 865.

There was no abuse of discretion in refusing leave to file a proposed amended answer alleging a counter-claim after the trial was concluded. Gibbons v Hausch, 185 M 290, 240 NW 901.

5. Amendments conforming pleadings to the proof

Where evidence is received, and facts established, the pleadings may be amended to conform to the proof, or the omission may be disregarded. Cairncross v McGrann, 37 M 130, 33 NW 548; Erickson v Bennett, 39 M 326, 40 NW 157; Almich v Downey, 45 M 460, 48 NW 197; Dougan v Turner, 51 M 330, 53 NW 650; Cun-

ningham v Mpls. Stockyds. 59 M 325, 61 NW 329; Nichols v Dedrick, 61 M 513, 63 NW 1110; Adams v Castle, 64 M 505, 67 NW 637; First Nat'l v Strait, 71 M 69, 73 NW 645; Aultman v O'Dowd, 73 M 58, 75 NW 756; Bd. v Amer. Loan, 75 M 489, 78 NW 113; Klein v Funk, 82 M 3, 84 NW 460; Forman v Saunders, 92 M 369, 100 NW 93; Briggs v Rutherford, 94 M 23, 101 NW 954; Maul v Steele, 95 M 292, 104 NW 4; English v Mpls. & St. Paul, 96 M 213, 104 NW 886; Gracz v Anderson, 104 M 476, 116 NW 1116.

Trial court should freely permit amendments to complaint to conform to the proof. Carlson v Lesselyoung, 163 M 517, 204 NW 326; Central State v Royal Indemnity, 167 M 494, 210 NW 66; Short v Gt. N. 179 M 20, 228 NW 440; Erickson v Equit. Life, 193 M 269, 258 NW 736; Birdsall v Dul. Superior, 197 M 411, 267 NW 363; Dight v Palladium, 201 M 247, 276 NW 3.

A counter-claim may be amended to conform to proof adduced. Lee v Woolsey, 187 M 659, 246 NW 25.

Where the defendant in his pleadings admitted the execution of a contract, the court rightfully refused to permit an amendment to the answer setting up a denial. Fisher v Rodohl, 196 M 409, 265 NW 43.

The court did not abuse its discretion in denying defendant a right to amend his answer, the request not being made until on motion for a new trial. Davis v Reichert, 197 M 287, 266 NW 855.

6. Construed and applied liberally

Amendments of pleadings should be allowed with liberality where justice can be promoted, especially where a meritorious defense is proposed. Cool v Kelly, 85 M 359, 88 NW 988.

The summons in an action to foreclose a mechanic's lien will not be set aside for defects which do not affect or prejudice the substantial rights of the defendant. Dressel v Brill, 168 M 99, 209 NW 868.

7. In furtherance of justice

The court may take into account the nature of the defense in determining in the exercise of its judicial discretion, whether it should grant leave to amend a pleading by setting it up. Mpls. v Firemen's Ins. 62 M 315, 64 NW 902.

8. Must be material

An amendment introducing immaterial averments will not be allowed. Newman v Springfield Fire, 17 M 123 (98); Carli v Union Depot, 32 M 101, 20 NW 89.

Under the facts of this case there was no abuse of judicial discretion in refusing appellant's motion to amend the answer by pleading defect of parties defendant, for appellant's defense could neither be harmed nor aided by the amendment. Hanson v Bowman, 199 M 71, 271 NW 127.

It is error to allow a new pleading which shows on its face that it states no cause of action. Melgaard's Will, 204 M 194, 283 NW 112.

9. Terms

Leave to amend granted on terms. Deering v McCarthy, 36 M 302, 30 NW 813; Nichols v Dedrick, 61 M 513, 63 NW 1110.

10. Motions

The motion for leave to amend except when made on the trial, is regularly made on notice and "in all cases where an application is made for leave to amend a pleading, such application shall be accompanied with a copy of the proposed amendment, and an affidavit of merits and be served upon the opposite party." Barker v Wallbridge, 14 M 469 (351); Markell v Ray, 75 M 138, 77 NW 788.

The court on its own motion may amend the pleadings to conform to the proof. Dight v Palladium, 201 M 247, 276 NW 3.

11. Service of order

An order granting leave to amend need not be served on the opposite party unless it so directs. Holmes v Campbell, 12 M 221 (141).

12. Allowable amendment of complaint

Amendment does not mean substitution. A complaint cannot be amended by introducing an entirely new cause of action. Holmes v Campbell, 12 M 221 (141); Iverson v Duboy, 39 M 325, 40 NW 159; Burns v Schreiber, 48 M 366, 51 NW 120; Smith v Prior, 58 M 247, 59 NW 1016; Cunningham v Mpls. Stockyards, 59 M 325, 61 NW 329; Traynor v Sieloff, 62 M 420, 64 NW 915; Swank v Barnum, 63 M 447, 65 NW 722; Porter v Win. & Dak. 78 M 210, 80 NW 965; Byard v Palace Clothing, 85 M 363, 88 NW 998.

No prejudice resulted in allowing the state in a bastardy proceeding to amend by adding a formal allegation that the child was illegitimate. State v Wiese, 161 M 28, 200 NW 746.

No competent evidence showed plaintiff not to be a real party in interest, nor did the court err in refusing defendant, in the third trial of the case, leave to amend the answer so as to allege that she was not a party. Aaberg v Minnesota, 161 M 384, 201 NW 626.

In an action for damages caused by a fire alleged set by defendant's locomotive; the trial court was within its discretion in refusing to permit an amendment to the complaint alleging that the loss was caused by a different fire. Smith v Davis, 162 M 256, 202 NW 483.

There was no error in refusing the plaintiff permission to amend the complaint by alleging a negligent plan of construction of the sidewalk; or that defendant was negligent in permitting artificial accumulation of ice and snow on the sidewalk. Freeman v Village of Hibbing, 169 M 353, 211 NW 819.

Plaintiff had but one cause of action, and there is no rule which prevented the trial court from permitting to amend so as to put himself in shape to sustain his case. Seifert v Union Brass, 191 M 362, 254 NW 273.

13. Allowable amendment of answer

Whether an entirely new defense may be introduced by amendments is an open question; but much greater liberality is allowed to defendant than to plaintiff in making amendments. Fowler v Atkinson, 5 M 505 (399); Wood v Cullen, 13 M 394 (365); Newman v Springfield Fire, 17 M 123 (98); Burke v Baldwin, 54 M 514, 56 NW 173; Mpls. St. Paul v Firemen's Ins. 62 M 315, 64 NW 902.

Allowing the amendment to the answer was within the discretion of the trial court. Cosmopolitan v Sommervold, 158 M 356, 197 NW 743.

If doubt exists as to whether defensive matter is admissible under a general denial, great liberality should be shown in allowing an amendment to render it admissible. Sargent v Bryan, 160 M 200, 199 NW 737.

In an action for divorce, defendant admitted a worth of $160,000 and defendant relied thereon. The court properly, in the exercise of its discretion, refused to permit the withdrawal of the admission on trial. Burton v Burton, 160 M 224, 199 NW 908.

There having been no objection noted, the act of the trial court in permitting an amendment to the answer cannot be reviewed. Hoofnagle v Alden, 170 M 414, 213 NW 53.

Failure to strike out prejudicial testimony on abandoned issue, and failure to strike out evidence introduced before amendment, was ground for new trial. Bankers v Bruce, 181 M 285, 232 NW 325.

In an action on a promissory note the court, near the close of the trial, rightfully refused to allow an amendment to the answer, the proposed answer being a complete reversal of the original theory on which the case was tried. Bank v Van Overleeke, 190 M 331, 251 NW 669.

14. Changing action ex contractu to action ex delicto

Where a complaint states a cause of action ex delicto, no recovery can be had upon a cause of action ex contractu not embraced in such statement. Mpls. Harv. v Smith, 30 M 399, 16 NW 462; Mykleby v Chic. St. P. 39 M 54, 38 NW 763; Day v Prior, 58 M 247, 59 NW 1016.

15. Amendment of parties

The court may at any time amend the name of any party except for the purpose of acquiring jurisdiction. Hinkley v St. Anthony Falls, 9 M 55 (44); Atwood v Landis, 22 M 558; McEvoy v Bach, 37 M 402, 34 NW 740; Erskine v McIlrath, 60 M 485, 62 NW 1130.

Where there is a defect of parties, if the defect appears on the face of the complaint the objection may be taken by demurrer; if it does not so appear, the objection may be taken by answer, and if no objection is raised the defect is deemed waived. Davis v Chouteau, 32 M 548, 21 NW 748.

In an action brought in favor of a minor in the name of the guardian, it is allowable to amend the record by adding the name of the ward. Perrine v Grand Lodge, 48 M 82, 50 NW 1022; Beckett v N. W. Masonic, 67 M 298, 69 NW 923.

Atwood v Landis, 22 M 558, overruled. All proceedings are regular except that in all of them the name of the plaintiff is written "Charles" Casper, whose true name was "Christian" Casper. The judgment is not absolutely void, but it is capable of being amended. The defendants cannot justify under the judgment until it and the judgment and all proceedings are amended in a direct proceeding for that purpose. Casper v Klippen, 61 M 353, 63 NW 737.

The court may strike out the name of a plaintiff improperly joined. Weisner v Young, 50 M 21, 52 NW 390.

A misnomer of the defendant by adding to its corporate name the words "Relief Department" was not a ground for dismissal, jurisdiction having been acquired, as the defect was amendable of course. Wise v Chic. & Burlington, 133 M 434, 158 NW 711.

Denying an application to amend the complaint by changing the corporate name of the defendant was not an abuse of discretion. Farmers & Mchts. v Hampton, 171 M 209, 213 NW 742.

An amendment of the name of a party is in the discretion of the court. Mullany v Firemen's Ins. 206 M 29, 287 NW 118.

16. Amendment increasing damages

On appeal from the justice court, an amendment may be allowed increasing the damages claimed. Bingham v Stewart, 14 M 214 (153); McOmber v Balow, 40 M 388, 42 NW 83.

The court may allow a complaint to be amended on trial by increasing the amount of damages claimed. Austin v Northern Pacific, 34 M 473, 26 NW 607.

17. Amendment after verdict

See note 5.

In an action for specific performance the agreement as proved by the plaintiff and as found by the court, did not conform strictly to the pleadings as respect the boundaries; as the pleading might have been amended, the variance is disregarded. A variance between the pleading and the proof is waived by a failure to seasonably object to the evidence on that ground. Cairncross v McGann, 37 M 130, 33 NW 548; Adams v Castle, 64 M 505, 67 NW 637; Aultman v O'Dowd, 73 M 58, 75 NW 756; Briggs v Rutherford, 94 M 23, 101 NW 954.

The court has no power to grant an amendment of the complaint after verdict to conform to evidence which was seasonably objected to on the trial as inadmissible under the pleadings and without which the plaintiff could not have recovered. Guerin v St. Paul Fire, 44 M 20, 46 NW 138.

On the facts presented it was within the discretion of the trial court to vacate the judgment and permit plaintiff to serve and file his amended complaint. Strand v Chgo. G. W. 147 M 1, 179 NW 369.

A complaint stated a cause of action arising out of an alleged violation of section 181.32. Upon trial, the court refused application to amend so as to bring the case under section 181.40. Against objection evidence was admitted going to prove under section 181.40. This was error. Harvey v Ruff, 164 M 21, 204 NW 634.

The insurer pleaded the limitation in the rider and a cancelation of the policy as defenses. After verdict, it moved to amend by striking out the allegation relative to the rider and substituting an allegation that the insured had taken out additional insurance. There was no error in the denial of the motion. Hutchins v United States, 170 M 273, 212 NW 451.

A motion to amend the answer after the trial and determination of the case by alleging facts upon which a reformation of the contract sued on might be had, was properly denied. Claridge v Claridge, 172 M 214, 214 NW 780.

The trial court did not abuse its discretion in denying the motion for leave to amend the answer so as to set up a defense of usury. Traub v Schreiber, 173 M 14, 216 NW 314.

18. Amendment after judgment

An amendment after judgment of an insufficient statement for judgment by confession will not be allowed to the prejudice of third parties. Wells v Gieseke, 27 M 478, 8 NW 380; Auerbach v Gieseke, 40 M 258, 41 NW 946.

The court on plaintiff's motion for a new trial rightly refused to amend the complaint by substituting either a complaint for reformation of the contract or one for money had and received, since the dismissal was not a bar. Martineau v Czajkowski, 201 M 342, 276 NW 243, 276 NW 232.

The court has power to amend the pleadings after judgment but it is a power to be exercised sparingly. North v Webster, 36 M 99, 30 NW 429; Adams v Castle, 64 M 505, 67 NW 637; Pfefferkorn v Haywood, 65 M 429, 68 NW 68; Aultman v O'Dowd, 73 M 58, 75 NW 756; Western Land v Thompson, 79 M 423, 82 NW 677; State ex rel v District Court, 91 M 161, 97 NW 581.

There was no abuse of discretion in refusing defendant leave after the case was tried and decided, to amend his answer so as to plead mistake and ask a reformation of the contract. Leslie v Mathwig, 131 M 159, 154 NW 951; Clifford v Colbert, 141 M 151, 169 NW 529; Meisenhelder v Byram, 178 M 417, 227 NW 426.

19. Amendment after appeal

The question whether the trial court has exceeded its discretion in allowing amendments to pleadings before trial may be reviewed upon appeal from the judgment. City of Winona v Minn. Ry. 29 M 68, 11 NW 228.

A trial court, in the exercise of its proper discretion, may allow pleadings to be amended so as to raise new issues, after the cause has been disposed of in the appellate court on findings of fact and conclusions of law, and, as a necessary result of its power to permit such amendments, may grant a new trial. Burke v Baldwin, 54 M 514, 56 NW 173; Reeves v Cress, 80 M 466, 83 NW 443; Cool v Kelly, 85 M 359, 88 NW 988; Strand v C. & G.W. 147 NW 3, 179 NW 369; Melgaard's Will, 204 M 194, 283 NW 112.

Liberality in allowing amendments to pleadings is greatest in the early stages of a lawsuit, decreases as it progresses, and changes to a strictness, nearly prohibitory after the matters litigated have received the normally final sanction of an adjudication by the trial court, affirmed on appeal by the court of last resort. Todd v Bettingen, 102 M 260, 113 NW 906.

20. Application of statute

The statute does not authorize the bringing in of new parties. Lee v O'Shaughnessy, 20 M 173 (157); Davis v Chouteau, 32 M 548, 21 NW 748.

It authorizes the court to amend its records. Berthold v Fox, 21 M 51; Burr v Seymour, 43 M 401, 45 NW 715.

It authorizes the supreme court to reinstate an appeal. Baldwin v Rogers, 28 M 68, 9 NW 79.

It is applicable to condemnation proceedings. Wilcox v St. Paul & N. 35 M 439, 29 NW 148.

It is applicable only to judicial proceedings; not to a mechanic's lien statement. Meehan v St. P. Mpls. 83 M 187, 86 NW 19.

The trial court has the power to permit an amendment to a motion for a new trial after decision thereon by inserting therein an additional ground of motion, where such relief will not prejudice the adverse party. Jung v Hamm, 95 M 367, 104 NW 233.

The publication of a summons to "George H. Leslie" confers no jurisdiction over "George W. Leslie." D'Autremont v Anderson Iron, 104 M 165, 116 NW 357.

A summons in a civil action may be amended, upon proper application, to make the time, as therein stated, for answering the complaint, conform to the statute. Lockway v Mod. Woodman, 116 M 115, 133 NW 398.

There was no error in amending the findings of fact, as the evidence was sufficient to sustain the amendment. Moriarty v Maloney, 121 M 285, 141 NW 186.

Plaintiff bringing suit against father, served upon father, but by mistake used the son's initials. An amendment to cure the error allowable. Morrison v Duclos, 131 M 173, 154 NW 952.

21. Amendment to an answer

The amendment proposed to the answer should have been allowed. Kulberg v Supreme Ruling, 126 M 494, 148 NW 299.

The evidence that plaintiff authorized and ratified the contract is ample, and the court did not err in amending the answer to conform to the facts. Scott v Stevenson Co. 130 M 151, 153 NW 316.

In a divorce action plaintiff consented to the amendment, and the issue raised thereby was tried by consent. Tolzman v Tolzman, 130 M 342, 153 NW 745.

The service of summons on Lincoln's birthday does not confer jurisdiction and the default judgment may be vacated. Farmers v Sandberg, 132 M 389, 157 NW 642.

544.31 AVERMENTS.

HISTORY. R.S. 1851 c. 70 ss. 86 to 88; P.S. 1858 c. 60 ss. 90 to 92; G.S. 1866 c. 66 ss. 100 to 102; G.S. 1878 c. 66 ss. 120 to 122; G.S. 1894 ss. 5262 to 5264; R.L. 1905 ss. 4158, 4159; G.S. 1913 ss. 7784, 7785; G.S. 1923 ss. 9281, 9282; M.S. 1927 ss. 9281, 9282.

1. Proof must follow pleadings
2. Immaterial variance
3. Material variance
4. Effect of statute on pleadings
5. Complaint ordered amended to conform to evidence
6. Failure of proof

1. Proof must follow pleadings

In order to recover it is not enough for the plaintiff to prove a cause of action. He must prove the cause of action alleged in his complaint. The evidence must follow the allegations. Desnoyer v L'Mereux, 1 M 17 (1); Lawrence v Willoughby, 1 M 87 (65); Karns v Kunkle, 2 M 313 (268); Cummings v Long, 25 M 337; Burton v St. P. Mpls. 33 M 189, 22 NW 300; Barrows v Thomas, 43 M 270, 45 NW 443; Marshall v Gilman, 47 M 131, 49 NW 688; Cremer v Miller, 56 M 52, 57 NW 318; Register Prtg. v Willis, 57 M 93, 58 NW 825; Bank v Smith, 57 M 377, 59 NW 311; Gaar v Fritz, 60 M 346, 62 NW 391; Joannin v Hansen, 77 M 428, 80 NW 364.

A party plaintiff, who has declared on an express agreement, cannot recover on proof of an implied contract. Ecker v Isaacs, 98 M 146, 107 NW 1053.

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Sorenson v School District, 122 M 59, 141 NW 1105.

There is no abuse of discretion on the part of the trial court in permitting plaintiff to amend her complaint during trial and in requiring the trial to proceed. Johnson v Elmberg, 165 M 67, 205 NW 628.

Plaintiff who has declared on an express contract cannot recover on proof of an implied contract. Having based his claim upon the specified contract, he must prove its performance before he can recover. Marshall v Anderson, 166 M 163, 207 NW 193.

The fact that the complaint alleged that the defendant had collected the mortgage while the proof shows that defendant had not collected it but had taken it over as its own property is not a fatal variance under the facts in this case. Christianson v National Citizens, 168 M 211, 209 NW 899.

This case presents a mere variance "between the allegations in the pleading and proof" and so it was not material unless it "actually misled the adverse party to his prejudice in maintaining his action or defense on the merits." Johnson v Elmborg, 165 M 67, 205 NW 628.

The trial court was clearly within its discretion in allowing the amendment in substance and form. The respondent was clearly misled. Central State Bank v Royal Indemnity, 167 M 494, 210 NW 66.

The fact that the complaint alleged that the defendant had collected the mortgage, while the proof shows that defendant had not collected but taken it over in its own portfolio is not a fatal variance. Christianson v Nat'l Citizens, 168 M 211, 209 NW 899.

A liberal construction must be given to a pleading attacked for the first time on the trial. Stopf v Wobbrock, 171 M 358, 214 NW 49.

The defendant dentist voluntarily stated that his act was "good practice." This opened the case so that plaintiff could call experts. Prevey v Watzke, 182 M 332, 234 NW 470.

The complaint is construed on demurrer as not stating facts sufficient to state a cause of action, it seeking to recover money accruing from alleged performance of contract, and the proof indicates damages for breach of the contract. House of Gurney v Ronan, 187 M 150, 245 NW 30.

Under a complaint alleging sale and delivery, plaintiff may prove either an express or implied contract. Krocak v Krocak, 189 M 346, 249 NW 671.

Without amendment of the pleadings the trial court was not authorized to find that the lease was oral for the term of one year, to begin about two weeks after it is made, and hence void. Vethourlkas v Schloff, 191 M 573, 254 NW 909.

There was no fatal inconsistency between the special finding and the general verdict. Robbins v N. Y. Life, 195 M 205, 262 NW 210, 872.

A stipulation in open court eliminated the issue of whether plaintiff was an employee of the defendant company and consequently subject to the workmen's compensation act. This stipulation left the case where the court properly submitted it on the question whether plaintiff was an invitee and entitled to ordinary care. Anderson v Hawthorn, 198 M 509, 270 NW 146.

In two cases for review the liability was predicated upon express contract. Enforcement of liability as for unjust enrichment cannot be had. Swenson v Miller, 200 M 354, 274 NW 222.

Forms of action are under our code system abolished, and the nature of a cause of action is to be determined by the facts alleged and not by the formal character of the complaint. Recovery may be had either for tort or breach of contract if the facts proved within the allegations of the pleading justify it, though the pleader was mistaken as to the nature of his cause of action. Walsh v Mankato Oil, 201 M 58, 275 NW 377.

It appearing from the evidence that the amount contended for by defendants to be the correct sale price did not include an excessive sum as interest, the defense of usury is not available. Mpls. Dis. v Croff, 201 M 111, 275 NW 511.

Plaintiff sues to recover for deceit, not for money had and received. The issue of money had and received was not and is not now in the case. Plaintiff must recover, if at all, upon claims presented by his complaint. Houchin v Braham, 202 M 543, 279 NW 370.

Where the defense of breach of implied warranty is neither pleaded nor litigated by consent, it comes too late when suggested for the first time by defendant's motion for amended findings or a new trial. Allen v Central Motors, 204 M 295, 283 NW 490.

Where it is sought to charge the master under the doctrine of respondeat superior with liability for an assault committed by his servant upon plaintiff, it is not error to exclude evidence to charge the master with personal fault in retaining the employee in his employment. Porter v Grennan Bakries, 219 M 14, 16 NW(2d) 906.

Review of the second edition of Phillips on code pleading. 17 MLR 832.

2. Immaterial variance

Where the disagreement between the facts alleged and the facts proved or sought to be proved is so slight that it is perfectly obvious that the adverse party could not have been misled in his preparation for trial, the variance is deemed immaterial, and the court will either disregard it altogether or order an immediate amendment without costs. Caldwell v Bruggerman, 4 M 270 (190); Chapman v Dodd, 10 M 350 (277); Rau v Minn. Valley, 13 M 442 (407); Sonnenberg v Riedel, 16 M 83 (72); Hartz v St. P. & S. C. 21 M 358; Rogers v Hastings & Dak. 22 M 25; Johnston v Clark, 30 M 308, 15 NW 252; Blakeman v Blakeman, 31 M 396, 18 NW 103; Mikleby v Chic. St. P. 39 M 54, 38 NW 763; Iverson v Duboy, 39 M 325, 40 NW 159; Moser v St. P. & Dul. 42 M 480, 44 NW 530; Erickson v Schuster, 44 M 441, 46 NW 914; Fravell v Nett, 46 M 31, 48 NW 446; Nichols v Shepard, 61 M 513, 63 NW 1110; Anderson v Johnson, 74 M 171, 77 NW 26; Board v Amer. Loan, 75 M 489, 78 NW 113; Nutzmann v Germania Life, 82 M 116, 84 NW 730; Olson v Minn. & No. Wis. 89 M 280, 94 NW 871; Gaar v Brundage, 89 M 412, 94 NW 1091; Lemon v DeWolf, 89 M 465, 95 NW 316; Briggs v Rutherford, 94 M 23, 101 NW 954; Kaufman v Barbour, 103 M 173, 114 NW 738; Johnson v Scott, 119 M 470, 138 NW 694; O'Connor v Gt. Northern, 120 M 359, 139 NW 618; Blakely v Neils, 121 M 280, 141 NW 179; Pennington v Roberge, 122 M 295, 142 NW 710; Howell v Gt. Northern, 125 M 137, 145 NW 804; Bombolis v Mpls. & St. L. 128 M 112, 150 NW 385; Meyer v Saterbok, 128 M 304, 150 NW 901; Thompson v Mpls. Cereal, 133 M 318, 158 NW 424; Maletta v Oliver Iron, 135 M 178, 160 NW 771; Kaufman v Kaufman, 137 M 457, 163 NW 780; Anderson v Mpls. & St. P. 146 M 436, 179 NW 47; Benson v Barrett, 171 M 308, 214 NW 47.

The complaint was in the ordinary form for goods sold and delivered. The evidence was that defendant directed plaintiff to deliver goods to a third person and he, the defendant, would pay for them. The goods were delivered on the sole credit of defendant. There was no variance. Kutina v Combs, 180 M 467, 231 NW 194.

There was no variance between the complaint alleging the arresting officer was a deputy sheriff, and the proof showing the arrest by a constable. Evans v Jorgenson, 182 M 282, 234 NW 292.

In an action against a druggist for selling poisonous goods, there was no variance between allegations of complaint, and proof. Tiedje v Haney, 184 M 569, 239 NW 611.

The court properly denied the motion of defendant to change the allegation from acceptance by Stone & Thomas to proposal by the Rockford company, as there was no prejudice. Chicago Flexotile v Lane, 188 M 429, 247 NW 517.

3. Material variance

See note 2.

When the disagreement between the facts alleged and the facts proved or sought to be proved is so great that the adverse party might reasonably have

been misled in his preparation for trial, and such party makes it appear to the court that he was actually misled, the variance cannot be disregarded and an amendment will be ordered with costs, or a continuance granted with leave to amend with or without costs in the discretion of the court. It is not enough that there is a material variance appearing on the face of the pleadings and evidence but the fact that the adverse party has been misled must be proved aliunde the pleadings and evidence. Short v McRae, 4 M 119 (78); Washburn v Winslow, 16 M 33 (19).

A litigant who claims prejudice between his adversary's pleading and his evidence has no standing to complain without proof that he has been misled, and "in what respect he has been misled." Outcault v Wee, 175 M 443, 221 NW 682.

4. Effect of statute on pleadings

This section does not relieve a plaintiff from alleging in his complaint all the essential facts constituting his cause of action. Loomis v Youle, 1 M 175 (150).

The granting of amendments of pleadings during a trial is within the discretion of the trial court, and its action will not be reversed on appeal except for clear abuse. Garedpy v Chic. Milw. 176 M 331, 223 NW 605.

5. Complaint ordered amended to conform to evidence

The complaint did not plead a modification of the agreement, but in the findings the court ordered that it be amended to conform to the evidence. Kociemba v Kociemba, 146 M 65, 177 NW 928.

Motion to amend peladings, after verdict, to comply with proofs, rests in the discretion of the trial court, but in the instant case there was no evidence to support the proposed amendments. Normandin v Freidson, 181 M 471, 233 NW 14.

All the testimony came into the case without objection, all issues therein were tried by consent, and it was therefore permissible for the trial court to allow an amendment of the pleadings to conform to the proof. Jasinski v Keller, 216 M 15, 11 NW(2d) 438.

6. Failure of proof

When the disagreement between the facts alleged and the facts proved is of such a character that a different cause of action than the one set up in the pleadings is proved, the court cannot order or grant an amendment over objection, but must dismiss the action. To prove fatal, the disagreement need not extend to all the facts. The same facts may enter into two different causes of action. The test is not the extent of the disagreement in the facts, but the different character of the causes of action made out by the facts. Snow v Johnson, 1 M 48 (32); Lawrence v Willoughby, 1 M 87 (65); Helfer v Alden, 3 M 332 (232); White v Culver, 10 M 192 (155); McCarty v Barrett, 12 M 494 (398); O'Brien v City of St. P. 18 M 176 (163); Leighton v Grant, 20 M 345 (298); Cowles v Warner, 22 M 449; Cummings v Long, 25 M 337; Mpls. Harv. v Smith, 30 M 399, 16 NW 462; Benson v Dean, 40 M 445; 42 NW 207; Dennis v Spencer, 45 M 250, 47 NW 795; Downs v Finnegan, 58 M 112, 59 NW 981; Irish-Amer. v Bader, 59 M 329, 61 NW 328; Gaar v Fritz, 60 M 346, 62 NW 391; Scofield v Nat'l Elev. 64 M 527, 67 NW 645; First Nat'l v Strait, 71 M 69, 73 NW 645; Commonwealth v Dakko, 71 M 533, 74 NW 891; Joannin v Barnes, 77 M 428, 80 NW 364; Waggoner v Preston, 83 M 336, 86 NW 335.

Under an allegation of facts constituting a legal title, facts constituting an equitable title cannot be proved. Merrill v Dearing, 47 M 137, 49 NW 693; Stuart v Lowry, 49 M 91, 51 NW 662; Hersey v Lambert, 50 M 373, 52 NW 963; Freeman v Brewster, 70 M 203, 72 NW 1068; Olson v Minn. & No. Wis. 89 M 280, 94 NW 871.

Incorporation when not material need not be proved. Finch v Le Sueur, 128 M 73, 150 NW 226.

There is no fatal variance in the following cases between the allegations and the proof. Bombolis v M. & St. L. 128 M 112, 150 NW 385; Lundeen v Gt. Northern, 128 M 332, 150 NW 1088.

This statute changes the common rule, and provides that when there is an allegation of a joint contract with two or more defendants and the proof is of a several contract with one, there may be a recovery against the one liable. Schmidt v Agric. Ins. 190 M 585, 252 NW 671.

Variance. 12 MLR 121.

544.32 EXTENSIONS OF TIME; RELIEF AGAINST MISTAKES.

HISTORY. R.S. 1851 c. 70 s. 90; P.S. 1858 c. 60 s. 94; G.S. 1866 c. 66 s. 105; 1876 c. 49 s. 1; G.S. 1878 c. 66 s. 125; 1887 c. 61; G.S. 1894 s. 5267; R.L. 1905 s. 4160; G.S. 1913 s. 7786; G.S. 1923 s. 9283; M.S. 1927 s. 9283.

I. THE STATUTE GENERALLY

1. Application
2. Extension of time
3. Protection to bona fide purchasers or encumbrancers

II. AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

1. To be made with caution
2. Discretionary
3. When may be made
4. Notice of motion
5. Who may oppose motion
6. Order of court necessary
7. Extrinsic evidence admissible
8. Clerical mistakes of clerk
9. Mistakes of judge
10. Amendment of verdict
11. Judgment not authorized by order
12. Judgment not authorized by verdict
13. Judgment not authorized by report of referee
14. Modification of orders
15. Modification of judgments
16. Amendment of proof of service of summons
17. Amendment of false return by sheriff
18. Amendment of execution
19. Amendment of names of parties
20. Supplying omissions in record
21. Replacing lost records
22. Rights of third parties to be saved

III. VACATION OF JUDGMENTS AND ORDERS

1. Statute a regulation, not a grant of power
2. Notice of motion
3. Application by non-resident; attachment
4. Application by strangers to judgment
5. Application by assignee
6. Merits need not be shown
7. Diligence
8. Motion defeated by amendment
9. Void judgments
10. Jurisdictional defects
11. Return of service of summons not conclusive

IV. OPENING DEFAULTS

I. THE STATUTE GENERALLY

1. Application

The statute is applicable:

To cases where a party has failed to take, or to take correctly, some step pointed out by the statute under which he is proceeding. Castle v Thomas, 16 M 490 (443);

To proceeding in the supreme court. Baldwin v Rogers, 28 M 68, 9 NW 79;

To judicial proceedings generally; but not to proceedings in pais. State ex rel v Kerr, 51 M 417, 53 NW 719; Farnsworth v Commonwealth, 84 M 62, 86 NW 877; Morrison v Duclos, 131 M 174, 154 NW 952; In re Judicial Ditch, 131 M 374, 155 NW 626.

Inapplicable to a final judgment in an action for divorce. Scribner v Scribner, 93 M 195, 10 NW 163.

Applicable in municipal court of St. Paul. Wentworth v Nat'l Live Stock, 110 M 107, 124 NW 977.

Where jurisdiction was acquired over a party in the suit in which judgment was obtained, the remedy under this section where applicable, is exclusive, except as to judgments obtained by fraud. Cremer v Michelet, 114 M 454, 131 NW 627; Stein v Waite, 126 M 157, 148 NW 49.

An order amending a judgment is appealable. Mpls. St. P. v Grimes, 128 M 321, 150 NW 180, 906.

A correction of a decree of divorce so as to more accurately express the decision of the court in respect to the alimony awarded may be made at any time where neither party to the suit, nor any third party has, between the entry of the decree and its correction, changed position so as to be prejudiced by the correction. Hoff v Hoff, 133 M 86, 157 NW 999.

This section is applicable:

To an order vacating an order for dismissal, and for reinstatement. Rishmiller v Den. & Rio G. 134 M 261, 159 NW 272;

To a case where an action dismissed for want of prosecution was reinstated. Murray v Mulligan, 135 M 471, 160 NW 1032.

An injunction against a railroad from occupying a street may be vacated. Larson v Minn. N. W. 136 M 423, 162 NW 523;

As may an order vacating a final order under a drainage statute. Brecht v Troska, 137 M 466, 163 NW 126.

This section applies where it is necessary to reopen, and amend or modify a decree of the probate court. Savela v Erickson, 138 M 93, 163 NW 1029.

The section applies to ordinary procedure in ditch and other special proceedings. In re Judicial Ditch No. 15, 140 M 233, 167 NW 1042; Co. of Itasca v Ralph, 144 M 446, 175 NW 899.

This section has no application to a Torrens section. Murphy v Borgen, 148 M 375, 182 NW 449.

The mistakes and amendment statute (section 544.32) is inapplicable under the workmen's compensation act. Distinguishing State v Dist. Ct. 134 M 189, 158 NW 825, in that it did not involve a lump sum settlement. Integrity Mut. v Nelson, 149 M 337, 183 NW 837; Bruening v Central Warehouse, 150 M 525, 184 NW 273.

The order approving a settlement in a workmen's compensation case was not final under General Statutes 1913, Section 8221, for the disability to be compensated was not limited to less than a six-month period, nor was it final under section 8222 for there was no commutation to a lump payment and hence the order could be relieved against for the causes provided in General Statutes 1913, Section 7786 (section 544.32). Ronstadt v Minor, 152 M 10, 187 NW 703.

Refusal to vacate an order of assessment upon stockholders rightly sustained. Hosford v Cuyuna, 153 M 186, 189 NW 1025.

Where no delay, inconvenience or prejudice results to a defendant, the court, in the interest of justice, should readily grant a plaintiff's motion to open the case to supply a missing link in the testimony called to his attention, when defendant rested for the purpose of moving for a directed verdict. Jakula v Starkey, 161 M 58, 200 NW 811.

In order to sustain a judgment for the vacation of a part of a street, it was permissible for the trial court to receive evidence extraneous to the record that notice of application for judgment had been given by posting the judgment roll containing proof of notice by publication only. Application of Peters, 163 M 206, 203 NW 593.

Denial of motion to vacate default judgment is clearly within discretion of the trial court. Pittsburgh Glass v Smith, 163 M 513, 203 NW 984.

An order refusing to vacate an unauthorized judgment is appealable, but one refusing to vacate a judgment authorized by order, the argument being that the judgment was erroneous rather than unauthorized, is not appealable. In such case, the statutory appeal from the judgment itself is exclusive. Gasser v Spalding, 164 M 443, 205 NW 374.

Errors of the trial court could not change the result. Zuercher v Woodward, 165 M 262, 206 NW 168.

The verdict for the employee and against the employer is so perverse as to require a new trial. The attempt to apportion the damages was beyond the power of the jury and so surplusage, but it must be given effect to the extent that

it names the two defendants upon whom exclusively the jury placed the entire liability. Begin v Liederbach, 167 M 84, 208 NW 546.

The summons in an action to foreclose a mechanic's lien will not be set aside for defects therein which do not affect or prejudice the substantial rights of the defendants. Dressel v Brill, 168 M 99, 209 NW 868.

There must be a showing of grounds for relief as mistake, inadvertence, surprise, or excusable neglect. Marthaler v Meyers, 173 M 606, 218 NW 127; Stebbins v Friend-Crosby, 178 M 549, 228 NW 150.

Subject to the one-year limitation this section permits relief from judgments in compensation cases. Strizich v Zenith Furnace, 176 M 556, 223 NW 926.

The probate court, like the district court, may within one year after notice thereof, correct its records and decrees and relieve a party from his mistake, inadvertence, surprise, or excusable neglect. Simon's Estate, 187 M 399, 246 NW 31.

The power of the court to vacate judgments and the like is statutory, but is also based upon the general equity powers of the court. Orfield v Morstain, 199 M 468, 272 NW 260.

A motion for an amendment of the pleadings may be based on this section. Stebbins v Friend-Crosby, 178 M 549, 228 NW 150.

In matters involving jurisdiction of the court, compliance with the statute is essential or the proceedings are a nullity. The court cannot appropriate jurisdiction which it does not possess. It cannot amend or correct a notice of appeal after the time for taking an appeal has expired. Strom v Lindstrom, 201 M 226, 275 NW 833.

Our district courts are possessed of broad general jurisdiction; and are in fact "courts of superior jurisdiction." As such they are possessed of "inherent power to open their judgments and grant relief from default" and in that respect section 544.32 is but a limitation rather than a grant of power. Whipple v Mohler, 215 M 587, 10 NW(2d) 771.

The exclusion of divorce cases from the provisions of sections 543.13, 544.32, does not affect the inherent power of the court to grant relief to a party who has been denied and opportunity to defend in a divorce action under such circumstances as amount to a fraud on the court and the administration of justice. Cahaley v Cahaley, 216 M 175, 12 NW(2d) 182.

Comparative law; full faith and credit. 20 MLR 160.

Minnesota probate practice. 20 MLR 718.

2. Extension of time

Where a proposed case is not served within the time allowed by an order of leave, the failure to make timely service is cured by the actual settlement and allowance of the case. Valmer v Stagerman, 25 M 234.

A district court cannot, in the exercise of the discretionary powers conferred by statute, extend or enlarge the period of time within which real property must be redeemed from a sale made in proceedings to foreclose a mechanic's lien. State ex rel v Kerr, 51 M 417, 53 NW 719.

When the trial court overruled the demurrer to plaintiff's amended complaint, it abused its discretion in refusing leave to the defendants to serve an answer. Potter v Holmes, 74 M 508, 77 NW 416.

The statute of limitations applicable to judgments, instead of enforceable tax burdens for the original taxes, applies necessarily in cases where, as in the instant case, prior tax judgments are to be included in the new judgment. State v Ward, 79 M 362, 82 NW 686.

The court has no power to enlarge the time fixed by statute for making a demand for a review by a jury of the order of the court fixing the amount of benefits or damages in a ditch proceeding. In re Judicial Ditch No. 52, 131 M 372, 155 NW 626.

Defendant served his answer May 2. The court did not abuse its discretion in permitting plaintiff to reply in July. Roesler v Union Hay, 131 M 489, 154 NW 789.

3. Protection to bona fide purchasers or encumbrancers

Prior to Laws 1887, Chapter 61, a bona fide purchaser from the successful party in a judgment, in an action under the statute to determine adverse claims to real estate, takes his title subject to be defeated by the subsequent reversal or vacation of the judgment. He did not stand in the position of a purchaser at a judicial sale. (See Berryhill v Gasquoine, 88 M 281, 92 NW 1121.) Lord v Hawkins, 39 M 73, 38 NW 689; Welch v Marks, 39 M 481, 40 NW 611.

In this action to determine an adverse claim, the evidence was sufficient, within the provisions of Laws 1887, Chapter 61, to sustain a finding of the trial court that defendant city was a bona fide purchaser. Drew v City of St. Paul, 44 M 501, 47 NW 158.

The setting aside of a judgment for the recovery of money, upon grounds not affecting the original validity of the judgment, does not avoid a prior sale of real estate, under execution thereon, to a stranger who had purchased in good faith. The proviso added by Laws 1887, Chapter 61, is construed as not having such effect. Gowen v Conlow, 51 M 213, 53 NW 365.

Where a judgment decree against more than one party, or a certified copy thereof, has been filed and recorded as provided in Laws 1887, Chapter 61, Section 1, one of the parties against whom such decree has been duly indexed and entered in the reception books kept in the office of the register of deeds, cannot take advantage of a failure to index and enter said decree against another party. Whitacre v Martin, 51 M 421, 53 NW 806.

Although under General Statutes 1894, Section 5267 (section 544.32), an action is, after final judgment, still under the control of the court for the purposes of that section, yet the action is not pending, (at least after the time for appealing has expired), so as to render a purchaser from a party to the action of property the title of which is affected by the judgment a purchaser pendente lite. Aldrich v Chase, 70 M 243, 73 NW 161.

Conceding that Laws 1887, Chapter 61, removed the distinction between classes of judgments, as defined in Lord v Hawkins, 39 M 73, 38 NW 689, and that such amendment had the effect of only limiting the rights of innocent purchasers, and conceding that the right of action in the original owner of real estate sold in pursuance of such judgment was not affected by the amendment. The demand of such owner rests upon the implied promise to return the property or its value in case the judgment upon which it was based should be set aside, and that such claim arises out of a contract, and cannot be recovered in an action, but must be filed as a claim when the probate court has jurisdiction of the estate. Berryhill v Gasquoine, 88 M 281, 92 NW 1121.

Application to open a judgment entered by default and permit defendant to answer, based upon excusable neglect, is addressed to the discretion of the trial court. White v Gurnee, 92 M 271, 99 NW 889.

One who takes a conveyance of the premises from the one in whom title was adjudged in an action in ejectment holds his title subject to the rights and equities of the party filing the notice of lis pendens, from the time of filing until the final determination of the second trial. Voight v Wall, 110 M 6, 124 NW 447.

II. AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

1. To be made with caution

History and discussion of the rule that in exercising its judicial discretion in granting amendments, great caution should be observed. In the instant case, a criminal case, the court after the term at which the trial was had, properly amended the record so as to make it conform to the truth of the case. Bilansky v State, 3 M 427 (313).

Being a question on distribution of funds derived from action for wrongful death, whether by workmen's compensation act, or by the amendment, the demand of a motion to amend the order of the trial judge was sustained. Joel v Peter Dale Garage, 206 M 581, 289 NW 524.

Amendment and aider of pleading; variance. 12 MLR 121.

2. Discretionary

In exercising the authority granted by this section, the trial court may exercise sound judicial discretion. Bilansky v State, 3 M 427 (313); Berthold v Fox, 21 M 51; Burr v Seymour, 43 M 801, 45 NW 715.

A proposed answer so devoid of merit that it would have to be stricken out on motion cannot be used as the basis for opening a default judgment. Peterson v Davis, 216 M 60, 11 NW(2d) 800.

3. When may be made

It may be made after the expiration of the term. Bilansky v State, 3 M 427 (313).

It cannot be made after an appeal and return to the supreme court so as to affect the rights of the parties on appeal. Floberg v Joslin, 75 M 75, 77 NW 537.

The jurisdiction of the supreme court over a cause comes to an end when the remittitur is filed in the trial court. An application to the supreme court to direct the trial court to amend its findings and render judgment for the plaintiff was denied. Hunt v Meeker Abstract Co. 130 M 530, 152 NW 866.

Motion, more than one year after entry and satisfaction of judgment, to tax costs and disbursements is too late. Cox v Selover, 177 M 369, 225 NW 282.

Where an error was made by the clerk, defendant's rights were not impaired nor prejudiced by the delay of six months before the judgment was corrected. Plankerton v Continental, 180 M 168, 230 NW 464.

A successor judge may reopen a judgment ordered by his predecessor and make new findings and conclusions to correct the errors of the deceased trial judge. Fogerstrom v Cotton, 188 M 245, 246 NW 884.

Where the trial court in its directions to the probate court made improper conclusions of law, the matter may be remedied by application to the court before the entry of judgment. Anderson v Anderson, 197 M 252, 266 NW 841.

Where parties, for about one year through no fault of theirs, had no knowledge of the pending of probate proceedings or of an order made therein and moved to vacate such order promptly upon discovery, they are not guilty of laches barring the right to have the order vacated under section 544.32. Daniel's Estate, 208 M 420, 294 NW 465.

In ordinary actions, after the time for appeal expires, it is well settled that the court cannot modify a judgment except for clerical error or misprision, or except as prescribed in section 544.32. Smude v Amidon, 214 M 270, 7 NW(2d) 776.

4. Notice of motion

The application for an amendment being made by the defendant more than two years after the entry of judgment, notice of such application should be served upon the plaintiff; and service on his attorney is insufficient, where the only authority to represent his client is that implied in his retainer. Berthold v Fox, 21 M 51; Sheldon v Risedorph, 23 M 518.

If the purchaser is not made a party to or given notice of an application to vacate a judgment, the setting aside or modification will be, as to him, void and inoperative to affect his title. Aldrich v Chase, 70 M 243, 73 NW 161.

Plaintiff obtained a judgment and a decree of foreclosure. After the judgment had been entered it was found the foreclosure was inoperative, and the court on motion, but without notice, properly entered an order modifying the judgment so as to merely direct a personal judgment against the defendant. Louisville v Blake, 70 M 253, 73 NW 155.

Notice of a motion to vacate a judgment in favor of a non-resident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof. Phelps v Heaton, 79 M 476, 82 NW 990.

A party litigant is not entitled to proceed to trial in the absence of proof of service of notice of trial upon the parties who have appeared. Zell v Friend-Crosby, 160 M 181, 199 NW 928.

It was reversible error to amend the order for judgment, and judgment by an ex parte order. Wilson v City of Fergus Falls, 181 M 329, 232 NW 322.

5. Who may oppose the motion

One who, on behalf of the plaintiff, executes the undertaking required in an action of replevin, and, after judgment for defendant in that action, successfully defends, in another state, a suit upon the undertaking on the ground that the erroneous entry of judgment in the replevin suit discharged him from liability, cannot afterwards contest a motion by defendant for the amendment of the judgment in the replevin suit, or appeal from the order granting it. Berthold v Fox, 21 M 51.

An attorney is, while his authority continues, authorized to act for his client in protecting the judgment against proceeding to avoid it, and notice of such proceeding should be served on him. Shelden v Risedorph, 23 M 518.

Defendant owner of a mortgage appeared in proceedings to reopen a judgment, and the decision was adverse and she failed to appeal. She can not be heard when the owner of the property applies for an order canceling the mortgage of record. Yennie v Slingerland, 161 M 372, 201 NW 605.

6. Order of court necessary

To constitute a judgment for the purpose of docketing, it must be entered in the judgment book. A docketing without such entry is of no avail. The clerk cannot, without an order of court, enter a judgment nunc pro tunc. Rockwood v Davenport, 37 M 533, 35 NW 377.

A court commissioner is without power to vacate a judgment rendered by the district court. Sacramento Co. v Niles, 131 M 129, 154 NW 748.

7. Extrinsic evidence admissible

If the direction for judgment did not mention the name of the receiver, the court might cure the irregularity by filing a direction naming the receiver nunc pro tunc. Lundberg v Single Men's Ass'n, 41 M 508, 43 NW 394.

An omission to find upon some of the issues is not waived by a failure to except; but where the issues not passed upon are entirely distinct, the court may order a retrial of those particular issues only, or in proper cases, where there can be no doubt or dispute, and the defect is merely formal, or made through inadvertence, the court may amend the verdict. Crich v Williamsburg, 45 M 441, 48 NW 198.

8. Clerical mistakes of clerk

Though a verdict cannot be changed by the court in point of substance, it may be so amended in point of form or language, as to give the real intention full expression, in proper legal terms. Coit v Waples, 1 M 134 (110).

The clerk in 1860 kept two books for entry of judgment, one a "judgment book" and the other a "decree book," and the judgment in the instance case was entered in the "decree book." Held to be harmless error. Thompson v Bickford, 19 M 17 (1).

In an action of replevin where the verdict was in the alternative, and the clerk erroneously entered a money judgment only, the court may, in its discretion, amend the judgment to conform with the verdict. Berthold v Fox, 21 M 51.

It is competent for a district court to amend nunc pro tunc the record of naturalization proceedings had therein, so as to correct an error of the clerk and make the record conform to the truth. State ex rel v Macdonald, 24 M 48.

Irregularities of the clerk below in entering judgment must be passed upon by the lower court before they can be considered by the supreme court. Lundberg v Single Men's Ass'n, 41 M 508, 43 NW 394.

The court, on motion of the defendant, made an order vacating a judgment as being unauthorized. Later on order to show cause obtained by the plaintiff, the court made an order setting aside its previous order, and ordering that de-

fendant's motion stand "open for trial." This latter order was not appealable. State v Crossly, 63 M 205, 65 NW 268.

The evidence justified the trial court in correcting its records so as to show that a bond on appeal was filed within the required time, and in vacating a former order dismissing the appeal. Gross v Board, 137 M 152, 163 NW 126.

The mistakes and amendment statute (section 544.32) is inapplicable in the instant workmen's compensation case. (Distinguishing State v District Court, 134 M 189, 158 NW 825). Integrity Mutual v Nelson, 149 M 337, 183 NW 837.

The court properly ordered the dismissal of an action, the clerk having mistakenly entered a memorandum indicating that the case was stricken from the calender, when in fact it was dismissed by the court on motion of the defendant. Walsh v Flour City, 157 M 396, 196 NW 486.

Defendant's rights were not impaired nor prejudiced by the delay of six months before the error of the clerk was corrected. Plankerton v Continental, 180 M 168, 230 NW 464.

9. Mistakes of judge

A district court may on motion correct its previous order for judgment, that is, correct its own clerical mistakes, so as to make the findings and judgment conform to what it intended they should be. The one-year limitation does not apply in such cases. Hodgins v Heaney, 15 M 185 (142); McClure v Bruck, 43 M 305, 45 NW 438; Knappen v Freeman, 47 M 491, 50 NW 533; Chase v Whitten, 62 M 498, 65 NW 84; U.S. Invest. v Ulrickson, 84 M 14, 86 NW 613, 1004.

Where a cause is submitted to the trial court upon stipulation of facts covering certain, but not all, issues made by the pleadings, and by inadvertence, the court in its findings and judgment determines the issues so excluded in addition to those submitted by the stipulation, the findings and judgment may, on motion, be amended and made to express the intention of the parties. Wright v Krabbenhoft, 104 M 460, 116 NW 940.

The mistakes and amendment statute (section 544.32) applies to workmen's compensation as well as other cases. Integrity Mut. v Nelson, 149 M 341, 183 NW 837.

Where the sitting judge makes an order in a preliminary hearing in a judicial ditch proceeding, under General Statutes 1923, Section 9283 (section 544.32), and through mistake, inserts a finding not intended, such mistake may be corrected by his successor in office. In re Judicial Ditch No. 2, 163 M 383, 202 NW 52, 204 NW 318.

Needed correction should be made by motion in the trial court. Sprandel v Nims, 165 M 293, 206 NW 434.

Error in admitting incompetent testimony was cured by subsequent proof of same facts by competent and undisputed evidence. Donten v Wamsley, 176 M 234, 223 NW 98.

Mistake of judge properly corrected prior to entry of judgment. Wilson v City of Fergus Falls, 181 M 329, 232 NW 322.

The trial court has absolute power to vacate prior order and to make contrary findings where controlling statute, previously overlooked, is called to the court's attention. Lehman v Norton, 191 M 211, 253 NW 663.

An obvious clerical error in the decision of the trial judge may and should be corrected by his successor. Lustman v Lustman, 204 M 228, 283 NW 387.

10. Amendment of verdict

Although a verdict cannot be changed by the court in point of substance, it may be so amended in point of form, or language, as to give the real intention full expression, in proper legal terms. Coit v Waples, 1 M 134 (110); Miller v Hogan, 81 M 312, 84 NW 40.

Defendant could not recover, as damages, more than he claimed; nor could he assume the value to be the amount assessed; nor could the verdict be amended so as to find the value. Plaintiff's remedy was by motion to set aside the judgment as not authorized by the verdict. Eaton v Caldwell, 3 M 134 (80).

When a verdict is once perfected and the parties satisfied as to form, it cannot be aided by any additions or subtractions, from any source, and a statement signed by the trial judge, designed to throw light upon a special verdict, and to show the meaning of the jury in a certain particular, was stricken from the record in the supreme court, upon motion. Dana v Farrington, 4 M 433 (335).

The record showing that the verdict was recorded before the motion to poll the jury, it cannot be contradicted. Steele v Etheridge, 15 M 501 (413).

The borough recorder had no power to summon and impanel a jury, and therewith to try one charged with a breach of an ordinance; and sentence passed by him upon conviction on such trial is illegal. Borough v Bauer, 21 M 327.

A verdict was rendered and jury discharged. The jurors, two days after, came into court and stated that the verdict, as rendered, was not such as they intended. This was no cause for a new trial. A verdict cannot be thus impeached. Stevens v Montgomery, 27 M 108, 6 NW 456.

An omission to find upon some of the issues is not waived by a failure to except; but where the issues not passed upon are entirely distinct, the court may order a new trial of those particular issues only, or in proper cases, where there can be no doubt or dispute, and the defect is merely formal, or made through inadvertence, the court may, as discussed in the opinion, amend the verdict. Crich v Williamsburg, 45 M 441, 48 NW 198.

11. Judgment not authorized by order

Irregularities of the clerk below in entering judgment, as where he enters judgment while there is a stay of proceedings, or where he inserts in it a provision not authorized by the order for judgment, must be passed on by the trial court before the supreme court will consider them. The proper remedy is a motion addressed to the trial court to correct the entry. An order denying such a motion is appealable. Lundberg v Single Men's Ass'n, 41 M 508, 43 NW 394; Nell v Dayton, 47 M 257, 49 NW 981; Hall v Merrill, 47 M 260, 49 NW 980; Levine v Lancashire Co. 66 M 138, 68 NW 855; Harper v Carroll, 66 M 487, 69 NW 610, 1069; Parker v Bradford, 68 M 437, 71 NW 619; McLaughlin v Nicholson, 70 M 71, 72 NW 827, 73 NW 1; Bishop v Hyde, 72 M 16, 74 NW 1016.

12. Judgment not authorized by verdict

Where a judgment is entered by the clerk, without any order of the court, the question whether it is authorized by the verdict will not be considered on appeal, unless application has been first made to the trial court to correct or vacate the judgment. Eaton v Caldwell, 3 M 134 (80); County Commrs. v Jones, 18 M 199 (182); Scott v Mpls. St. P. 42 M 179, 43 NW 966; Hall v Merrill, 47 M 260, 49 NW 980.

13. Judgment not authorized by report of referee

It is competent for the clerk to enter judgment on a verdict, decree of the court, or report of a referee, without any special order of the court to that effect, and without notice to the other party. The rule is the same in equitable as in legal proceedings. Piper v Johnston, 12 M 60 (27).

Where a judgment not authorized by the verdict or direction of the court, or referee, is entered, the proper remedy is, in the first instance, not by appeal, but by motion to correct the entry. Hall v Merrill, 47 M 260, 49 NW 980.

14. Modification of orders

The order for judgment not being appealable, and no judgment having been entered thereon, the court had jurisdiction to vacate or modify it. Weiser v City of St. Paul, 86 M 26, 90 NW 8.

The time to appeal from the former order not having expired, the court had power to set it aside on motion for good cause shown. The power to set aside or modify is not limited to non-appealable orders. Gross v Board, 137 M 153, 163 NW 126; O'Hara v Western Mtge. 147 M 417, 180 NW 701.

15. Modification of judgments

Prior to Laws 1876, Chapter 49, it was held that after entry of judgment pursuant to order a court had no authority to correct its judicial errors on motion, the only remedy being a new trial or an appeal. Grant v Schmidt, 22 M 1; Semrow v Semrow, 23 M 214; White v Iltis, 24 M 43; Weld v Weld, 28 M 33, 8 NW 900.

The omission of a justice to state in his docket the fees due to each person separately does not render the judgment erroneous; and on appeal the district court may modify the judgment where the erroneous part is severable from the remainder. Meister v Russell, 53 M 54, 54 NW 935.

Since enactment of Laws 1876, Chapter 49, it is the rule that a court may modify its judgments on motion at any time within the period for taking an appeal. Gallagher v First-American Bank, 79 M 226, 81 NW 1057; U. S. Invest. v Ulrickson, 84 M 14, 86 NW 613.

Where a judgment was erroneously entered, which would not be a bar to a new action, such judgment could not be amended by the court, against objections, so as to make it a dismissal upon its merits. Day v Mountin, 89 M 297, 94 NW 887.

The probate court is limited in amending its decrees and orders to the same extent as provided for the district court, and the district court has no power to modify its judgment after the time has expired for taking an appeal therefrom, except in certain cases as provided by General Statutes 1894, Section 5267 (section 544.32). Tomlinson v Phelps, 93 M 350, 101 NW 496.

A judgment of dismissal entered upon stipulation may be set aside by the court and the cause reinstated for sufficient cause shown. The matter rests largely in the judicial discretion of the trial court. Macknick v Switchmen's Union, 131 M 246, 154 NW 1099.

General Statutes 1913, Section 7786 (section 544.32), in accepting a final judgment in an action of divorce from the judgments which the court may modify and amend is not an inhibition against correcting or amending a decree of divorce as to alimony, but only against modifying or vacating the part of such decree which deals with the marriage status of the parties. Hoff v Hoff, 133 M 86, 157 NW 999.

The evidence justified the trial court in correcting its records so as to show that a bond on appeal was filed within the required time. The power of the court to correct errors and mistakes, and to modify its judgments and orders is not limited to non-appealable orders. Gross v Board, 137 M 152, 163 NW 126.

The court may amend a final decree so as to protect the right of after-born children. Savela v Erickson, 138 M 99, 163 NW 1029.

The district court may, in its discretion, at any time within one year after notice thereof, for good cause shown, modify or set aside its judgments, orders or proceedings, whether made in or out of term. O'Hara v Western Mtge. 147 M 417, 180 NW 701.

This section is inapplicable to proceedings to Torrens title. Murphy v Borgen, 148 M 375, 182 NW 449.

In the exercise of judicial discretion, it was not improper for the court, on the application of the defendants, to strike out the deficiency clause in a judgment in a foreclosure action which was in effect a personal judgment against the defendants for a debt not yet due. Winne v Lahart, 155 M 307, 193 NW 587.

Error properly corrected before entry of judgment. Wilson v Fergus Falls, 181 M 329, 232 NW 322.

Except where otherwise provided by statute, where the court has imposed a valid sentence it cannot modify such sentence after the expiration of the term at which the sentence was imposed. State v Carlson, 178 M 626, 228 NW 173.

To obtain a modification of a decree for limited divorce the proper practice is to move to open the decree and present proof warranting a decree in a modified form. Feltmann v Feltmann, 187 M 591, 246 NW 360.

The husband having obtained a decree of divorce, the wife's motion to amend the judgment by allowing her an interest in the homestead, and larger permanent alimony, was properly denied. Wilson v Wilson, 188 M 23, 246 NW 476.

A motion, after judgment was entered, to set aside or reduce the amount of the verdict and judgment on a ground presented to and passed upon at the trial and again on an alternative motion for judgment on a new trial, cannot be maintained. Lavelle v Anderson, 197 M 169, 266 NW 445.

The circuit court of appeals affirmed the district court's judgment of $5,000 in favor of the insured. The insurer could not maintain a bill of review to have a state court judgment for $1,800 deducted from the $5,000, when it had satisfied the state court judgment pending the appeal in federal court and had made no application in federal court to file its federal action. Simonds v Norwich Union, 73 F(2d) 412.

16. Amendment of proof of service of summons

Defective proof of service of a summons, but which has a legal tendency to make out such service, may be amended. Hinkley v St. Anthony Falls, 9 M 55 (44).

If the delinquent tax list is filed and the list and notice are in fact published, the court has jurisdiction to allow proof of publication to be filed. Board v Morrison, 22 M 178; Bennett v Blatz, 44 M 56, 46 NW 319; State v Crosley Park, 63 M 205, 65 NW 268.

In an action against a non-resident defendant, the court may allow the filing of a proper affidavit of publication to be filed nunc pro tunc. Burr v Seymour, 43 M 401, 45 NW 715.

It is within the power of the district courts to supply an omission in the original proof of service upon which a default judgment is entered, by ordering such proof to be made a part of the judgment roll nunc pro tunc. Fowler v Cooper, 81 M 19, 83 NW 464.

The trial court did not err in setting aside the appearance of the attorney for the non-resident defendant as unauthorized, nor in vacating the judgment; nor in denying the plaintiff's motion to file proof of publication of summons nunc pro tunc. Stai v Selden, 87 M 271, 92 NW 6.

17. Amendment of false return of sheriff

The vacation of a return on an execution of satisfaction by levy and sale of personal property sustained, where a mortgage of the property recovered its full value from the judgment creditor; it not appearing that the debtor had, at the time of the levy and sale, any valuable interest in it. Osborne v Wilson, 37 M 8, 32 NW 786.

The municipal court of Minneapolis has jurisdiction to set aside a sheriff's return of the execution by him of a writ of restitution, it being untrue. The court has power to enforce its judgment by the issuance of an alias writ. Suchaneck v Smith, 53 M 96, 54 NW 932.

18. Amendment of execution

The clerk at the time in question (1860) kept a "judgment book" and a "decree book," this judgment being entered in the "decree book." This error may be disregarded. Thompson v Bickford, 19 M 17(1).

Judgment docketed in Hennepin county in favor of Sumner W. Farnham. A certified copy of transcript in Carver county corresponded in every particular except the name of plaintiff therein was "Samuel," is competent evidence to prove the docketing. Thompson v Bickford, 19 M 17 (1).

19. Amendment of names of parties

It is in the discretion of the trial court to amend the record in respect to the plaintiff's name; and, if the defendant was not misled the appellate court will not review the action of the court below. McEvoy v Bock, 37 M 402, 34 NW 740.

If suit is brought in the name of the guardian, the trial court may amend the record by inserting the name of the ward as plaintiff. Perine v Grand Lodge, 48 M 82, 50 NW 1022; Beckett v N. W. Masonic, 67 M 298, 69 NW 923.

All of the proceedings are regular except that in all the papers plaintiff is termed "Charles" but his true name was "Christian" Casper. The judgment was not absolutely void, but it and all proceedings are capable of being amended. Casper v Klippen, 61 M 353, 63 NW 737.

A judgment by default against defendants in an action is valid, notwithstanding a mistake in the summons in the Christian name of one of the plaintiffs. Bradley v Sandilands, 66 M 40, 68 NW 321.

The trial court made its order granting appellant's motion to vacate the judgment and permit him to answer on condition that he pay $75.00 costs. The court did not abuse its discretion. Ueland v Johnson, 77 M 543, 80 NW 700.

The trial court had power to amend the pleadings and judgment by adding to the designation of plaintiff's name, "Western Land Association," the words "Of Minnesota." Charron v Pine Tree Co. 79 M 425, 82 NW 677.

The real debtor was the father, and service was made on him, but the pleadings carried the initials of the son. The court had power before the trial and on notice to amend. Morrison v Duclos, 131 M 173, 154 NW 952.

20. Supplying omissions in record

The district court may, in a criminal case, and after the term at which the trial was had, amend the record so as to make it conform to the truth of the case. Bilansky v State, 3 M 427 (313).

After judgment by default, the court may correct a mistake in the date of the affidavit if no answer. Dunwell v Warden, 6 M 287 (194).

Upon an application to vacate a judgment, the affidavits being conflicting, it is not an abuse of discretion for the court to refuse the relief; and also on a second application where the facts stated in the moving petition should have been known and produced in the first instance. Swanstrom v Marvin, 38 M 359, 37 NW 455.

An affidavit for attachment which wholly fails to state the grounds of plaintiff's claim against defendant is fatally defective, and confers no jurisdiction to allow writ. Duxbury v Dahle, 78 M 427, 81 NW 198.

The application of section 544.32 need not be considered because on other grounds the order is not appealable. Brecht v Troska, 137 M 466, 163 NW 126.

21. Replacing lost records

A court has the power to replace its own records when lost or destroyed. This power extends to supplying any pleadings or other papers in civil cases before as well as after judgment. Red River v Sture, 32 M 95, 20 NW 229.

22. Rights of third parties to be saved

In an action in replevin, where the defendant has a verdict in the alternative, but the clerk erroneously entered an absolute money judgment for the defendant, the trial court, in its discretion, amended the judgment to conform to the verdict. Such amendment is inoperative to affect the rights of third persons, not parties to the suit; but a clause saving the rights of third persons should be inserted in the order allowing the amendment. Under certain circumstances the surety on plaintiff's bond cannot oppose the amendment. Berthold v Fox, 21 M 51.

The trial court cannot allow an amendment nunc pro tunc of an insufficient statement for judgment by confession so as to affect the rights of creditors who have subsequently acquired liens, and who have begun proceedings to avoid the judgment. Wells v Gieseke, 27 M 478, 8 NW 380; Auerbach v Gieseke, 40 M 258, 41 NW 946.

The affidavit of service being insufficient but judgment nevertheless entered, if the summons was in fact published and no facts appearing that it would affect intervening rights of third parties, the court may allow a proper affidavit of publication to be filed nunc pro tunc. Burr v Seymour, 43 M 401, 45 NW 715.

Rights of third parties not prejudiced by correction of judgment nunc pro tunc. Plankerton v Continental, 180 M 168, 230 NW 464.

III. VACATION OF JUDGMENTS AND ORDERS

1. Statute a regulation, not a grant of power

Where, upon an application to the court in vacation for judgment, for want of an answer, the court orders judgment, and the judgment is entered, the court cannot review its decision upon motion to vacate the judgment. The only remedy of the defendant in error in the decision is by appeal from the judgment. Grant v Schmidt, 22 M 1.

The return of an officer of the service of a summons is not conclusive upon the defendant, but may be impeached by affidavit, upon motion or other direct proceedings in the action to set aside the judgment on default. Crosley v Farmer, 39 M 305, 40 NW 71.

Where objections to a judgment can be made by an appeal from it, they will not be reviewed on appeal from motion to vacate the judgment. Gasser v Spalding, 164 M 443, 205 NW 374; Matcham v Phoenix, 165 M 479, 205 NW 637.

It is within the power of a court of general jurisdiction to vacate its orders. The power is inherent, and recognized by statute (section 544.32). The court did not abuse its discretion in the instant case. Duffy v Stratton, 169 M 136, 210 NW 866.

The rules relating to vacation of judgments apply generally to amendments to pleadings. Stebbins v Friend-Crosby, 178 M 549, 228 NW 150.

Mere inadvertence of counsel in not offering available evidence is not a reasonable excuse for granting a new trial. State ex rel v City of Eveleth, 179 M 99, 228 NW 447.

Vacating the original findings and opening the case for further evidence was within the discretion of the court. Morris v Blossom, 181 M 71, 231 NW 397.

Decision of motion by the trial court based on conflicting affidavits will not be disturbed on appeal. Mason v MacNeil, 186 M 278, 243 NW 129.

Pending a motion for a new trial judgment was entered by the prevailing party without notice. This was not ground for vacating the judgment based upon alleged excusable negligence of the attorney for the judgment debtor in not asking for a stay of proceedings. Wilcox v Hedwall, 186 M 504, 243 NW 709.

Motion to vacate judgment properly dismissed in view of denial of similar motion based on same grounds, no leave having been obtained from the court. Universal v Braisie, 186 M 648, 243 NW 393.

Rules applicable to a motion to strike a pleading as sham or frivolous do not apply to a motion to reopen a judgment to enforce specific performance. Ramsay v Barnard, 189 M 333, 249 NW 192.

The beneficiary having consented to the allowance of the annual account of the trustee, the trial court properly denied the motion to set aside the orders. Fleischmann v N. W. Bank, 194 M 232, 260 NW 310.

The district court has no power to vacate an intermediate order after judgment has been entered. A judgment may not be vacated and set aside where the only objections thereto are based upon matters that might have been raised on appeal. Johnson v Union Bank, 196 M 590, 266 NW 169.

The relief allowed in the trial court was beyond the power of the court to grant. Section 548.14 and not section 544.32 applies where the statutory time has run. Jordan's Estate, 199 M 58, 271 NW 104.

The provisions of sections 548.14 and 544.32 are concurrent remedies. Melgaard's Will, 200 M 508, 274 NW 641.

If a case was settled in disregard of attorney's lien on cause of action under Minnesota statute, judgment of dismissal could be reinstated for purpose of enforcing lien against the defendant. Byram v Miner, 47 F(2d) 112.

2. Notice of motion

See II, clause 4.

3. Application by non-resident; attachment

The order vacating a judgment against defendants on the ground they had no interest in the property seized, was error. Whitney v Sherin, 74 M 4, 76 NW 787.

4. Application by stranger to judgment

The continuance of an action by bringing in new parties in place of a deceased defendant, is to be effected, not under General Statutes 1866, Chapter 66, Section 104, but under section 36 of the same chapter. A continuance under these circumstances could be allowed only upon supplemental complaint, in analogy to the proceeding by bill of revivor under the old chancy practice. Lee v O'Shaughnessy, 20 M 173 (157).

An assignee for benefit of creditors may maintain an action to determine an adverse claim against one allegedly making a false claim under a deed to defendant from plaintiff's assignor. Hunter v Cleveland, 31 M 505, 18 NW 645.

The statute authorizing "the party aggrieved" to prosecute an action to set aside a judgment obtained by fraud, does not authorize one not a party to the action in which such judgment was recovered, although he was interested in the result, to maintain such statutory action. Stewart v Duncan, 40 M 410, 42 NW 89.

The point made by appellant that this plaintiff, if not served with process, is a stranger to the judgment, is inconsistent with the fact that judgment was recorded against him. Magin v Lamb, 43 M 80, 44 NW 675.

A judgment, void for want of jurisdiction appearing on its face, may be set aside on motion of one, not a party to the action, who has an interest in the property upon which the judgment is a cloud. Mueller v Reimer, 46 M 314, 48 NW 1120.

In an action to determine adverse claims, the plaintiff claiming under a deed from defendant, the trial court held that an intervenor had title under a tax sale. The trial court rightfully denied defendant leave to defend the action as to plaintiff. Holcomb v Stretch, 74 M 234, 76 NW 1132.

5. Application by assignee

If a transfer of interest in property which is the subject of an action takes place pendente lite, and the assignee desires to proceed, whether in the name of the original plaintiff, or otherwise, he must, in a proper proceeding establish the fact of the transfer and obtain leave of the court to continue the action in the name of the original plaintiff, or be added or substituted in the action, which must be on notice to the parties. Chisholm v Clitherall, 12 M 375 (251).

Defendant under section 544.32 applied for and obtained an order vacating the default judgment, and reopening the case. Plaintiff's assignee appealed. The trial court found no abuse of discretion. DeCoster v Jorgenson, 137 M 472, 163 NW 1069.

6. Merits need not be shown

A judgment entered upon service of summons pursuant to an order founded upon an insufficient affidavit, will be vacated without requiring defendant to show a defense or want of notice of the suit. Mackubin v Smith, 5 M 367 (296); Lee v O'Shaughnessy, 20 M 173 (157); Heffner v Gunz, 29 M 108, 12 NW 342; Svgs. Bank v Authier, 52 M 98, 53 NW 812, 850.

Where in making findings and order the court overlooks a controlling statute, the court may vacate the foreclosure without a showing on the part of the mortgagor. Lehman v Norton, 191 M 211, 253 NW 663.

7. Diligence

When the judgment is merely voidable, the applicant must show due diligence. Jorgenson v Griffin, 14 M 464 (346); Stocking v Hanson, 22 M 542; Covert v Clark, 23 M 539; Dillon v Porter, 36 M 341, 31 NW 56; Feikert v Wilson, 38 M 341, 37 NW 585; Eisenmenger v Murphy, 42 M 84, 43 NW 784; Seibert v M. & St. L. 58 M 72, 59 NW 828.

When the judgment is absolutely void and not merely voidable, the moving party need not show diligence. Lee v O'Shaughnessy, 20 M 173 (157); Heffner v Gunz, 29 M 108, 12 NW 342; Stocking v Hanson, 35 M 207, 28 NW 507; Feikert v Wilson, 38 M 341, 37 NW 585.

A void judgment never becomes good by lapse of time. McNamara v Casserly, 61 M 335, 63 NW 880.

Notice of a motion to vacate a judgment in favor of a non-resident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof. Phelps v Heaton, 79 M 476, 82 NW 990.

An application to vacate a judgment made more than nine months after the defendant acquired knowledge of it comes too late and is not excused by illness. Nat'l Council v Canter, 132 M 354, 157 NW 586.

An order directing receiver to pay over certain money to defendant was on proper application properly vacated although three years elapsed between the making and the vacation of the order. Pulver v Commercial, 135 M 286, 160 NW 781.

The court was justified, in view of the non-appearance of the defendant or his attorney at the trial, in refusing to vacate the judgment. Barwald v Thuet, 157 M 94, 195 NW 768.

There was a lack of diligence in the failure to seek relief from a judgment of foreclosure and sale until nearly nine months after the moving party became chargeable with notice of the judgment. Alexander v Hutchins, 158 M 391, 197 NW 754, 756.

The court might well conclude that defendant had knowledge of the entry of the judgment four years having expired. Ladwig v Peterson, 160 M 13, 199 NW 226.

No proceedings for administration for five years, and this action was commenced one year later. The court properly refused to vacate the judgment against the deceased. Lambertz v Daniels, 160 M 180, 199 NW 904.

Under the facts stated in the opinion the district court did not abuse its discretion in denying appellant's application to vacate the order of the probate court on the ground of appellant's laches and long acquiescence in the order after having actual notice thereof. Butler's Estate, 183 M 591, 237 NW 592.

In the absence of fraud or mistake of fact, the power of the probate court to vacate an order or decree is exhausted when the time to appeal therefrom has expired. Simon's Estate, 187 M 399, 246 NW 31.

An application to vacate orders, one extending time to redeem from foreclosure, and the other declaring petitioner in default under the extension order, are addressed to the discretion of the trial court. Orfield v Morstain, 199 M 466, 272 NW 260.

The trial in the district court was de novo, and the question of abuse of discretion by the probate court does not apply. In the instant case there is a clear case of laches on the part of the applicant. Holum's Estate, 179 M 318, 229 NW 133.

The record is clear that the application to vacate the order of Oct. 9, 1939, was made after the time within which such an application was permitted under section 544.32. State ex rel v Funck, 211 M 27, 299 NW 684.

8. Motion defeated by amendment

Where a judgment was entered by default against a non-resident, and on application to vacate the judgment the affidavit of publication is found insufficient, if the evidence discloses that the publication was in fact properly made, the court may allow a proper amendment of the affidavit effective nunc pro tunc. Burr v Seymour, 43 M 401, 45 NW 715.

9. Void judgments

A person against whom a void judgment has been entered has an absolute right at any time and without showing diligence, or a meritorious defense to have it vacated on motion. An appearance to set aside a void judgment does not validate it. Mackubin v Smith, 5 M 367 (296); Lee v O'Shaughnessy, 20 M 173 (157); Covert v Clark, 23 M 539; Heffner v Gunz, 29 M 108, 12 NW 342; Chauncey v Wass, 35 M 1, 35, 25 NW 457, 30 NW 826; Feikert v Wilson, 38 M 341, 37 NW 585; Godfrey v Valentine, 39 M 336, 40 NW 163; Magin v Lamb, 43 M 80, 44 NW 675; Wistar v Foster, 46 M 484, 49 NW 247; Strong v Comer, 48 M 66, 50 NW 936; Roberts v Chic. St. Paul, 48 M 521, 51 NW 478; Svgs. Bank v Authier, 52 M 98, 53 NW 812;

Gillette v Ashton, 55 M 75, 56 NW 576; City of Duluth v Diblee, 62 M 18, 63 NW 1117; Holcomb v Stretch, 74 M 234, 76 NW 1132; Phelps v Heaton, 79 M 476, 82 NW 990.

A judgment entered upon the default of the defendant without due service of process is void for want of jurisdiction and will be vacated at any time on reasonable notice. Pugsley v Magerfleisch, 161 M 246, 201 NW 323.

10. Jurisdictional defects

The following jurisdictional defects have been held ground for vacating judgments on motion:

Defective or untrue affidavits for publication of summons. Mackubin v Smith, 5 M 367 (296); Chauncey v Wass, 35 M 1, 35, 25 M 457, 30 NW 826; Feikert v Wilson, 38 M 341, 37 NW 585;

Failure to substitute proper parties after death of the defendant. Lee v O'Shaughnessy, 20 M 173 (157);

Service by publication on a resident of the state. Covert v Clark, 23 M 539; Bardwell v Collins, 44 M 97, 46 NW 315; see Shepard v Ware, 46 M 174, 48 NW 773; McClymond v Noble, 84 M 329, 87 NW 838;

Improper service of summons on an officer of a foreign corporation. State ex rel v District Court, 26 M 233, 2 NW 698;

Unauthorized appearance. Stocking v Hanson, 35 M 207, 28 NW 507; Deering v Donovan, 82 M 162, 84 NW 745;

Improper service at house of usual abode. Crosby v Farmer, 39 M 305, 40 NW 71;

Defective publication of summons. Godfrey v Valentine, 39 M 336, 40 NW 163; Stai v Selden, 87 M 271, 92 NW 6;

No service of summons. Flanigan v Duncan, 47 M 250, 49 NW 981; Knutson v Davies, 51 M 363, 53 NW 646; Allen v McIntyre, 56 M 351, 57 NW 1060;

Rendition of judgment in state court after removal to federal court. Roberts v Chic. St. P. 48 M 521, 51 NW 478;

Service of summons on wrong person. Magin v Lamb, 43 M 80, 44 NW 675; Svgs. Bank v Authier, 52 M 98, 53 NW 812;

Improper personal service of summons. Svgs. Bank v Authier, 52 M 98, 53 NW 812; and

Departure from the requirements of the statute in the service of summons. Lee v Clark, 53 M 315, 55 NW 127.

A motion to vacate a judgment, and nothing more, is usually based upon a jurisdictional defect appearing upon the face of the record. A motion to vacate a judgment is a matter of right. A motion to open is directed to the sound discretion of the court, and merits and diligence must be shown. City of St. Paul v Meister, 176 M 61, 222 NW 520.

The mortgage foreclosure being void for irregularity, the trial court properly set aside orders permitting extension under the moratorium law, and later order declaring a non-compliance with the terms of the extension. Orfield v Marstain, 199 M 468, 272 NW 260.

It was error for the district court to vacate the probate court's vacating order upon the ground that the probate court acted without jurisdiction; pointing out the difference between jurisdiction and error. Showell's Estate, 209 M 542, 297 NW 111.

In case where a tax has been paid, but through mistake a tax judgment has been entered, the judgment may be set aside upon motion. OAG Dec. 15, 1944 (412a-10).

11. Return of summons not conclusive

The return of an officer of the service of summons is not conclusive upon the defendant but may be impeached by affidavit, upon motion or other direct proceedings in an action to set aside the judgment on default. Crosby v Farmer, 39 M 305, 40 NW 71; Burton v Schurck, 40 M 52, 41 NW 244; Gray v Hayes, 41 M

12, 42 NW 594; Knutson v Davies, 51 M 363, 53 NW 646; Allen v McIntyre, 56 M 351, 57 NW 1060; Town of Hinckley v Kettle River, 70 M 105, 72 NW 835; Osman v Wisted, 78 M 295, 80 NW 1127.

12. Unauthorized action

The attorney who assumed to act had no authority to do so, and the court had no jurisdiction and the judgments were void. Stocking v Hanson, 35 M 207, 28 NW 507.

The action was commenced and prosecuted entirely without plaintiff's knowledge or consent, but the corpus was turned over to client, and defendant had judgment for return of the goods or its value. Plaintiff's motion to set aside the proceedings and vacate the judgment is denied on the ground that plaintiff had not returned or offered to return the harvester. Deering v Donovan, 82 M 162, 84 NW 745.

13. Erroneous judgment

If a judgment entered in strict accordance with the order of the court for judgment departs from or exceeds the relief demanded in the complaint, the proper remedy is by appeal from the judgment, not by motion to wholly vacate. Palmer v Zumbrota, 65 M 90, 67 NW 893.

14. Facts arising after judgment

The authority given by General Statutes 1866, Chapter 62, Section 25, to revise and alter a judgment for alimony, is to be exercised only upon new facts occurring after the judgment, or new facts occurring before the entry of judgment of which the party charged with payment of the alimony was excusably ignorant at the time. Semrow v Semrow, 23 M 214.

Where facts have arisen after final judgment, of such a nature that it ought not to be executed, relief by the vacation or modification of the judgment may be granted on motion, the facts being undisputed. Weaver v Miss. Co. 30 M 477, 16 NW 269.

A plaintiff may recover damages resulting from a nuisance and may also in the same action obtain an order abating the acts complained of. Calstrum v M. & St. L. 33 M 516, 24 NW 255.

The court had authority to exercise its discretion in vacating its approval of a father's settlement of a claim for injury to a minor son, where separate and distinct injuries were sustained by the minor not contemplated in the settlement. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

15. Fraud

An action cannot be maintained to set aside a judgment on the ground that the award was procured by means of false testimony, in a case where the court rendering the judgment has full power to grant adequate relief, upon proper application and showing in the same suit. Johnston v Paul, 23 M 46; Wieland v Shillock, 23 M 227.

Laws 1877, Chapter 131, is unconstitutional as applied to judgments absolute at the time of its enactment. Weiland v Shillock, 24 M 345.

The district court may vacate a decree of divorce, upon a summary application seasonably made, for fraudulent practices in obtaining it; but the evidence must be clear and convincing. Olmstead v Olmstead, 41 M 297, 43 NW 67; Walters v Walters, 151 M 302, 186 NW 693.

In a personal injury case a stipulation of settlement and dismissal with prejudice may be set aside on a showing of fraud. Becker v Messner, 175 M 471, 221 NW 724.

The court was justified in vacating the stipulation and amended judgment, and reinstating the original judgment upon the ground that it was procured by undue influence and over-reaching. Halper v Halper, 179 M 488, 229 NW 791.

Evidence of fraud must be strong, clear, and conclusive in order to furnish grounds for setting aside an order for judgment. Fleischmann v N. W. Bank, 194 M 227, 260 NW 310.

Plaintiff has a choice of two remedies. He may proceed by action under section 548.14 or by motion under section 544.32; but where an action has been fully litigated and upon appeal the decision affirmed, the defeated party may not again have a new trial on the ground that witnesses made mistakes or wilfully testified falsely. Nichols v Village of Morristown, 204 M 212, 283 NW 748.

The probate court is authorized under section 544.32, to vacate its orders procured through fraud, mistake, inadvertence, or excusable neglect, provided the motion is seasonably made. Gooch's Estate, 212 M 272, 3 NW(2d) 494.

16. Surprise

Upon the facts stated, the judgment may properly be said to have been taken against Wieland through his surprise or excusable neglect. Wieland v Shillock, 23 M 227.

The appearance of the judgment defendant's attorney, for the purpose of the motion only, is a special appearance. Covert v Clark, 23 M 539.

Where a party neglected for six months after the filing of findings to examine them, it is not an abuse of discretion in the court to refuse to allow him to propose or settle a case, or obtain a vacation of the judgment. Siebert v M. & St. L. 58 M 72, 59 NW 828.

Certiorari is the remedy for review in compensation cases. Bruening v Central Warehouse, 150 M 525, 184 NW 273.

17. Failure to file or serve complaint

Where a summons is regular on its face, and is duly served, the court acquires jurisdiction of the cause. The fact that the complaint is not filed, or a copy thereof is not served with the summons, does not render the judgment void. It is a mere irregularity, and is waived unless the defendant moves to set aside the service. Kimball v Brown, 73 M 167, 75 NW 1043.

18. Judgment against an infant

A judgment rendered upon default against an infant over 14 years of age, after service of a summons upon him, but without the appointment of a guardian ad litem, is erroneous and voidable, but not void. An unexcused delay of more than a year after he became of age, he having knowledge of the judgment, is fatal to an application for relief. Eisenmenger v Murphy, 42 M 84, 43 NW 784.

19. Default judgment prematurely entered

Where a seasonable demand is made for a copy of the complaint, and same is served by mail, the defendant has double time to answer; and, if judgment is prematurely entered, he has an absolute right to have it set aside. Gillette v Ashton, 55 M 75, 56 NW 576.

20. Vacation of orders

The order for judgment not being appealable, and no judgment having been entered thereon, the court had jurisdiction to vacate or modify it. Weiser v City of St. Paul, 86 M 26, 90 NW 8.

The court has the power to vacate an order establishing a ditch upon seasonable application therefor. Troska v Brecht, 140 M 233, 167 NW 1042; County v Ralph, 144 M 446, 175 NW 899.

After judgment has been entered the district court has no power to vacate an intermediate order. Johnson v Union Bank, 196 M 590, 266 NW 169.

Dismissal of a case because of no advancement in pleadings for a year is not a "clerical mistake, error or default," cognizable by writ of error coram nobis. Under the federal district court rules, the court is without jurisdiction to vacate

after term. Order dismissing case because of no advancement in pleadings for a year. New England v United States, 2 F. Supp. 648.

IV. OPENING DEFAULTS

1. Remedy by motion, how far exclusive

The trial court found that the attorney could have found the address of defendant by reasonable inquiry, and his failure to do so amounted to fraud in law. A conditional vacation was authorized by the facts. Geisberg v O'Laughlin, 88 M 432, 93 NW 310.

General Statutes 1894, Section 5434, being in derogation of the common law, is not applicable in a case such as this, where the case was fully tried on its merits, and the parties were fully apprised of the issues. Distinguishing the case of Geisberg v L'Laughlin, 88 M 432, 93 NW 310. Maundry v Witzka, 89 M 300, 94 NW 885.

Plaintiff is bound by the judgment entered in a prior action, involving the same subject matter, wherein the same contracts were considered and construed. The proper relief from such prior judgment is by motion under General Statutes 1894, Section 5267 (section 544.32). Phelps v Western Realty, 89 M 319, 94 NW 1085, 1135.

Vacation of default judgment. 1 MLR 273.

Vacation of judgment. 24 M 817.

2. Statute is a regulation and not a grant of power

See III (1).

On conflicting evidence the decision of the trial court on vacating a judgment is final. Peterson v Bengston, 166 M 494, 207 NW 20.

The trial court has jurisdiction and in its discretion may allow a renewal of a motion to vacate a judgment. The strict rule of res judicata does not apply. La Plante v Knutson, 174 M 345, 219 NW 184.

Quoting Continental v Holland, 66 F(2d) 829: "Conditions for granting relief by a court of equity are: (1) The party seeking the relief had a good defense; (2) that he was prevented by fraud, concealment, accident, mistake, or the like from presenting such defense; and (3) that he has been free from negligence in failing to avail himself of the defense. Simons v Norwich Union, 73 F(2d) 415.

A statutory remedy which permits a defendant not personally served to set aside a default judgment and defend on the merits within one year should be allowed as a matter of right, and with certain exceptions, is not within the discretion of the trial judge. Kane v Stallman, 209 M 138, 296 NW 1.

3. To what applicable

The proceedings based on this section are applicable:

To garnishment proceedings. Goodrich v Hopkins, 10 M 162 (130);

To an action of ejectment. Hallam v Doyle, 35 M 337, 29 NW 130;

To condemnation proceedings. In re Proceedings by Mpls. Ry. Term. 38 M 157, 36 NW 105;

To habeas proceedings. State ex rel v Lembke, 38 M 278, 37 NW 338;

To actions in which the summons was served by publication. Lord v Hawkins, 39 M 73, 38 NW 689; Welch v Marks, 39 M 481, 40 NW 611; Russell v Blakeman, 40 M 463, 42 NW 391; Boeing v McKinley, 44 M 392, 46 NW 766; Nauer v Benham, 45 M 252, 47 NW 796; Hoyt v Lightbody, 93 M 249, 101 NW 304;

To partition proceedings. Welch v Marks, 39 M 481, 40 NW 611;

To foreclosure proceedings. Russell v Blakeman, 40 M 463, 42 NW 391;

To actions against "unkown heirs". Boeing v McKinley, 44 M 392, 46 NW 766;

To tax proceedings. City of Duluth v Diblee, 62 M 18, 63 NW 1117;

To actions against "other persons or parties unknown". Hoyt v Lightbody, 93 M 249, 101 NW 304;

To an action to annul a marriage for fraud and duress. Waller v Waller, 102 M 405, 113 NW 1013.

This section is not applicable to a judgment in an action for divorce. Scribner v Scribner, 93 M 195, 101 NW 163; LaFond v LaFond, 102 M 344, 113 NW 896; Laird v Laird, 149 M 104, 182 NW 955;

Nor to Torrens proceedings. Murphy v Borgens, 148 M 375, 182 NW 449.

Upon a sufficient showing of newly discovered evidence, a judgment awarding compensation under the workmen's compensation act may be opened. State ex rel v District Court, 134 M 191, 158 NW 825.

While the industrial commission may in its discretion grant rehearings, where the commission determines that a right has terminated, that is a final decision and can only be reviewed by certiorari. Rosenquist v O'Neil, 187 M 375, 245 NW 621.

A default judgment may be set aside and a defendant may appear and defend where the complaint does not allege a cause of action, the time for appeal not having expired. Roe v Widme, 191 M 251, 254 NW 274.

4. Relief granted liberally

Relief should not be allowed in a way to encourage loose practice or lax administration of the law. Merritt v Putnam, 7 M 493 (399); Noye v Wheaton, 60 M 117, 61 NW 910; Walsh v Boyle, 94 M 437, 103 NW 506.

It is in furtherance of justice that an action be tried on the merits. Whitcomb v Shafer, 11 M 232 (153); Walsh v Boyle, 94 M 437, 103 NW 506.

Courts are inclined to relieve a party from a default if he furnishes any reasonable excuse for his neglect and makes any fair showing of merits. People's Ice v Schlinker, 50 M 1, 52 NW 219; Martin v Curley, 70 M 489, 73 NW 405; Milwaukee v Schroeder, 72 M 393, 75 NW 606; Hull v Chapel, 77 M 159, 79 NW 669; McMurran v Bourne, 81 M 515, 84 NW 338; Walsh v Boyle, 94 M 437, 103 NW 506; Barrie v Northern Assur. 99 M 272, 109 NW 248; Hendricks v Conner, 104 M 399, 116 NW 751; Wilhelm v Wilhelm, 201 M 466, 276 NW 804.

Different considerations apply when the application is made by a "prowling assignee" or speculative purchaser. McClymond v Noble, 84 M 329, 87 NW 838.

When no application to trial court, no consideration will be accorded on appeal. Nichols v Frederick, 123 M 531, 143 NW 1123.

In any application on the ground of newly discovered evidence, after rendition of the judgment, relief should be granted cautiously. State ex rel v District Court 134 M 189, 158 NW 825; DeCoster v Jorgenson, 137 M 472, 163 NW 1069.

Where the appellant from probate to district court can be relieved of his defaults, and there is no prejudice to other party and the appeal was in good faith, the court may permit an amendment based on his concise statement of the law and fact on which he relies. Dohn v Dohn, 203 M 19, 279 NW 715.

In the interests of justice it is proper that the provisions of section 544.32 be liberally construed; but upon the facts in the instant case the defendant is as a matter of law guilty of inexcusable and culpable neglect and not entitled to relief. Lentz v Lutz, 215 M 230, 9 NW(2d) 505.

5. Discretionary

The matter of opening a default lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. Perrin v Oliver, 1 M 202 (176); Myrick v Pierce, 5 M 65 (47); True v True, 6 M 458 (315); Swift v Fletcher, 6 M 550 (386); Jorgenson v Boehmer, 9 M 181 (166); Goodrich v Hopkins, 10 M 162 (130); Barker v Keith, 11 M 65 (37); Whitcomb v Shafer, 11 M 232 (153); Woods v Woods, 16 M 81 (69); Reagan v Madden, 17 M 402 (378); Sheldon v Risedorph, 23 M 518; Libby v Mikelborg, 28 M 38, 8 NW 903; Moran v Mackey, 32 M 266, 20 NW 159; Smith v Harmon, 32 M 312, 20 NW 238; Frear v Heichert, 34 M 96, 24 NW 319; Sandberg v Berg, 35 M 212, 28 NW 255; Hallam v Doyle, 35 M 337, 29 NW 130; Exley v Berryhill, 36 M 117, 30 NW 436; St. P. Land v Dayton, 39 M 315, 40 NW 66; Bray v Church, 39 M 390, 40 NW 518; Russell v Blakeman, 40 M 463, 42 NW 391; Bridgeman v Dambly,

41 M 526, 43 NW 482; Foote v Branch, 42 M 62, 43 NW 782; Weller v Hammer, 43 M 195, 45 NW 427; Boeing v McKinley, 44 M 392, 46 NW 766; Flanigan v Sable, 44 M 417, 46 NW 854; Strum v School District, 45 M 88, 47 NW 462; Nauer v Benham, 45 M 252, 47 NW 796; Grance v Frings, 46 M 352, 49 NW 60; Kipp v Cook, 46 M 535, 49 NW 257; McMurran v Meek, 47 M 245, 49 NW 983; Lathrop v O'Brien, 47 M 428, 50 NW 530; Peoples' Ice v Schlinker, 50 M 1, 52 NW 219; Stickney v Jordain, 50 M 258, 52 NW 861; Gerdsten v Cockrell, 52 M 501, 55 NW 58; Pine Mountain v Tobans, 55 M 287, 56 NW 895; Wolford v Bowen, 57 M 267, 59 NW 195; Fitzpatrick v Campbell, 58 M 20, 59 NW 629; Rhodes v Walsh, 58 M 196, 59 NW 1000; St. Mary's v Nat'l Benefit, 60 M 61, 61 NW 824; Missouri v Norris, 61 M 256, 63 NW 634; Northern Trust v Markell, 61 M 271, 63 NW 735; City of Duluth v Diblee, 62 M 18, 63 NW 1117; Forin v City of Duluth, 66 M 54, 68 NW 515; Stewart v Cannon, 66 M 64, 68 NW 604; Bates v Bates, 66 M 131, 68 NW 845; Northern Trust v Crystal Lake, 67 M 131, 69 NW 708; Glaeser v City of St. Paul, 67 M 368, 69 NW 1101; First Nat'l v Nor. Trust, 69 M 176, 71 NW 928; Town of Hinckley v Kettle River, 70 M 105, 72 NW 835; Martin v Curley, 70 M 489, 73 NW 405; Milwaukee Harv. v Schroeder, 72 M 393, 75 NW 606; Whitney v Sherin, 74 M 4, 76 NW 787; Hull v Chapel, 77 M 159, 79 NW 669; Ueland v Johnson, 77 M 543, 80 NW 700; Osman v Wisted, 78 M 295, 80 NW 1127; Schuler v Wood, 81 M 372, 84 NW 21; McMurran v Bourne, 81 M 515, 84 NW 338; Deering v Donovan, 82 M 162, 84 NW 745; McClymond v Noble, 84 M 329, 87 NW 838; Wood v Schoenauer, 85 M 138, 88 NW 411; Village of Kasson v Lloyd, 86 M 286, 90 NW 1133; Queal v Bulen, 89 M 477, 95 NW 310; Crane v Sauntry, 90 M 301, 96 NW 794; Peru Plow v King, 90 M 517, 97 NW 373; White v Gurney, 92 M 271, 99 NW 889; Lynn v Schunk, 101 M 22, 111 NW 729; Waller v Waller, 102 M 405, 113 NW 1013; Perkins v Gibbs, 108 M 151, 121 NW 605; Slimmer v State Bank, 122 M 187, 142 NW 144; Nichols v Frederick, 123 M 531, 143 NW 1123; Shoop v Opplinger, 124 M 535, 144 NW 743; Noonan v Spear, 125 M 475, 147 NW 654; N. W. Thresher v Herding, 126 M 184, 148 NW 57; Rodgers v United States Ins. 127 M 435, 149 NW 671.

If a default judgment is entered when in fact there was no default, an application to open is not addressed to the discretion of the court but is a matter of right. Swift v Fletcher, 6 M 550 (386).

The discretion contemplated by the statute is not the arbitrary and uncontrolled pleasure or caprice of the judge, but a sound legal discretion; a discretion in the exercise of which it is his duty to grant the desired relief in a meritorious case. Merritt v Putnam, 7 M 493 (399); Willard v Shillock, 24 M 345; Forin v City of Duluth, 66 M 54, 68 NW 515; Potter v Holmes, 74 M 508, 77 NW 416; Child v Maxwell, 183 M 170, 236 NW 202.

If it is obvious that the trial court has acted wilfully, arbitrarily, capriciously or under a misapprehension of the law, and in denial of justice, its action will be reversed on appeal, for its discretion in this regard is not absolute but judicial and must be judicially exercised. Hildebrandt v Robbecke, 20 M 100 (83); Altman v Gabriel, 28 M 132, 9 NW 633; Welch v Marks, 39 M 481, 40 NW 611; Weymouth v Gregg, 40 M 45, 41 NW 243; People's Ice v Schlinker, 50 M 1, 52 NW 219; Baxter v Chute, 50 M 164, 53 NW 379; Jones v Swain, 57 M 251, 59 NW 297; Noye v Wheaton, 60 M 117, 61 NW 910; Potter v Holmes, 74 M 508, 77 NW 416; Osman v Wisted, 78 M 295, 80 NW 1127; McClure v Clark, 94 M 37, 101 NW 951.

The appellate court will not reverse the trial court except in case of a clear abuse of discretion; and particularly is this true when the determination of the trial court is made on conflicting affidavits. Libby v Mikelborg, 28 M 38, 8 NW 903; Moran v Mackey, 32 M 266, 20 NW 159; Swanstrom v Marvin, 38 M 359, 37 NW 455; Flanigan v Duncan, 47 M 250, 49 NW 981; Barta v Nestaval, 133 M 116, 157 NW 1076.

The discretion cannot be exercised except in favor of a party who brings himself within the provisions of the statute by a showing of fraud, mistake, inadvertence, surprise or excusable neglect. McClure v Clarke, 94 M 37, 101 NW 951.

Not an abuse of discretion. Johns-Manville v Gt. Northern, 128 M 311, 150 NW 907; Nelson v C. & N. W., 129 M 316, 152 NW 721; Fitzgerald v Maher, 129 M 414, 152 NW 772; Schultz v Wallin, 130 M 45, 152 NW 865; Moot v Searle, 165 M 308, 206 NW 447; Holmes v Conter, 209 M 144, 295 NW 649; Pilney v Funk, 212 M 399, 3 NW(2d) 792.

Permission to amend summons. Morrison Co. v Duclos, 131 M 173, 154 NW 952.

Petition granted on condition. Macknick v Switchmen's Union, 131 M 248, 154 NW 1099.

Permission to serve reply. Roesler v Union Hay Co. 131 M 489, 154 M 789.

Vacation refused because of laches. Nat'l Council v Canter, 132 M 354, 157 NW 586.

No absolute right, and inexcusable neglect of counsel appearing, there is no abuse of discretion. Statvaki v Jendro, 134 M 328, 159 NW 752; Everdell v Addison, 136 M 319, 162 NW 352; DeCoster v Jorgenson, 137 M 472, 163 NW 1069.

Vacating judgment and permitting service of amended complaint. Strand v C. & G. W. 147 M 1, 179 NW 369; Flannery v Kusha, 147 M 156, 179 NW 902.

Inapplicable to Torrens system. Murphy v Borgen, 148 M 375, 182 NW 449.

Applicable to workmen's compensation act. Ronstadt v Minor, 152 M 10, 187 NW 703.

Refusal to reopen an order for an assessment on stockholders justified. Hosford v Cuyuna, 153 M 186, 189 NW 1025.

Refusal of the trial court to open the default was an abuse of discretion. Hasara v Swaney, 161 M 94, 200 NW 847.

In determining whether judicial discretion should relieve against a claim allowed as on default, it is proper to consider the statement of claim as filed and the objections or defense proposed thereto. Walker's Estate, 183 M 325, 236 NW 485.

It was not an abuse of discretion to refuse to set aside a default judgment where defendant returned the complaint to the plaintiff's attorney with explanations. Lodahl v Hedburg, 184 M 154, 238 NW 41.

Vacating judgments or orders, opening defaults, permitting interposition of answer, settling case and similar, are in the judicial discretion of the trial court. Marthaler v Meyers, 173 M 606, 218 NW 127; Wagner v Broquist, 181 M 39, 231 NW 241.

An order denying a motion to open a default made on conflicting affidavits is not reversible by the supreme court. Jennrich v Moeller, 182 M 445, 234 NW 638; Roe v Widme, 191 M 251, 254 NW 274.

Denial of parties' motion for relief such as motion to vacate or set aside a judgment of any kind, motion to reopen default, and similar, are within the sound discretion of the trial court, and will not be reversed on appeal except for clear abuse of discretion. Union Bank v Quevli, 174 M 46, 218 NW 170; MacLean v Reynolds, 175 M 112, 220 NW 435; Manufacturers v Moshier, 177 M 388, 225 NW 283; McMahon v Pequot Co. 186 M 141, 242 NW 620; Nystrom v Nystrom, 186 M 492, 243 NW 704.

Abuse of judicial discretion and the trial court reversed by appellate court. Central Hanover v Price, 189 M 36, 248 NW 287; Slingerland Estate, 196 M 354, 265 NW 21; Kennedy v Torador, 201 M 422, 276 NW 650.

Preponderance of conflicting affidavits clearly sustained refusal of trial court to vacate a default judgment. Johnson v Hallman, 177 M 619, 225 NW 283.

The trial court acted within its discretionary powers when it vacated a judgment entered by the clerk. High v Supreme Lodge, 207 M 228, 290 NW 425.

Where mortgagors admitted default in payment and did not move to vacate default in foreclosure action, but merely requested continuance to attempt refinancing, and reserved right to object to receivership proceedings, refusal to set aside default, foreclosure judgment, and sale thereunder was proper. National Guardian v Schwartz, 217 M 288, 14 NW(2d) 347.

6. Excusable neglect

An application to be relieved from a judgment, on the ground that it was taken against the party by mistake, inadvertence, surprise, or excusable neglect, is in the discretion of the court, and no appeal lies from its decision, except for palpable abuse of discretion. Merritt v Putnam, 7 M 493 (399); Jorgenson v Boehmer, 9 M 181 (166); Hilderbrandt v Robbecke, 20 M 100 (83); Zapries v Mil. St. Paul, 20 M 156 (139); City of Win. v Minn. Ry. 29 M 68, 11 NW 228; Sand-

berg v Berg, 35 M 212, 28 NW 255; Bray v Church, 39 M 390, 40 NW 518; Bridgman v Dambly, 41 M 526, 43 NW 482; Foote v Branch, 42 M 62, 43 NW 782; Lathrop v O'Brien, 47 M 428, 50 NW 530; Pine Mt. v. Tabour, 55 M 287, 56 NW 895; Noye v Wheaton, 60 M 117, 61 NW 910; Missouri v Norris, 61 M 256, 63 NW 634; Stewart v Cannon, 66 M 64, 68 NW 604; Bates v Bates, 66 M 131, 68 NW 845; Glaeser v City of St. Paul, 67 M 368, 69 NW 1101; Martin v Curley, 70 M 489, 73 NW 405; Milwaukee v Schroeder, 72 M 393, 75 NW 606; Whitney v Sherin, 74 M 4, 76 NW 789; Hull v Chapel, 77 M 159, 79 NW 669; Osman v Wisted, 78 M 295, 80 NW 1127; Schuler v Wood, 81 M 372, 84 NW 21; McMurran v Bourne, 81 M 515, 84 NW 338; Wood v Schoenauer, 85 M 138, 88 NW 411; Queal v Bulen, 89 M 477, 95 NW 310; White v Gurney, 92 M 271, 99 NW 889; Foster v Coughran, 113 M 433, 129 NW 853.

Relief from default in filing reply. McLaughlin v City of Breckenridge, 122 M 154, 141 NW 1134, 142 NW 134.

Vacating default for lack of answer. Slimmer v State Bank, 122 M 187, 142 NW 144; N. W. Thresher v Herding, 126 M 185, 148 NW 57; Randall v Randall, 133 M 63, 157 NW 903; DeCoster v Jorgenson, 137 M 472, 163 NW 1069.

Vacation of default because of service outside the state. Wheaton v Welch, 122 M 396, 142 NW 714.

No showing of abuse of discretion on the part of the trial court in granting the motion for relief. Wagner v Broquist, 181 M 39, 231 NW 241; Chamber of Com. v Thomas, 171 M 327, 214 NW 57; Walker's Estate, 183 M 325, 236 NW 485; Meehan v Mitchell, 191 M 412, 254 NW 584; Tiden v Shurstead, 191 M 518, 254 NW 617; Wilhelm v Wilhelm, 201 M 462, 276 NW 804.

No abuse of privilege in denying motion. City of St. Paul v Meister, 176 M 59, 222 NW 520.

It was an abuse of discretion of the trial court to deny relief. Deaver v Nelson, 180 M 38, 230 NW 122.

7. Surprise

Judgment set aside on the ground of surprise, and new trials granted. Woods v Woods, 16 M 81 (69); Hilderbrandt v Robbecke, 20 M 100 (83); Dupreis v Mil. St. Paul, 20 M 156 (139); Northwest Thresher v Herding, 126 M 184, 148 NW 57.

Refusal to set aside. Foote v Branch, 42 M 62, 43 NW 782.

Motion by defendant, himself an attorney at law, to vacate a judgment of divorce and for leave to answer properly denied, he having withdrawn his answer, and his only reason for desiring to reopen was to attack the evidence given in the default case. Selvig v Selvig, 175 M 71, 220 NW 546.

8. Mistake

The trial court did not abuse its discretion in opening the default and permitting the defendant to answer. Jorgenson v Boehmer, 9 M 181 (166); Lathrop v O'Brien, 47 M 428, 50 NW 530; Forin v City of Duluth, 66 M 54, 68 NW 515; Martin v Curley, 70 M 489, 73 NW 405; N. W. Thresher v Herding, 126 M 184, 148 NW 57; Everdell v Addison, 136 M 319, 162 NW 352; DeCoster v Jorgenson, 137 M 472, 163 NW 1069.

There being a meritorious case for relief, it was not a reasonable exercise of the discretion of the court to require defendants to file a bond. Brown v Brown, 37 M 128, 33 NW 546.

Relief may be granted on the second or renewed application. Gerdtzen v Cockrell, 52 M 501, 55 NW 58.

The court did not err when it denied the petition. Northern Trust v Crystal Lake, 67 M 131, 69 NW 708.

The court did not abuse its discretion in permitting defendant to answer, allowing the judgment to stand as a lien on the property pending the result of the trial. Shoop v Opplinger, 124 M 535, 144 NW 743.

A mistake of law as well as a mistake of fact may afford ground for relief from a judgment. Flanery v Kusha, 147 M 156, 179 NW 902.

The same rules govern the industrial commission as to vacation for mistake of fact, as govern the district court. Moffett v Cit. Bank, 198 M 480, 270 NW 596.

In the instant case, the evidence sustains the court's finding that the minor's suit was settled under mutual mistake of fact as to the character of the injuries sustained, and the court's action in vacating the judgment of dismissal and order approving settlement is sustained; and such order of vacation may be made more than a year after the dismissal. Elsen v State Farmers Mutual, 219 M 315, 17 NW(2d) 653.

9. Fraud

A judgment for a divorce cannot be granted upon default except upon proof of the facts. Other than the evidence of the parties; and when such judgment is obtained by fraud it will be vacated. True v True, 6 M 458 (315); Young v Young, 17 M 181 (153).

Judgment set aside, although the default was occasioned, not by the plaintiff, but by the acts of plaintiff's agent. Bray v Church, 39 M 390, 40 NW 518.

Where judgment against a school district is entered by collusion between plaintiff and one of the defendant's officers, the court may set aside the judgment and permit an answer. Sturm v School District, 45 M 88, 47 NW 462.

Court did not err in refusing to set aside a judgment in personal injury upon the ground that a release alleged in the answer was executed under mistake and induced by fraud. Swan v Rivoli, 174 M 197, 219 NW 85.

The probate court may vacate its final decree for fraud or mistake. Koffel's Estate, 175 M 527, 222 NW 68.

Where affidavits indicate strongly that award was based on false testimony, it is an abuse of discretion not to reopen and grant a new hearing. Meehan v Mitchell, 191 M 412, 254 NW 584.

Affidavits claiming fraud were insufficient as grounds to vacate a divorce decree. Wilhelm v Wilhelm, 201 M 462, 276 NW 804.

10. When year begins to run

The year within which a party may have relief from a judgment, commences to run from the time when he has actual notice of the judgment. Wieland v Shillock, 23 M 227.

Express references to the judgment in a chattel mortgage executed by the judgment debtors to secure the same, proves notice of the judgment. Dillon v Potter, 36 M 341, 31 NW 56.

A defendant upon whom a summons was served by publication, may apply to be relieved from the resultant judgment, and for leave to answer within one year after notice of the entry of judgment; and a purchaser at execution sale takes his title subject to result of trial in case the judgment is set aside. Lord v Hawkins, 39 M 73, 38 NW 689.

11. Time of application; diligence

A party must make his application within a reasonable time after notice of the judgment and at all events within one year of such notice. Gerish v Johnson, 5 M 23 (10); Groh v Bassett, 7 M 325 (254); Jorgenson v Boehmer, 9 M 181 (166); Holmes v Campbell, 13 M 66 (58); Altman v Gabriel, 28 M 132, 9 NW 633; Sheffield v Mullin, 28 M 251, 9 NW 756; Frear v Heichert, 34 M 96, 24 NW 319; Dillon v Porter, 36 M 341, 31 NW 56; Van Aerman v Winslow, 37 M 514, 35 NW 381; Kipp v Cook, 46 M 535, 49 NW 257; McMurran v Meek, 47 M 245, 49 NW 983; Stickney v Jordan, 50 M 258, 52 NW 861; Carlson v Phinney, 56 M 476, 58 NW 38; Siebert v M. & St. L. 58 M 72, 59 NW 828; Northern Trust v Crystal Lake, 67 M 131, 69 NW 708; First Nat'l v Northern Trust, 69 M 176, 71 NW 928; McMurran v Bourne, 81 M 515, 84 NW 838; Queal v Bulen, 89 M 477, 95 NW 310.

A party must proceed with due diligence regardless of the one-year limitation. Gerish v Johnson, 5 M 23 (10); Groh v Bassett, 7 M 325 (254); Altman v Gabriel, 28 M 132, 9 NW 633; St. P. Land v Dayton, 39 M 315, 40 NW 66; Weymouth v Gregg, 40 M 45, 41 NW 243; Town of Hinckley v Kettle River, 70 M 105, 72 NW

835; McClymond v Noble, 84 M 329, 87 NW 838; City of St. Paul v Meister, 176 M 59, 222 NW 520.

It must affirmatively appear to justify granting such motion when addressed to the discretion of the court, that it was made with due diligence and within one year from actual notice of the judgment. Kipp v Clinger, 97 M 135, 106 NW 108.

The court erred in granting defendant's motion to reopen the judgment with permission to answer. Hoffman v Freimuth, 101 M 48, 111 NW 732.

Party who applies, within one year after entry of default judgment on service of summons by publication only, must be permitted to defend as a matter of right, provided his motion is accompanied by answer setting up defense on merits, and he has not been guilty of laches. Fink v Woods, 102 M 374, 113 NW 909.

Record of the judgment is not "notice" of the entry thereof within this section. Foster v Coughran, 113 M 433, 129 NW 853.

Applies to workmen's compensation cases. Johnson v Iverson, 175 M 319, 221 NW 65, 222 NW 508.

The power of the district court to review and vacate an appealable order made before judgment, or to permit a renewal of the motion, is not lost because of expiration of the time for appeal. Barrett v Smith, 183 M 433, 237 NW 15.

The dilatory conduct of the defendant was sufficient grounds for denial of relief. Ramsay v Barnard, 189 M 333, 249 NW 192.

Whether reasonable diligence was shown was a question for the trial court to determine. Roe v Widme, 191 M 251, 254 NW 274.

The trial court was within its discretion in refusing plaintiff's motion to reopen the judgment to permit her to answer the intervenor's complaint. Scott v Van Sant, 193 M 465, 258 NW 817.

Although the default judgment was entered on personal service, there was no abuse of discretion in reopening the default though five years had elapsed. Isensee v Rand, 196 M 267, 264 NW 782.

An order allowing the final account of an executor is equivalent to a judgment or decree, and may not be vacated after the expiration of the time to appeal except under the provisions of sections 544.32 or 548.14. The court did not err in denying the motion to vacate based on fraud and mistake, four years having elapsed. Woodworth's Estate, 207 M 563, 292 NW 192; Henry's Estate, 207 M 613, 292 NW 249.

It was error to vacate the judgment. There was no showing of fraud, and more than the statutory time had elapsed. Cacka v Goulke, 212 M 405, 3 NW(2d) 791.

Appealability of second order. 16 MLR 117.

12. Meritorious defense necessary

The applicant must have a good defense on the merits and exhibit it to the court on the motion. Frazier v Williams, 15 M 288 (219); St. P. Land v Dayton, 39 M 315, 40 NW 66; Flanagan v Sable, 44 M 417, 46 NW 854; Peoples' Ice v Schlenker, 50 M 1, 52 NW 219; Jones v Swain, 57 M 251, 59 NW 297; Town of Hinckley v Kettle River, 70 M 105, 72 NW 835; Osman v Wisted, 78 M 295, 80 NW 1127.

In setting aside the judgment and granting leave to answer, the court need not be content with a formal compliance, but may require that its denials show the actual extent of the controversy upon the matters denied. St. P. & Dul. v. Blackmar, 44 M 514, 47 NW 172.

The applicant need not set forth the evidence of his defense and its truth or falsity cannot be tried on affidavits. Lathrop v O'Brien, 47 M 428, 50 NW 530; McMurran v Bourne, 81 M 515, 84 NW 338; Queal v Bulen, 89 M 477, 95 NW 310.

A verified general denial shows a good defense and is ordinarily sufficient. Jones v Swain, 57 M 251, 59 NW 297; Fitzpatrick v Campbell, 58 M 20, 59 NW 629; Rhodes v Walsh, 58 M 196, 59 NW 1000.

The proper practice is to exhibit the proposed answer setting forth a good defense. McMurran v Bourne, 81 M 515, 84 NW 338.

The trial court did not err in refusing to open a default judgment, where the proposed answer and defendant's affidavit showed neither frankness nor merit. Klein v W. & D. Ry. 124 M 530, 144 NW 1134.

The court properly permitted the defendant to answer on condition the judgment stand as a lien pending the result of the trial. Shoop v Opplinger, 124 M 535, 144 NW 743.

The court is sustained in its refusal to sign a settled "case" after the time fixed in a stay of proceedings. State ex rel v Olson, 124 M 537, 144 NW 755.

Inexcusable neglect of counsel so clearly appeared that the trial court is sustained in denying the application. Stotoski v Jendro, 134 M 328, 159 NW 752.

Vacation of judgment procured by default was warranted. Everdell v Addison, 136 M 319, 162 NW 352.

An affidavit of merits is essential upon an application to vacate a default judgment and for leave to answer. Selover v Strackfus, 136 M 426, 162 NW 518.

The showing of respondent was sufficient to justify an order vacating the order approving the settlement in a workmen's compensation case. Ronstadt v Minor, 152 M 10, 187 NW 703.

13. Sufficiency of proposed answer

The appellate court will not reverse the trial court on the ground that the proposed answer is insufficient, unless the insufficiency is such that, had the answer been served in time, it would have been struck on motion. The answer in the instant case is not a sham answer. Woods v Woods, 16 M 81 (69); Sheldon v Risedorph, 23 M 518; Lathrop v O'Brien, 47 M 428, 50 NW 530; Rhodes v Walsh, 58 M 196, 59 NW 1000; Forin v City of Duluth, 66 M 54, 68 NW 515.

14. Affidavit of merits

Upon an application addressed to the discretion of the trial court, the court may disregard any failure to comply with its rules governing such application. Sheldon v Risedorph, 23 M 518; Forin v City of Duluth, 66 M 54, 68 NW 515.

The court was not obliged to insist upon the strict rule requiring a separate affidavit of merits by the defendant in addition to the other evidence. Russell v Blakeman, 40 M 463, 42 NW 391.

In application for vacation of a judgment, and granting leave to answer, an affidavit of merits is essential, and it must be made by the party himself, or someone having personal knowledge of the facts. Peoples' Ice v Schlenker, 50 M 1, 52 NW 219; Selover v Streckfus, 136 M 428, 162 NW 518.

The answer was joint. The affidavit of merits was made by three of the defendants on behalf of all, each swearing that he is personally familiar with all the facts in the cause. It was for the trial court to determine whether there was a compliance with the rules of that court. Rhodes v Walsh, 58 M 196, 59 NW 1000.

Neither the formal affidavits of merits provided for in the rule of the district court, nor the tender of a proposed answer, is indispensable when the court does not require the same as a prerequisite to relief, when the facts authorizing the exercise of the court's discretion are made to appear by affidavit of the moving party. McMurran v Bourne, 81 M 515, 84 NW 338; Wood v Schoemaker, 85 M 138, 88 NW 411; Crane v Sauntry, 90 M 301, 96 NW 794.

An affidavit of a grantee stating in general terms that the defendant, his grantor, had no actual notice or knowledge of the judgment, is hearsay evidence, and insufficient. Kipp v Clinger, 97 M 135, 106 NW 108.

An affidavit by an attorney, based upon knowledge acquired from investigation of the affairs of a corporation, contains sufficient showing of facts to sustain an order opening a default judgment. Rodgers v United States Insur. Co. 127 M 435, 149 NW 671.

Without taking the affidavits into consideration, it is clear there was at least excusable neglect, and the judgment was properly reopened. Barta v Nestaval, 133 M 116, 157 NW 1076.

A showing was made of a meritorious defense, and the excuse for the default, the error of defendant's attorney in applying the facts to the law of the case, was

sufficient to warrant vacation of the judgment. Everdell v Addison, 136 M 319, 162 NW 352.

There is no statutory requirement of an affidavit of merits on application by a defendant for relief from default and for leave to answer. The rules of the district court require an affidavit of merits in such a case, but the court may waive this requirement, if it fairly appears from the record that the defendant has a good defense on the merits. Grady v Rothschild, 145 M 74, 176 NW 153.

To justify vacating and setting aside a default judgment of divorce on the ground of the alleged fraud of the prevailing party invoking the jurisdiction of the court, subsequent to the entry of which there has been a good faith marriage to an innocent person, the evidence of the fraud must be clear and convincing. Mere preponderance is insufficient. Walters v Walters, 151 M 300, 186 NW 693.

The rule of the court requiring an affidavit of merits is properly waived when the record shows merits. Unowsky v Shaw, 161 M 489, 201 NW 936.

On the face of the complaint the cause of action is barred by the statute of limitations, and does not state a cause of action, and the judgment is reopened and defendant granted leave to demur or answer. The affidavit of merits and demurrer present a meritorious defense. Reo v Widme, 191 M 251, 254 NW 274.

15. Counter affidavits

Counter affidavits are not permissible to show want of merits or to controvert the allegations of the proposed answer or affidavit of merits. The court cannot try the merits of the cause on affidavits. Lathrop v O'Brien, 47 M 428, 50 NW 530; McMurran v Bourne, 81 M 515, 84 NW 338; Queal v Bulen, 89 M 477, 95 NW 310.

When attorneys for plaintiff and defendant drew and signed a stipulation the judgment should be entered for plaintiff for $100.00 "without costs" and judgment was entered by the clerk for $102.00, including $2.00 clerk fees, trial court on defendant's motion properly reducing the judgment to $100.00. Berthiaume v Erickson, 218 M 403, 16 NW(2d) 288.

16. Notice of motion

A motion should be brought on by a written notice of eight days, or by an order to show cause. Marty v Ahl, 5 M 27 (14); Goodrich v Hopkins, 10 M 162 (130).

Within two years after the entry of judgment notice should be served on the attorney. Sheldon v Risedorph, 23 M 518.

Rules of court in respect to the hearing of motions may, in the discretion of the court, be suspended by it in any particular case. Gillette v Ashton, 55 M 75, 56 NW 576.

Purchasers of property affected by the judgment must be served with notice. Aldrich v Chase, 70 M 243, 73 NW 161.

Notice of a motion to vacate a judgment in favor of a non-resident plaintiff may be served on the attorney of record, although more than two years have elapsed since the entry thereof. Phelps v Heaton, 79 M 476, 82 NW 990.

The mortgagee takes land which is vested in the mortgagor by a judicial decree subject to the right of the defendant to vacate the same within the statutory limit, and is not protected by the registry acts as an innocent purchaser. White v Gurney, 92 M 271, 99 NW 889.

17. Terms

Granting leave to answer, and the terms of leave, are in the discretion of the court, and will not be reversed except for abuse. The grant may be made conditional. Washburn v Sharpe, 15 M 63 (43); Exley v Berryhill, 36 M 117, 30 NW 436; St. Mary's v Nat'l Benefit, 60 M 61, 61 NW 824; Henderson v Lange, 71 M 468, 74 NW 173.

It was an unreasonable condition to require the non-resident defendant to file a bond. Brown v Brown, 37 M 128, 33 NW 546.

It is not unreasonable to require the petitioner to pay costs as a condition for the vacation. Ueland v Johnson, 77 M 543, 80 NW 700.

Terms in an order granting relief, to be fixed by the trial (another) court at the time of the trial on the merits, construed as surplusage and without legal effect. Suhring v Stafford, 166 M 430, 208 NW 136.

In an equity case to set aside cancelation of a land contract, the vendee must offer to make all payments admittedly in default. Madsen v Powers, 194 M 418, 260 NW 510.

18. Allowing judgment to stand as security

It is not an abuse of discretion for the court to annex certain equitable conditions to the order opening defendant's default, as where the case is reopened by the judgment allowed to stand and pendente lite. Barman v Miller, 23 M 458; Exley v Berryhill, 36 M 117, 30 NW 436.

But to require a non-resident to file a bond would be unreasonable. Brown v Brown, 37 M 128, 33 NW 546.

19. Who may apply

Generally, only parties may apply. Kern v Chalfaut, 7 M 487 (393); Johnson v Lough, 22 M 203; Wolford v Bowen, 57 M 267, 59 NW 195.

If a transfer of interest in property which is the subject of an action, takes place, pendente lite, and the assignee desires to proceed, whether in the name of the original plaintiff or otherwise, he must establish the fact of transfer and obtain leave of court to be substituted, or he may continue in the name of his assignor. Chisholm v Clitheral, 12 M 375 (251).

A grantee or personal representative may be substituted as defendant and then apply. Stocking v Hanson, 22 M 542; Boeing v McKinley, 44 M 392, 46 NW 766.

In an action against unknown persons and parties to determine adverse claims to real estate, the trial court did not abuse its discretion in denying the motion of a grantee of such unknown party to vacate the judgment. McClymond v Noble, 84 M 329, 87 NW 838.

The court did not abuse its discretion in denying a petition of a trustee in bankruptcy to reopen a judgment taken against the bankrupt. Peru v King, 90 M 517, 97 NW 373.

The trial court is sustained in its denial of an application to reopen a judgment, a grantee of the judgment debtor being the applicant. Kipp v Clinger, 97 M 135, 106 NW 108.

Where fraud or collusion is shown, the stockholders may intervene and continue the action. National Power v Rossman, 122 M 355, 142 NW 818.

The court may in its discretion open a default judgment obtained against a corporation because of bad faith or intentional neglect or the officer charged with the duty of making defense. Rodgers v U. S. & Dom. 127 M 435, 149 NW 671.

The rule of res judicata does not apply and a second application may be made to the discretion of the court. Wilhelm v Wilhelm, 201 M 462, 276 NW 804.

20. Application by municipal corporation

Judgment reopened on application of municipality or school district. Forin v City of Duluth, 66 M 54, 68 NW 515; Gloeser v City of St. Paul, 67 M 368, 69 NW 1101; Queal v Bulen, 89 M 477, 95 NW 310.

The affidavit of an attorney, based upon knowledge acquired from investigation of the affairs of the corporation, contains sufficient showing of the facts to sustain an order reopening a default judgment. An affidavit of all the officers and directors is not mandatory. Rodgers v U. S. Ins. Co. 127 M 435, 149 NW 671.

21. Application by minors

A minor heir upon good cause shown may be allowed to defend his interest in real property involved in the matter of a vacation of judgment, within two years of his becoming of age, where jurisdiction was obtained by publication,

and he was without actual notice of the pendency of the action before entry of judgment. Hoyt v Lightbody, 93 M 249, 101 NW 304.

544.33 UNIMPORTANT DEFECTS DISREGARDED.

HISTORY. R.S. 1851 c. 70 s. 92; P.S. 1858 c. 60 s. 96; G.S. 1866 c. 66 s. 107; G.S. 1878 c. 66 s. 127; G.S 1894 s. 5269; R.L. 1905 s. 4161; G.S. 1913 s. 7789; G.S. 1923 s. 9285; M.S. 1927 s. 9285

1 Generally
2. Evidence
3. Conduct of court and counsel
4. Charge to jury
5. Findings; conclusions; verdicts

1. Generally

Pleadings in mandamus may be on information and belief. State ex rel v Cooley. 58 M 514, 60 NW 338.

Rules of pleading and practice are mere means to an end, and do not themselves constitute the end sought to be obtained by a judicial determination. Their purpose in all cases being to facilitate and insure administration of justice; and in no case should they, by blind and unreasoning application, be allowed to defeat the very purpose for which they were adopted. Jacobson v Gt. Northern, 120 M 52, 139 NW 142; Rappaport v Stockdale, 160 M 78, 199 NW 513; Shuster v Vecchi, 203 M 76, 279 NW 841.

A blank in a written simple contract may be filed under any sort of express or implied authorization. Palmer v Mutual Life, 121 M 398, 141 NW 518.

An action brought by a guardian was improperly entitled, but the defect may be disregarded or an amendment ordered by the trial court. Richardson v Kotek, 123 M 360, 143 NW 973.

The argument relating to the source of the state auditor's salary is more technical than substantial. State ex rel v Schmahl, 125 M 106, 145 NW 794.

Failure of plaintiff to furnish a bill of particulars on demand is not prejudicial to defendant where the information is contained in the complaint. Ewing v Kirtland, 132 M 8, 155 NW 617.

A distinction between First Presbyterian Church of Duluth, and trustees of the First Presbyterian Church of Duluth is not a prejudicial difference in an action against the surety on a builder's bond. Trustees v U. S. Fid. Co. 133 M 433, 158 NW 709.

In a case tried to the court the admission of immaterial evidence, which furnishes no basis for any finding made, is not prejudicial error. Halford v Crowe, 136 M 20, 161 NW 213.

A decision of the industrial commission will not be reversed on a mere matter of procedure. Babich v Oliver Iron Co. 157 M 122, 195 NW 784.

There was no reversible error in permitting the defendant to open and close the case. An amendment to the answer may be permitted. Parlin v Evenson, 158 M 348, 197 NW 489.

Mere clerical errors will not reverse a case. Bohr v Union Fire, 167 M 479, 209 NW 490.

The summons in an action to foreclose a mechanic's lien will not be set aside for defects therein which do not affect or prejudice the substantial rights of the defendants. Dressel v Brill, 168 M 99, 209 NW 868.

Where as a matter of law the evidence is conclusive one way or another upon the only issue presented by the appeal, the appellate court will not reverse the trial court's correct decision, because of errors in other findings not before the appellate court. Chippewa Bank v Veigel, 179 M 284, 229 NW 130.

As the defendant's own version of the affair shows he is liable as a matter of law, errors, if any, in the rulings became immaterial. Corn v Sheppard, 179 M 490, 229 NW 869.

Where an amendment to the pleadings was allowed, a new trial may be ordered because of failure to strike out prejudicial testimony on an abandoned issue. Bankers Nat'l v Bruce, 181 M 285, 232 NW 325.

Since the judgment of municipal court was proper upon the record, it should not be reversed because the district court gave the wrong reason for affirming it. Iowa Guar. v Kingery, 181 M 477, 233 NW 18.

No reversible error in denial of a continuance nor in refusing to grant a new trial. Miller v Phillips, 182 M 108, 233 NW 855.

The charge to the jury was erroneous because it permitted the finding of negligence on an independent ground not included in the pleadings. Farnum v Peterson, 182 M 338, 234 NW 646.

Under the circumstances the examination of the policy out of court by one of the jurors, not being disclosed to other jurors, was not ground for a mistrial. Honkomp v Martin, 182 M 404, 234 NW 638.

An error which has not prejudiced appellant is not ground for a new trial. Stead v Erickson, 182 M 469, 234 NW 678.

If a complaint shows a right to nominal damages and nothing more, and a general demurrer is sustained, the appellate court will not reverse. The rule de minimis controls. Smith v Altier, 184 M 299, 238 NW 479.

Where a motion for a new trial is granted solely for errors of law, the order granting the motion may be sustained for errors prejudicial to respondent other than those specified by the trial court. Tiedje v Haney, 184 M 569, 239 NW 611.

A mere irregularity of such nature that it can be corrected below on proper motion is not ground for reversal. Roelers v Thompson, 185 M 154, 240 NW 111.

Plaintiff cannot complain of the fact that the defendant in his answer and court by directed verdict gave him more than he was entitled to receive. Crain v Baumgartner, 192 M 426, 256 NW 671.

The court having submitted the question of defendant's negligence to the jury on the theory of failure to exercise ordinary care, and plaintiff having recovered on that ground, the question whether he occupied the same position as a passenger and was entitled to the care required of common carriers of passengers for hire is not directly involved. Mardorf v Duluth-Superior, 194 M 537, 261 NW 177.

The complaint alleged a right by way of prescription at a designated place, but court and counsel were fully advised that the proof would be that after the right accrued a different place was agreed upon. The court properly found a prescriptive road so claimed and facts as to agreement to be insufficient to accomplish a substitution, and enjoined obstruction to the road acquired by prescription. Schmidt v Koecher, 196 M 179, 265 NW 347.

Where defendants prevailed in the trial court, plaintiffs cannot complain of court's determination that neither party should be allowed costs and disbursements against the other. Walsh v Kuechenmeister, 196 M 483, 265 NW 340.

No prejudice resulted in bringing out the facts that insurance companies were interested in the outcome of both sides of the case. Tri-State v Nowotny, 198 M 537, 270 NW 684.

Where before the court made its findings and decision, parties united in requesting the court to make findings and conclusions, neither party can complain because the matter was not submitted to the jury, nor can any complaint be made that the court in making findings set aside answers submitted to the jury. Coughlin v Farmers & Mechanics, 199 M 102, 272 NW 166.

In this case it was not error in a denial of an adjournment to enable plaintiff to procure attendance of an additional witness. Hack v Johnson, 201 M 10, 275 NW 381.

No proof of representation in the application for reinstatement was adduced; hence any error in the trial of that issue is not ground for a new trial. Schoedler v N. Y. Life, 201 M 327, 276 NW 235.

The contract being unambiguous and not vague or indefinite, submission to the jury was not reversible error. Davis v Newcombe, 203 M 295, 281 NW 272.

A defendant is not prejudiced because by consent certain of the plaintiffs and also certain defendants are dismissed, and on trial the remaining plaintiff recovers

from the remaining defendant a judgment for a part of the relief demanded. Bauman v Katzenmeyer, 204 M 240, 283 NW 242.

Burden rests upon the appealing party to show prejudicial error. McDowall v Hanson, 204 M 349, 283 NW 537.

In this case it was not reversible error for the trial court to permit the jury to assess damages for increased construction costs incurred because of the injunction. Detroit Lakes v McKenzie, 204 M 490, 284 NW 60.

The supreme court will not reverse a case for an error which obviously did not materially prejudice the appellant. Jasinski v Keller, 216 M 15, 11 NW(2d) 438.

2. Evidence

In an action against surety on depository bond, plaintiff alleged demand upon the bank, but furnished no proof. The court held proof of a general assignment by the bank was sufficient. Board v Amer. L. & T. 75 M 489, 78 NW 113.

The description at certain places was inaccurate as to cause and distance, but by designated fixed lines and points no difficulty would be found in locating the highway. Such inaccuracies were not fatal to the proceeding. Obert v Board, 122 M 20, 141 NW 810.

Evidence erroneously received, tending to show damage resulting from delays caused by defects in the dredge, are not prejudicial and do not require a new trial. Skoog v Mayer, 122 M 209, 142 NW 193.

If this case depended wholly on the question of the ringing of the bell, possibly negligence was not proven, but there was sufficient other supplemental evidence to sustain the verdict. Moore v M. & St. L. 123 M 195, 142 NW 152, 143 NW 326.

Where a fact is proven by uncontroverted testimony, the reception of testimony in the nature of legal conclusions to prove the same fact is not reversible error. Ludowese v Amidon, 124 M 291, 144 NW 965.

No reversible error in rulings on testimony. Hollister v Enston, 124 M 53, 144 NW 415; Kulberg v Nat'l Council, 124 M 437, 145 NW 120; Chase v Kelly, 125 M 318, 146 NW 1113; Wright v Waite, 126 M 116, 148 NW 50; Raski v Gt. Northern, 128 M 129, 150 NW 618; Doran v Chic. & St. P. 128 M 193, 150 NW 800; Norton v Dul. Trsf. 129 M 129, 151 NW 907; Saunders v Conn. Credit, 192 M 272, 256 NW 142.

It was not error to refuse to permit a letter in evidence to be taken into jury room, the letter being read to the jury instead. Ruder v Nat'l Council, 124 M 432, 145 NW 118.

When during a trial objectionable evidence is admitted but later the court instructed the jury to disregard it, the presumption is that no error resulted from its reception. Town of Wells v Sullivan, 125 M 354, 147 NW 744.

The uncontradicted evidence showed plaintiff to be an employee and not a licensee, so no prejudice resulted in excluding a certain agreement. Rief v Gt. Northern, 126 M 431, 148 NW 309.

It was error to permit a legatee under the will to testify to statements made by the testator at the time he executed the will, but the validity of the will was conclusively established by other testimony and the error was without prejudice. Madson v Christenson, 128 M 18, 150 NW 213.

Though the trial court in an equity case erroneously excludes testimony, the case will not be reversed if with the facts as the party offered to prove them there could have been no other verdict than the one reached. Green v N. W. Trust, 128 M 30, 150 NW 229.

The improper admission of a letter was not reversible error for the reason that the letter was a mere repetition of other uncontradicted evidence. Bragg v Goldstein, 128 M 65, 150 NW 223.

Erroneous rulings admitting incompetent or immaterial evidence will constitute reversible error only when clearly prejudicial. Moe v Paulson, 128 M 277, 150 NW 914.

The fact that evidence was improperly rejected when first offered is not reversible error if the evidence was later received. Meaghen v Fogarty, 129 M 417, 152 NW 833; Cashman v Bremer, 195 M 195, 262 NW 216.

There is a clear distinction between the use of a memorandum to refresh the memory, and the use thereof as substantive or original evidence. Farmers Elev. v Gt. Northern, 131 M 157, 154 NW 954.

Admission of testimony relative to value of hay stumpage not sufficiently material to be prejudicial. Peterson v N. Pac. 132 M 272, 156 NW 121.

No prejudicial error could result from excluding questions calling for conclusions of the witness. Dalton v Bailey, 137 M 62, 162 NW 1059.

If the rulings on the admission of evidence were erroneous, they did not affect appellant's substantial rights, and the error, if any, must be disregarded. Manley v Connally, 155 M 348, 193 NW 590; Sticha v Benzick, 156 M 53, 194 NW 752; Moody v Can. Northern, 156 M 211, 194 NW 639; Harmer v Holt, 157 M 102, 195 NW 637; Klessig v Lea, 158 M 14, 196 NW 655; Gibbons v Hirschmann, 160 M 326, 200 NW 293; Oldenburg v Petersdorff, 160 M 402, 200 NW 446; Sullivan v Mpls. St. Ry. 161 M 46, 200 NW 922; Caldwell v First Nat'l, 164 M 401, 205 NW 282; Farm Mtge. v Pederson, 164 M 425, 205 NW 286; City of Duluth v Siden, 168 M 467, 210 NW 394; Luck v Mpls. St. Ry. 191 M 514, 254 NW 609; Detroit Lakes v McKenzie, 204 M 490, 284 NW 60; Keough v St. P. Milk, 205 M 96, 285 NW 809; Johnson v Kutches, 205 M 383, 285 NW 881; Davies v Village of Madelia, 205 M 526, 287 NW 1.

Where documentary evidence is offered to prove a fact admitted, the rejection of the offer is not error. State v Lewis, 157 M 250, 195 NW 901.

It is not error to exclude testimony corroborating a telephone talk which is in substance admitted. Erth v Gunter, 158 M 280, 197 NW 282.

No prejudicial error could result to the county from evidence of representations made by its engineer, who made a survey and indicated his findings on a map for the use of prospective bidders. Stanton v Morris Constr. Co. 159 M 380, 199 NW 104.

Error in receiving evidence of the rental value of bowling alleys was cured by the instructions to the jury. Shepard v Allen, 161 M 135, 201 NW 537, 202 NW 71.

There was no prejudicial error in excluding prior applications to defendant containing similar misstatements, because the answers in later applications were copies of those in earlier ones. Schmitt v U. S. Fid. 169 M 106, 210 NW 846.

Error in admitting testimony of what Billings "understood" the conversation to mean is not reversible error when the case was tried to the court, and there was in evidence the exact words of the conversation. Hawkins v Hayward, 191 M 543, 254 NW 809.

The fact that the complaint alleged that defendant had collected the mortgage, while the proof shows that defendant had taken over certain property, is not a fatal variance under the facts in the case. Christianson v Nat'l Bank, 168 M 211, 209 NW 899.

Over objection, the cross-examination of the defendant elicited the fact that he did not go to the aid of plaintiff after he struck him. If error, there was no prejudice if there was other evidence of the fact through others. Luslik v Walters, 169 M 312, 211 NW 311.

Erroneous admission of evidence or wrongful exclusion of offered evidence not reversible error where there is other sufficient evidence. Webster v Roedter, 173 M 529, 217 NW 933; Benson v Barrett, 171 M 305, 214 NW 47; MacGregor v Persha, 174 M 127, 218 NW 462; Hayden v Lundgren, 175 M 449, 221 NW 715; Tremont v General Motors, 176 M 294, 223 NW 137; Coyne v Bearman Fruit, 176 M 480, 224 NW 146; Schnirring v Stubbe, 177 M 441, 225 NW 389; Holt v Rural Wkly. 178 M 471, 227 NW 491; O'Mally v Macken, 182 M 294, 234 NW 323; Sorenson v N. Y. Life, 195 M 298, 262 NW 868.

Even if reading extracts from medical books was improper, it would not be reversible error, for their correctness was admitted by plaintiff's expert and indisputed. Rund v Hendrickson, 176 M 138, 222 NW 904.

The decedent spoke and understood only Norwegian. The two doctors who examined him the day he made his will were both competent to testify, because one spoke and understood the language of the decedent and the other understood it slightly. Olson's Estate, 176 M 361, 223 NW 677.

An admission of immaterial evidence or evidence not prejudicial is not reversible error. Scholte v Brabec, 177 M 13, 224 NW 259; Gorezki v Ideal Cr'y, 180 M 13, 230 NW 128.

Refusal to strike answer of witness was not prejudicial error, there being similar evidence remaining in the record. Gerlich v Thompson Yds. 177 M 425, 225 NW 273; State v Jue Ming, 180 M 221, 230 NW 639.

Plaintiff's case rested upon the testimony of a single witness. Excluding evidence that he had made statements inconsistent with his testimony was without prejudice to plaintiff for it would merely weaken the only evidence on which she could base her claim. Pullen v Chic. Milwaukee, 178 M 347, 227 NW 352.

The net was found at the exact spot where the shooting took place. There was nothing prejudicial in it being admitted in evidence. State v Farmer, 179 M 519, 229 NW 789.

Since the court instructed the jury that defendants were not liable unless negligence could be found in the acts or omissions of their employee Voros alone, no prejudice could result from the testimony relating to the conduct of another employee. Hoch v Byram, 180 M 298, 230 NW 823.

No error in refusing to suppress a deposition. Mollan's Estate, 181 M 217, 232 NW 1.

No error in reception of exhibits. First Nat'l v N. W. Trust, 181 M 115, 231 NW 790.

Error in receiving evidence as to a subsequent change in the street lighting was immaterial, for the court subsequently instructed the jury as a matter of law, the street was sufficiently lighted. McKnight v City of Duluth, 181 M 450, 232 NW 795.

The exhibit not being of a gruesome nature, and used to recall facts to the memory of the witness, there was no prejudicial error in its reception. Lund v Olson, 182 M 204, 234 NW 310.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial where it is perceived that no prejudice resulted. Drabek v Wedrickos, 182 M 217, 234 NW 6; Martin v Schiska, 183 M 258, 236 NW 312.

Error in the admission of a medical certificate of death as prima facie evidence of suicide is not cured by the fact that the coroner's verdict that the death wound was self-inflicted attached to plaintiff's proofs of death was excluded. Backstrom v N. Y. Life, 183 M 384, 236 NW 718.

It is not reversible error to permit a witness to testify that he purchased of plaintiff an automobile of the same kind sold to defendant, at about the same time defendant bought his, for $150.00 less than plaintiff testified the witness paid therefor. Baltrusch v Branlick, 183 M 470, 236 NW 924.

Exclusion of evidence showing at best a mere admission against interest is error without prejudice. Metalak v Rasmussen, 184 M 260, 238 NW 478.

Refusal to strike as a "conclusion" the witnesses statement that the motor traveled "just like a flash of lightning," is not error. Quinn v Zimmer, 184 M 589, 239 NW 902.

No reversible error occurs where respondent is permitted to show facts already testified to by appellant. Rohn v First Nat'l, 185 M 246, 240 NW 529.

Since plaintiff's medical expert was permitted fully to give his opinion, no prejudice resulted in refusing to testify to the same thing only in different words. Peterson v Langstein, 186 M 101, 242 NW 549.

Not error to exclude defendant's testimony as to the reason why he did not use the properly accepted remedy for hog cholera. Bekkemo v Erickson, 186 M 108, 242 NW 617.

It is not reversible error to exclude the answer to a specific question when the answer to substantially the same question is later received. Wilcox v Hedwall, 186 M 501, 243 NW 711.

Conceding it error to receive in evidence on the order to show cause in this proceeding, the testimony of a witness for respondent as found in the settled case in an action previously tried between the same parties, such error did not harm ap-

pellant, for what that proof showed is implied in the findings in that case, received herein without objection. Clark v Peyton, 187 M 155, 244 NW 550; Thier v Farmers' Union, 187 M 190, 244 NW 815; Strommen v Prudential, 187 M 381, 245 NW 632.

Evidence by defendants of difficulty in getting a job because of depression, was error; but no motion to strike it out was made, and no reference to the testimony later, so not sufficiently material to be reversible error. Wilson v Met. Life, 187 M 467, 245 NW 826.

No prejudice could result from not striking the testimony of plaintiff's witness, called to refute a false issue injected into the trial by the testimony of defendant's main witness. Cohoon v Lake Region, 188 M 429, 247 NW 520.

Error in admitting evidence of a conviction for drunken driving was not prejudicial where there was ample other evidence that he was intoxicated at the time of the accident. Mills v Harstead, 189 M 193, 248 NW 705.

Admission of testimony as to a conversation between husband and wife, the plaintiffs, being harmless, is not ground for a new trial. Stibal v First Nat'l, 190 M 1, 250 NW 718.

In an action on a promissory note, prejudicial error was not committed in permitting the defendant to introduce testimony of fraud sufficient as a defense at common law without first producing affirmative proof that the plaintiff was not a holder in due course and so making an issue for the jury upon the evidence tendered by the plaintiff. M & M Securities Co. v Dirnberger, 190 M 59, 250 NW 801.

The substance of what was contained in the excluded statement of a physician was either admitted or substantially proved. There was no prejudicial error. Elness v Prudential, 190 M 169, 251 NW 183; Bird v Johnson, 199 M 252, 272 NW 168.

The amount of the recovery in an action in libel was so small, the evidence objected to by defendant could not have been prejudicial. Thorsos v Albert Lea Pub. Co. 190 M 200, 251 NW 177.

Error of the trial court in refusing to strike out a part of an expert's answer which was speculative, indefinite, and uncertain as to an injury to plaintiff's back, is not, in this instance, prejudicial error. Johnston v Selfe, 190 M 274, 251 NW 525.

The misrepresentation of plaintiff's agent to induce defendant to buy was immaterial and it was harmless error in the admission of a duplicate original of a deposition. Thompson v Peterson, 190 M 566, 252 NW 438.

No prejudice could result to plaintiff by the ruling excluding evidence, for the judgment roll conclusively showed that the allegations of the amended complaint failed to state facts to constitute a cause of action. Calhoun Beach v Mpls. Builders, 190 M 576, 252 NW 442.

An erroneous determination of the qualifications of an expert witness is not ground for a new trial unless prejudice results to the losing party. Palmer v United Com. Trav. 191 M 204, 253 NW 543.

Even if it was error to receive the testimony of experienced officers of brotherhoods, plaintiffs were not prejudiced, for the record compels a finding that no rights were violated. Ross Lodge v Brotherhood, 191 M 373, 254 NW 590.

Admission of expert opinion evidence that repairs and repair parts were minor and incidental only, if error, was not prejudicial. G. M. Trucks v Phillips, 191 M 468, 254 NW 580.

It was not error to call a person only nominally a defendant for cross-examination under the statute, because plaintiff could have called him as his own witness, and under the circumstances would have been allowed to cross-examine his own witness. Wagstrom v Joseph, 192 M 220, 255 NW 822.

Where the evidence is close and conflicting on a vital issue in the case, the rejection of competent and material testimony bearing on such issue is reversible error. Taylor v N. S. Power, 192 M 415, 256 NW 674.

In an action against a farmer for personal injuries sustained the mere inquiry as to the number of acres in the farm was not reversible error, no other questions as to financial ability of the defendant being asked. Gilbert v Megears, 192 M 502, 257 NW 73.

Testimony of the attending physician, objected to, was harmless and the objections not well founded. Albrecht v Potthoff, 192 M 565, 257 NW 377.

Under the facts developed in the instant case, it was not prejudicial error to admit evidence that the maker of the note was adjudicated bankrupt shortly after the transfer of the note. Keyser v Roberts, 192 M 588, 257 NW 503.

The fact that the driver of the truck had on previous occasions used gasoline to clean the truck motor, and so testified, is so inconsequential that the admission of the evidence is not reversible error. Hector v Butler, 194 M 314, 260 NW 496.

As the X-rays were introduced in evidence for no purpose except as to the extent of the injuries, and as there is no claim of the allowance of excessive damages, the denial of the motion to exclude, did not affect defendant in any way. Erickson v Kuehn, 195 M 164, 262 NW 56.

A letter relied upon and which the jury found tolled the statute of limitations was properly received in evidence. Olson v Myrland, 195 M 628, 264 NW 129.

Upon defendant's motion for a new trial, plaintiff was required to remit all in excess of compensatory damages as a condition of denial of the motion. Goin v Premo, 196 M 74, 264 NW 219.

No substantial right of the defendant, a stockholder in an insolvent domestic corporation, was adversely affected by the failure to file the order of assessment of the shares of stock therein, under Minnesota Constitution, Article 10, Section 3, and under section 544.33 there is no reversible error. Hatlestad v Anderson, 196 M 232, 265 NW 50.

"It is difficult to conceive that the jury was prejudiced by the following clause in an affidavit: 'I gave the insurance adjuster for the Buick car a signed statement.'" Nye v Bach, 196 M 333, 265 NW 300.

The only conclusion possible upon the evidence is that the industrial commission properly denied compensation, so error in the admission of evidence was immaterial. Anderson v Russell-Miller, 196 M 358, 267 NW 501.

No prejudice resulted to defendant from adverse rulings excluding evidence purporting to prove facts which, for the purpose of this decision, the court assumes proved. Newgard v Freeland, 196 M 548, 265 NW 425; Young v Gt. Northern, 204 M 122, 282 NW 691.

No harm could come to defendant, appellant, as the result of certain testimony which the jury was instructed by the court to disregard. Kolars v Delnik, 197 M 183, 266 NW 705; Lorberbaum v Christopher, 198 M 289, 269 NW 646; Eyestad v Stambaugh, 203 M 392, 281 NW 526.

A new trial will not be awarded because of exclusion of evidence not shown to be material. Anderson v Anderson, 197 M 252, 266 NW 841.

Admission of opinion testimony, without proper foundation, in a closely contested case was reversible error even though the trial was to the court. Johnson v Hanson, 197 M 496, 267 NW 486.

No reversible error was made in not receiving in evidence a wrist watch worn by the wife, which stopped at 12:15, for without objection witnesses not contradicted testified that the watch so indicated, and moreover, that fact did not tend to prove she survived her husband. Miller v McCarthy, 198 M 497, 270 NW 559.

Plaintiff's claim that admission of evidence as to injury to defendant's right leg was for the purpose of indirectly drawing an inference that defendant had his foot on the brake. There was no error in admitting the testimony. Dehen v Berning, 198 M 529, 270 NW 602.

As there was ample evidence to the same general effect, the testimony of conversation had between policemen and motormen claimed to be a part of res gestae, if properly inadmitted, was without prejudice. Lachek v Duluth-Superior, 199 M 519, 273 NW 366.

Receipt in evidence of record of appeal proceeding in which part of attorney's services sued for were performed was not prejudicial to defendant. Daly v Donovan, 200 M 323, 273 NW 814.

Where the final conclusion and testimony of the expert witness was favorable, improper questions and answers propounded to the witness were not prejudicial. Brossard v Koop, 200 M 410, 274 NW 241.

Permitting a witness to state the contents of a memorandum renders harmless any error in excluding the memorandum itself. Eilold v Oliver Iron Co. 201 M 77, 275 NW 408.

The jury had the benefit of the testimony from which the witness might have rendered the conclusion. There is no prejudice to defendant in excluding the conclusion of the witness. Armstrong v Brown, 202 M 30, 277 NW 348.

No harm was done appellant because he was required to answer that he had neither brought a civil suit nor instigated a criminal prosecution against the driver of the car, the driver having paid part of the expense. Neeson v Murphy, 202 M 236, 277 NW 916.

Both drivers were found guilty of negligence, and consequently the evidence of a witness as to speed of appellant's car, no foundation being laid, was not prejudicial. Shuster v Vecchi, 203 M 80, 279 NW 841.

Ruling was without prejudice to defendant because his witnesses were permitted to go fully into the question as to how long they believed each of the injured parties survived the injury. Voggemast v Hess, 203 M 207, 280 NW 641.

It cannot be said that the numerous claimed errors in the reception of evidence was in any case prejudicial. Schorr v Minn. Util. 203 M 384, 281 NW 523.

The jury by its findings never reached the issue to which the proffered evidence was directed, so no prejudicial error in excluding it. Clark v Quinn, 203 M 452, 281 NW 815.

No error in excluding cumulative impeaching testimony. Weinstein v Schwartz, 204 M 191, 283 NW 127.

Erroneous admission merely cumulative, and without prejudice does not constitute reversible error. St. Paul Mercury v Lyell, 216 M 7, 11 NW(2d) 491.

Where one party takes and files a deposition, the deponent is deemed his witness, and if he fails to have it read in evidence, the opponent may have it introduced. Porter v Grennan, 219 M 14, 16 NW(2d) 906.

The court as well as the jury is well aware of the fact that medical testimony is compensated beyond the mere witness fee, and that payment of $50.00 a day to medical expert is not subject to criticism. State v Gorman, 219 M 162, 17 NW(2d) 42.

Testimony of the insurer's medical director that he would have declined the risk had he known of insured's treatment at a named clinic, if error, was not reversible in the instant case. First Trust v Kans. City Life, 79 F(2d) 49.

A dealer self-styled as dealing in "O.K'd used cars and trucks" sold a car to Rutman with an O.K.'d tag attached. A head-on collision occurred between Rutman's truck and Bruner, said to be due to faulty steering gear on the Rutman truck. Admission of evidence as to Egan's advertisement of the car as O.K.'d was not prejudicial when Egan admitted the truck was sold as safe and fit for use. Egan v Bruner, 102 F(2d) 373.

3. Conduct of court and counsel

By stipulation, plaintiff had 30 days within which to amend his complaint. Within that time he requested defendant to enter judgment so he could appeal, whereupon defendant served notice of taxation of costs. Plaintiff's attorney endorsed on the notice: "Due notice, by copy, of the within notice, is hereby admitted." This request and statement constituted a waiver of right to amend and the notice was properly served. Aetna Ins. v Swift, 12 M 437 (326).

Statements made in judicial proceedings, in order to be privileged, must be pertinent and material to the issue. Dodge v Gilman, 122 M 177, 142 NW 147.

Certain language addressed by the court to one of counsel for the defendants was not such as to require a new trial upon the ground that it was prejudicial. Faunce v Searles, 122 M 344, 142 NW 816.

No merit in the contention that there was misconduct of counsel for plaintiff in his argument to the jury. Hively v Galnick, 123 M 504, 144 NW 213; Gunderson v Mpls. St. Ry. 126 M 169, 148 NW 61.

That a rule of procedure may have been violated is not sufficient ground for reversing a trial, unless prejudice resulted therefrom to the party complaining,

and appellant is not in a position to insist that it was prejudiced by the refusal to allow additional challenges. Tuttle v Farmers' Wagon Co. 124 M 209, 144 NW 938.

Where through inadvertence the court in stating the purport of a statute omits an exception or limitation contained therein, it is the duty of counsel then to call attention thereto. Fairchild v Fleming, 125 M 431, 147 NW 434.

Misconduct of counsel not prejudicial was cured by instructions of judge. Sonnesyn v Hawbaker, 127 M 15, 148 NW 476; Graseth v N. W. Co. 128 M 245, 150 NW 804; Sahr v Jaul, 181 M 416, 232 NW 717.

The refusal to require plaintiff to elect between causes of action which were in fact tried as one, even if error, was without prejudice to the defendant. Johnson v Wild Rice Co. 127 M 490, 150 NW 218.

Failure to submit a case to the jury as required by Laws 1913, Chapter 245, where it clearly appears that such submission could not have changed the result, is error without prejudice. Church v Curtis, 130 M 112, 153 NW 259.

Disapproval expressed as to conduct of plaintiff's counsel, but not prejudicial error. Viita v Fleming, 132 M 129, 155 NW 1077.

Substantial rights of the defendant were prejudiced by a statement by the county attorney in his closing argument. State v Boice, 157 M 374, 196 NW 483.

Characterizing the testimony of a witness as "clear and intelligible" does not transgress the rule prohibiting trial courts from singling out a particular witness and charging as to his credibility. Shepard v Alden, 161 M 136, 201 NW 537, 202 NW 71.

Cases where remarks, opinions or statements by the trial judge were not sufficiently prejudicial to be grounds for new trial. Webster v Roedtker, 173 M 529, 217 NW 933; Taylor v Taylor, 177 M 438, 225 NW 287; Miller v McCarthy, 198 M 497, 270 NW 559; Tri-State v Nowotny, 198 M 537, 270 NW 684; Finney v Norwood, 198 M 555, 270 NW 592.

The record is insufficient to establish any prejudicial bias of the trial judge, who indulged in considerable examination of witnesses. Taylor v Taylor, 177 M 428, 225 NW 287.

Cases regarding remarks or conduct of counsel, withdrawn, cured by instructions of the court, not material, or not sufficiently prejudicial do not warrant a new trial. Dumbeck v Chic. & G. W. 177 M 261, 225 NW 111; Tuttle v Wicklund, 178 M 353, 227 NW 203; Horsman v Bigelow, 184 M 514, 239 NW 250; Renn v Wendt, 185 M 461, 241 NW 581; Harris v Raymer, 189 M 599, 250 NW 577; Erickson v Kuehn, 195 M 164, 262 NW 56; Finney v Norwood, 198 M 555, 270 NW 592; Elkins v Mpls. St. Ry. 199 M 63, 270 NW 914; Becker v Northland, 200 M 278, 274 NW 180, 275 NW 510; Serr v Biwabik, 202 M 165, 278 NW 355; Santee v Haggart, 202 M 361, 278 NW 520; Eyestad v Stambaugh, 203 M 392, 281 NW 526; Raymond v Kaiser, 204 M 223, 283 NW 119.

Answers of the trial judge to questions asked by the jury were not prejudicial. Monroe v Thulin, 181 M 501, 233 NW 241.

Improper and prejudicial remarks of plaintiff's counsel in his closing argument were of such nature as to require the supreme court to order a new trial notwithstanding instructions to the jury by the court to disregard them. Swanson v Swanson, 196 M 298, 265 NW 39; Krenik v Westerman, 201 M 255, 275 NW 849.

What might otherwise be misconduct of an attorney in the course of a trial ordinarily will not be ground for a new trial when it is invited by the adversary. Schlick v Berg, 205 M 465, 286 NW 356; Hinman v Gould, 205 M 377, 286 NW 377.

Alleged disparaging remarks by a trial judge concerning counsel are not prejudicial where verdict is right as a matter of law. Wentz v Guaranteed Sand Co. 205 M 611, 287 NW 113.

The direction of a verdict in favor of defendants foreclosed the possibility of any prejudice resulting to plaintiff by reason of the method followed in calling the jury panel. Kieger v St. Paul City Railway, 216 M 38, 11 NW(2d) 757.

No prejudice resulted in a prior filing of an information by the county attorney, followed by a complaint filed by complainant. State v Tofteland, 216 M 128, 11 NW(2d) 826.

Though erroneous, no prejudice resulted from the court's rulings. Waters v Fiebelkorn, 216 M 489, 13 NW(2d) 461.

Whether errors in the charge were prejudicial and likely to or did mislead the jury were questions which the trial court was in a better position to determine than this court. Flitton v Daleki, 216 M 549, 13 NW(2d) 477.

Remarks of counsel improper, but in the instant case not prejudicial. James v Chicago, St. Paul, 218 M 333, 16 NW(2d) 188.

Inaccuracies in the trial court's charge not called to the court's attention, and which could not have affected the result, are disregarded on appeal. James v Chicago and St. Paul, 218 M 333, 16 NW(2d) 188.

Defendants could not complain on appeal of submission of statute relating to slow driving and due care toward pedestrians. Moeller v St. Paul City Railway, 218 M 353, 16 NW(2d) 289.

The alleged misconduct of counsel in cross-examining the witness in an attempt to bring out matter prejudicial rather than evidential, is not grounds for a new trial, the court having sustained objections to the line of questions, and admonished the jury. Walker v Stecher, 219 M 152, 17 NW(2d) 317.

Informing jury of insurance coverage. 23 MLR 85.

4. Charge to jury

A new trial should never be granted in a civil action for errors in instructions where the verdict was the only one warranted by the law applicable to the case. McGrath v Northern Pac. 121 M 264, 141 NW 164; Carver v Luverne Brick, 121 M 388, 141 NW 488; Jelos v Oliver, 121 M 473, 141 NW 843; Bunkers v Peters, 122 M 130, 141 NW 1118; Thompson v Peterson, 122 M 229, 142 NW 307; Wells v Mpls. Baseball Co. 122 M 327, 142 NW 706; Hagen v Chgo. R. I. 123 M 110, 143 NW 121; Rodbacken v Chgo. Milw. 161 M 514, 200 NW 747; Riley v Belleview, 162 M 514, 202 NW 441; Norman v Lynn, 170 M 399, 212 NW 605; Ranwick v Nunan, 202 M 415, 278 NW 589.

Instructions of the court held to be prejudicial error. Cunningham v Co. of Big Stone, 122 M 393, 142 NW 802.

Charge upon so-called comparative negligence under the federal act was technically erroneous, but not prejudicial. Skaggs v Ill. Central, 124 M 503, 145 NW 381.

An instruction that the violation of a penal statute constituted a breach of duty owed to the defendant could not prejudice defendant in this instance. McMahon v Ill. Central, 127 M 1, 148 NW 446.

Verbal inaccuracies in the recital of certain evidence in the charge to the jury, to which the attention of the court was not called before the jury retired, do not ordinarily furnish ground for a new trial. McGray v Cobb, 130 M 434, 152 NW 262, 153 NW 736; McKenzie v Duluth St. Ry. 131 M 482, 155 NW 758.

Matters relating to the charge of the judge disapproved, but no reversible error. Curran v Chic. & Gt. Western, 134 M 394, 159 NW 955.

Even if the instructions to the jury were in error, the verdict by the jury is such that there was no prejudicial error. Ramstadt v Thunem, 136 M 223, 161 NW 413; Ensor v Duluth-Superior, 201 M 152, 275 NW 618; Paine v Gamble Stores, 202 M 462, 279 NW 257.

Instructing the jury that a fair preponderance of the evidence was sufficient to establish the mistake was without prejudice, as the right to avoid the release was conclusively established. Gendreau v No. Amer. Life, 158 M 261, 197 NW 257.

Defendant was not prejudiced by the submission to the jury of a question which must be resolved in plaintiff's favor as a matter of law. Kowalski v Chic. N. W. 159 M 388, 199 NW 178.

Error in the charge should not reverse, for, by the conduct of defendants in foreclosing and bidding in for the full amount due a mortgage accepted from the purchaser when the title was vested in her in fulfilment of the contract, there was a payment which matured the due bill. Olson v Nannestad, 162 M 412, 203 NW 59.

Errors in the judge's charge inadvertently made, and relating to matters of small evidentiary value, and having little if any effect on the verdict, are not reversible error. First Nat'l v St. Anthony, 171 M 461, 214 NW 288; Scheppman v Swennes, 172 M 493, 215 NW 861; Basa v Pierz Insur. Co. 178 M 305, 227 NW 39; Tuttle v Wicklund, 178 M 353, 227 NW 203; Allen v Florida Dredging Co. 180 M 514, 231 NW 204; Banfield v Warburton, 181 M 506, 233 NW 237; Cargill Grain v Cleveland-Cliffs, 182 M 516, 235 NW 268; Mechler v McMahon, 184 M 476, 239 NW 605; Ball v Gessner, 185 M 105, 240 NW 100; Romann v Bender, 190 M 419, 252 NW 80; Peet v Roth Hotel Co. 191 M 151, 253 NW 546; Erickson v Husemoller 191 M 177, 253 NW 361.

Error, if any, in the charge to the jury was cured by result of the trial. Peoples Fin. v Houck, 173 M 443, 217 NW 505; Manos v N. Y. Tea, 198 M 347, 269 NW 839.

Possible misleading sentence in the judge's charge not prejudicial when considered with the entire charge. Scholte v Brabec, 177 M 13, 224 NW 259; Honan v Kinney, 205 M 486, 286 NW 404.

A party cannot claim error on the ground that the instructions failed to define particular issues specifically where he made no request for more specific instructions. Norby v Sec. Bank, 177 M 127, 224 NW 843.

New trial granted because the only theory on which the case could be tried was that of negligence, and the charge of the court was confusing. Moll v Bestor, 177 M 420, 225 NW 393.

The rule in Steinbauer v Stone, 85 M 274, 88 NW 754, that error cannot successfully be assigned on obviously inadvertent misstatements of either law or fact in the charge to the jury unless same are at the time brought to the attention of the trial judge, applies in criminal as well as civil cases. The rule does not apply to an omission of appropriate instructions on a controlling principle in the case. State v Farmer, 179 M 516, 229 NW 789.

By defendant's own admission, he was guilty, therefore suffered no prejudice by the judge's failure to instruct the jury that it was within their power to find defendant not guilty. State v Corey, 182 M 49, 233 NW 590.

The reading of part of the pleadings in argument to the jury disapproved but not reversible error where the court by its charge defines and limits the issues for the jury to determine. Bullock v N. Y. Life, 182 M 193, 233 NW 858.

Error in charge is without prejudice to plaintiff, since defendant is entitled to a directed verdict. Dohs v Kerfoot, 183 M 379, 236 NW 620.

Error of the trial judge could have no effect on the verdict and so was not prejudicial. Keiffer v Sherwood, 184 M 205, 238 NW 331.

In an action to recover for fraud and deceit, an unequivocal instruction that a determinative proposition is undisputed on the evidence, the fact being to the contrary, was prejudicial error, which was not cured by an equivocal explanation liable to be misunderstood by the jury. Poppe v Bowler, 184 M 415, 238 NW 890.

The question of any exclusive right of the brokers to sell the property was not an issue under the pleadings. What was said by the court in its charge in reference to exclusive right to sell, as set forth in the opinion, was not such as to mislead the jury and was not prejudicial. Kaercher v Schee, 189 M 272, 249 NW 180.

Reading by the court quotations from reported decisions is disapproved. In the instant case it was not prejudicial. Christensen v Pestorious, 189 M 548, 250 NW 363.

An error by the court as to a factual matter, where called to the court's attention and corrected can have no prejudicial effect. Kouri v Olson, 191 M 101, 253 NW 98.

Instruction in respect to special damages, although not technically accurate, was not prejudicial to defendants. Gilbert v Megens, 192 M 495, 257 NW 73.

The court used the expression "loss of earnings" instead of "loss of earning capacity." This error in the instant case was harmless. Fredholm v Smith, 193 M 569, 259 NW 80.

When there are two or more issues tried to a jury and the verdict is general, it cannot be upheld if there was error in instructing the jury as to any one of the issues. Goldberg v Globe, 193 M 600, 259 NW 402.

An erroneous instruction on a particular point, afterwards cured by the general charge, or by a more complete statement, is not so prejudicial as to warrant a new trial. Gross v General Invest. 194 M 23, 259 NW 557.

A party cannot complain of an erroneous instruction which sounds in his favor. Hector v Butler, 194 M 310, 260 NW 496; Union Central v Flynn, 196 M 260, 264 NW 786; Barnard v Mpls. Dredging, 200 M 327, 274 NW 229; Serr v Biwabik, 202 M 165, 278 NW 355; Costello v Barry, 202 M 418, 278 NW 580.

An error of the court was not prejudicial when the case was decided on matters in which the point in dispute was immaterial. Faber v Herdliska, 194 M 321, 260 NW 500.

The use of the word "promptly" is criticised, but not a material error. Kelly v Furlong, 194 M 465, 261 NW 460.

The general verdict should stand although the instruction regarding a special verdict was erroneous. The special verdict was only for the purpose of laying foundation to save the judgment from discharge in bankruptcy, if applied for. Raths v Sherwood, 195 M 225, 262 NW 563.

Where two or more material issues are submitted and a general verdict returned, and one issue is not sustained by any evidence, there must be a new trial unless it conclusively appears that the party in whose favor the verdict was obtained was entitled thereto as a matter of law on one or more of the issues. Cavallero v Travelers, 197 M 417, 267 NW 370.

There must be a reversal where the court charged as a matter of law that it was the duty of the motor on the left to yield to the driver on the right, when the evidence indicated the driver to the right had forfeited that right by unlawful speed. Draxton v Brown, 197 M 311, 267 NW 498.

An error by the court in a cautionary instruction, is not prejudicial error when plaintiff claimed no right of recovery on the point covered by the erroneous charge, and the error could not in any way affect the judgment. Hartwell v Progresive Co. 198 M 488, 270 NW 570.

A litigant cannot tacitly consent to a charge and later, when disappointed with the verdict, obtain a new trial for mere omission or inadvertence in language omitted or chosen by the court in giving such charge. Dehen v Berning, 198 M 522, 270 NW 602.

A verdict against defendant precludes any finding that the accident was caused solely by the negligence of anyone else, so failure to charge the jury as to the liability of a third person was not prejudicial. Lachek v Duluth-Superior, 199 M 519, 273 NW 366.

Technical error in the charge with respect to the burden of proof to show excuse for leaving a gauze pack in wound, is not prejudicial when the doctors performing the operation admitted responsibility for the act and claimed an emergency as an excuse. Brossard v Koop, 200 M 410, 274 NW 241.

Defendant was entitled on the evidence to a directed verdict, so as to plaintiff errors in the charge became immaterial. Selover v Selover, 201 M 562, 277 NW 205.

Where plaintiff alleges a written instrument as an essential part of his case, the execution being denied by the answer, the burden of proving the execution of the instrument is on plaintiff, and error for the court to instruct otherwise. O'Hara v Crowball, 201 M 618, 277 NW 232.

Since both parties conceded that plaintiff's contract of employment with defendant entitled him to a commission on sales consummated as a result of plaintiff's efforts, the trial court's failure to charge the jury that plaintiff's efforts must be the procuring cause of the sales in order to entitle him to commissions was not prejudicial. Armstrong v Brown, 202 M 26, 277 NW 348.

The trial court rightfully refused to submit the question of the contributory negligence of a five-year-old child, who was killed by a truck. Vietor v Costello, 203 M 45, 279 NW 743.

In sustaining the trial judge the appellate court followed the statutory rule that in every stage of an action the court shall disregard all errors or defects in pleadings and proceedings which do not affect the statutory rights of the adverse

party, and no judgment shall be reversed or affected by reason thereof. Shuster v Vecchi, 203 M 76, 279 NW 841.

Assignments of error relating to the charge are without merit, being substantially in the same language as defendants requested instructions. Ekdahl v Minn. Utilities, 203 M 374, 281 NW 517.

Where each of two defendants moved for a directed verdict, to which each was entitled, errors asigned in the instruction to the jury, even if the assignments were meritorious, would not warrant a new trial. Johnson v City of Redwood, 204 M 115, 282 NW 693.

In this case, where the evidence overwhelmingly preponderated in plaintiff's favor on the issue of defendant's negligence so that a directed verdict would have been justified, any claimed errors in the court's charge would not justify a new trial. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

The use by the trial court of an inaccurate statement of the law relating to concurrent negligence was not, in the instant case, prejudicial. Walker v Stecher, 219 M 152, 17 NW(2d) 317.

5. Findings; conclusions; verdicts

A complaint in replevin, which alleges wrongful detention, but not demand and refusal, is cured by a verdict for plaintiff. Hurd v Simonton, 10 M 423 (340).

The appellate court will not review errors in taxation of costs, where no application to correct them has been made in the court below. Hurd v Simonton, 10 M 423 (340).

It will be presumed that the clerk signed the copy of the judgment, and as the affidavit states positively the fact that the papers constituting the judgment roll were in the custody of the clerk, it shows sufficiently the fact the judgment roll was filed. Jorgenson v Griffin, 14 M 467 (346).

Where a cause of action is stated in the complaint as joint, and a default judgment was entered against one, the district court in its discretion upon application, may permit an amendment of the complaint to allege a joint and several obligation. Pfefferkorn v Haywood, 65 M 429, 68 NW 68.

If the court can determine with reasonale certainty that the misconduct of the jurors did not affect the result, the verdict should stand. Thonson v Quinn, 126 M 48, 147 NW 716; Gunderson v Mpls. St. Ry. 126 M 168, 148 NW 61.

It is immaterial whether the proper measure of damages for nonperformance was given, since the verdict was established on other grounds. Johnson v Church of St. Charles, 126 M 338, 148 NW 281.

It is immaterial that the order for judgment omitted to direct a sale to satisfy the lien. Kipp v Love, 128 M 504, 151 NW 201.

An order sustaining a general demurrer to a complaint will not be reversed merely because the plaintiff might be entitled to nominal damages. Foster v Wagener, 129 M 11, 151 NW 407.

Although there was a variance between the allegations in the complaint and the proof at the trial, the variance was not fatal. Dechter v Nat'l Council, 130 M 329, 153 NW 742; Honchcliffe v Minn. Commercial, 142 M 205, 171 NW 776.

A plaintiff whose cause was erroneously dismissed will not be granted a new trial in order to give him merely nominal damages. Erickson v Minn. & Ontario. 134 M 209, 158 NW 979.

A new trial will not be granted where there is no substantial prejudice. Northwestern v Mpls. St. Ry. 134 M 378, 159 NW 832; Bankers Nat'l v Royal Indemn. 181 M 132, 231 NW 798.

On appeal from a judgment there will be an affirmance even though a material finding is wanting, when it clearly appears that its omission was an oversight and the evidence is conclusive as to what it should be. Rockey v Joslyn, 134 M 468, 158 NW 787.

While the amount to be credited by way of counter-claim was computed on the wrong theory, the defense is so small that a new trial will not be granted, and a modification of the amount is advised in the interest of justice. Bergland v American Multigraph, 135 M 69, 160 NW 191.

An assessment order, invalid because the court had not determined the class of corporation, cannot be validated as of the date of its entry. An amendment nunc pro tunc is not permissible. Phelps v Consol. Vermillion, 157 M 209, 195 NW 923.

An application for an order directing that a complaint be made more definite and certain is addressed to the discretion of the trial court and its conclusions will not be reversed where substantial rights upon the merits are not affected. Cull v Brennan, 166 M 53, 206 NW 929.

Error in the reception of defendant's evidence did not prejudice plaintiff, because defendant failed to prove a case. Harmer v Holt, 157 M 102, 195 NW 637.

The fact that the jury found that the appellant was entitled to certain specified property not involved in the litigation was without prejudice to the appellant. Cohen v Seashore, 159 M 345, 198 NW 1009.

Although the findings of fact did not cover every issue, appellant is not entitled to a reversal since his motion for findings did not point out the specific issues upon which findings were desired. Lieberman v Fox, 160 M 449, 200 NW 468.

Since the matters of fact admitted constitute no defense, the refusal to embody the same in the findings of fact will not reverse. Farmers & Mchts. v Olson, 161 M 310, 201 NW 440.

In the instant case, failure to find value is harmless. Amick v Exch. State Bank, 164 M 136, 204 NW 639.

Certain findings control the decision. Other findings challenged, and findings requested of contrary import will not be considered, nor matters not incorporated in the settled case. Northern Oil v Birkeland, 164 M 466, 203 NW 228, 205 NW 449, 206 NW 380.

The verdict demonstrates that the jury never reached the question of consideration as to which the charge is attacked as erroneous, and the errors in admission of certain evidence became immaterial. Heinrich v Est. of Beunes, 165 M 147, 205 NW 948.

The findings on the mooted question were made upon conflicting testimony, and cannot be disturbed by the appellate court. Christ v Christ, 166 M 374, 208 NW 22.

As none of the surety companies substantial rights were prejudiced, there was no error in denial of appellant's motion for a new trial based solely on the failure of plaintiff to obtain leave to sue on the bond before the action was commenced. Corey v Paine, 167 M 36, 208 NW 526.

Lack of evidence to sustain a finding which does not prejudice appellant will not reverse a decision. Klasens v Meester, 173 M 468, 217 NW 593.

The fact that one of several findings may not be sustained by the evidence is immaterial where other findings are decisive of the case. Sollar v Sollar, 176 M 225, 222 NW 926.

An erroneous finding of fact that can have no effect upon conclusions of law or the judgment irrespective of who prevailed, is immaterial and must be disregarded. Gorezki v Ideal Cr'y, 180 M 13, 230 NW 128.

Whether errors in the charge were prejudicial and likely to or did mislead the jury, are questions which the trial court is in better position to determine than is the appellate court, and it should require a clear showing of error or abuse of discretion to warrant a reversal. Mingo v Extrand, 180 M 395, 230 NW 895.

A finding that the father had no knowledge of certain transactions was immaterial when there was proof that the son as agent for the father had power to bind the father. The action was on a note, and both father and son were named as defendants. Kubat v Zika, 193 M 522, 259 NW 1.

The trial court having under the declaratory judgment act correctly construed the substantive and adjective features of the trust agreement the decision is affirmed, and it is immaterial that some of the findings were not sustained by the evidence. Towle v First Trust, 194 M 520, 261 NW 5.

Punitive damages having been eliminated and the amount fixed by the verdict as plaintiff's compensatory damages being well supported by the evidence, defendant is not in a position to complain. Goin v Premo, 196 M 74, 264 NW 219.

The failure of the trial court to comply with section 546.27 was cured by the filing of a memorandum which states the facts found and the conclusions of law separately. Trones v Olson, 197 M 21, 265 NW 806.

There being two other findings, each sufficient to sustain the conclusions of law and judgment, the plaintiffs are not entitled to have the judgment reversed for any error in finding of adverse possession. Lamprey v Amer. Hoist, 197 M 112, 266 NW 434.

Although the practice adopted in the entry of the judgment was not correct, no prejudice resulted. Martin Bros. v Lanesboro, 198 M 321, 270 NW 10.

Where plaintiff's recovery was less than was warranted by the evidence, defendant cannot complain. Daly v Donovan, 200 M 323, 273 NW 814.

544.34 DEFECTS RELIEVED AGAINST.

HISTORY. R.S. 1851 c. 70 s. 29; P.S. 1858 c. 60 s. 29; G.S. 1866 c. 66 s. 64; G.S. 1878 c. 66 s. 79; G.S. 1894 s. 5219; R.L. 1905 s. 4120; G.S. 1913 s. 7746; G.S. 1923 s. 9243; M.S. 1927 s. 9243.

See notes under sections 544.32, 544.33.

Under this section the supreme court may relieve an appellant and reinstate an appeal which has been dismissed. Baldwin v Rogers, 28 M 68, 9 NW 79.

This section has reference to matters of practice and procedure in pending actions and does not confer power to extend or modify the statute of limitations. Humphrey v Carpenter, 39 M 115, 39 NW 67.

Neither the district nor supreme court can give a party a right to appeal after the time for repeal prescribed by statute has passed. Burns v Phinney, 53 M 431, 55 NW 540.

A stay under this section operates as an extension of time to serve a case. State ex rel v Searle, 81 M 467, 84 NW 324.

Where objection is made to the introduction of evidence under a complaint every reasonable intendment must be indulged in its favor, and it will be sustained if it contains the essential facts by inference. Even conclusions of law may be resorted to. A complaint that might be had on demurrer may be sustained. Rotzien v Franson, 123 M 122, 143 NW 253.

The refusal to require plaintiff to elect between different causes of action which in fact were tried as one, even if error, was in the instant case without prejudice to defendant. Johnson v Wild Rice, 127 M 490, 150 NW 218.

A judgment of dismissal entered upon stipulation or aquiescence of plaintiff's counsel may be in its discretion set aside by the court and the cause reinstated. In the instant case parties had overlooked the fact that a new action was barred. Macknick v Switchmen's Union, 131 M 246, 154 NW 1099.

The court has no power to enlarge the time fixed by statute for making a demand for a review by a jury of the order of the court fixing the amount of benefits or damages in a judicial ditch proceeding. In re Ditch No. 52, 131 M 372, 155 NW 626; Troska v Brecht, 140 M 233, 167 NW 1042; Co. of Itasca v Ralph, 144 M 446, 175 NW 899.

The inherent power of the district court to modify its judgments is defined and regulated by sections 544.32, 544.34, and extends to all judgments. There is no exception in the case of judgments for the foreclosure of mortgages. Winne v Lahart, 155 M 312, 193 NW 587.

The summons in an action to foreclose a mechanic's lien will not be set aside for defects therein which do not affect or prejudice the substantial rights of the defendants. Dressell v Brill, 168 M 99, 209 NW 868.

A motion to vacate a judgment is usually based upon a jurisdictional defect and is a matter of right; while a motion to open a judgment and permit a defendant in default to answer is addressed to the discretion of the court. City of St. Paul v Meister, 176 M 59, 222 NW 520.

The provisions of this section do not permit a correction of the notice to comply with the statute after the time for appeal had expired. Mikkelson's Estate, 178 M 601, 228 NW 174.

A court of record may correct its own clerical errors and mistakes at any time to make the judgments and records conform; but in changes involving errors of substance, of judgment or of law, notice to parties in interest is required. Wilson v Fergus Falls, 181 M 329, 232 NW 322.

There is no error in permitting an amendment alleging that both defendants were employed to render medical services and that they were copartners. Schaul v Branton, 181 M 381, 232 NW 708.

The complaint correctly laid the venue in the district court, but the summons incorrectly put it in municipal court. The defect in the summons was fatal to jurisdiction. Brady v Burch, 185 M 440, 241 NW 393.

It is the fact of service on the proper party that controls. The return of service described a lessee as H. A. Salisbury, lessee's name being Hector A. Salvail. The service was valid. Petition of Rhode Island Hospital Trust, 191 M 354, 254 NW 466.

The provision of the statute as to filing of notice of appeal in an election contest is mandatory, and unless the notice is filed within the ten-day limitation after canvass is completed, no jurisdiction to hear the contest is acquired by the court. The court cannot appropriate to itself a jurisdiction which the law does not give it by permitting the correction of a notice of appeal after the time for taking appeal has expired. Strom v Lindstrom, 201 M 226, 275 NW 833.

A defect as to the names of the parties in the title of the petition and alternate writ of mandamus should be disregarded where, as here, the defect is remedied by the allegations in the body of the pleadings. Stenzel v Kreger, 210 M 509, 299 NW 2.

A misapprehension as to the effect of a stay of proceedings on the part of court and counsel is sufficient excuse for allowing a case to be subsequently proposed, and the court's discretion, properly exercised, should permit the presentation and allowance of such a case. Schmitt v Village of Cold Spring, 215 M 572, 10 NW(2d) 727.

544.35. PLEADINGS, TO BE FILED; PENALTY.

HISTORY. R.S. 1851 c. 70 s. 30; 1852 Amend. p. 8; P.S. 1858 c. 60 s. 30; G.S. 1866 c. 66 s. 65; 1867 c. 62 s. 3; G.S. 1878 c. 66 s. 80; G.S. 1894 s. 5220; R.L. 1905 s. 4121; G.S. 1913 s. 7747; G.S. 1923 s. 9244; M.S. 1927 s. 9244.