CHAPTER 547

NEW TRIALS

547.01 NEW TRIALS; GROUNDS; PRESUMPTION ON APPEAL.

HISTORY. R.S. 1851 c. 71 s. 59; P.S. 1858 c. 61 s. 59; G.S. 1866 c. 66 s. 235; G.S. 1878 c. 66 s. 253; 1891 c. 80 s. 1; G.S. 1894 s. 5398; 1901 cc. 46, 113; R.L. 1905 s. 4198; G.S. 1913 s. 7828; G.S. 1923 s. 9325; M.S. 1927 s. 9325; 1939 c. 52.

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I THE STATUTE GENERALLY

1. New trial defined

An order denying a motion to vacate an order sustaining a demurrer, and for a "new trial" on the demurrer, is not an order refusing a new trial, so as to be appealable. Dodge v Bell, 37 M 382, 74 M 739; Fergus v Board, 60 M 212, 62 NW 272.

A judgment will not be reversed for irregular or improper procedure as to which there is no statutory direction, and from which irregularity or impropriety alone it is impossible to presume prejudice resulted. Shell's Estate, 165 M 349, 206 NW 457.

Proceedings under Laws 1933, Chapter 339, are summary and do not contemplate motions for a new trial, nor may an order denying a new trial be reviewed on certiorari issued prior thereto to review the original decision. Young v Penn Mutual, 192 M 446, 256 NW 906.

A "petition for rehearing" is, under federal rules, in all respects the same as a "motion for a new trial". Safeway v Coe, 136 F(2d) 771.

2. A regulation, not a grant of power

The power of the court to grant a new trial is not, like the right to appeal, conferred by statute; such power is inherent in courts of general jurisdiction, not

given, but regulated by statute. When the trial court is satisfied that the party against whom the verdict is rendered is entitled to relief, the common-law remedy was to grant a new trial; and that remedy has not been changed, only regulated by statute. McNamara v Minnesota Central, 12 M 388 (269); Valerius v Richard, 57 M 443, 59 NW 534; State v Shevlin, 66 M 217, 68 NW 973; Bank v Lawler, 78 M 135, 80 NW 868; Gray v Minnesota Tribune, 81 M 333, 84 NW 113; Fischer v Sperl, 94 M 421, 103 NW 502.

The power of the district court to review and vacate an appealable order made before judgment, or to permit a renewal or repetition of the motion, is not lost because of expiration of the time for appeal. Barrett v Smith, 183 M 431, 237 NW 15.

The granting of amendments of pleadings during the trial is well within the discretion of the trial court, and its action will not be reversed on appeal except for clear abuse of discretion. Gilmore v Douglas County, 187 M 132, 244 NW 557.

3. Court may grant on its own motion

The trial court may, under proper circumstances, grant a new trial on its own motion. Bank v Lawler, 78 M 135, 80 NW 868.

Where an order for a new trial is granted pursuant to a motion specifying errors of law occurring at the trial exclusively, it is the duty of the trial court to declare in the order the grounds on which the new trial is ordered, as granting a new trial on grounds not assigned in the motion is objectionable. Weiss v Moriarty, 203 M 23, 279 NW 835.

Power to grant new trial on court's own motion. 7 MLR 423.

4. Applicable to both legal and equitable actions

Applicable not only in actions at law, but to suits or proceedings in equity as well. Valmer v Stagerman, 25 M 244; Marvin v Dutcher, 26 M 391, 4 NW 685; Sheffield v Mullin, 28 M 251, 9 NW 756; Ashton v Thompson, 28 M 330, 9 NW 876.

Laws 1933, Chapter 339, and succeeding statutes extending the time to redeem from mortgage foreclosure are summary and do not contemplate a motion for a new trial. Hjeltness v Johnson, 195 M 175, 262 NW 158.

Effect of verdict of jury on special issues of fact. 15 MLR 479.

5. Motion a matter of right

An order is entered directing the trial court to vacate its pro-forma order, and to consider and determine the motion for a new trial on its merits. Johnson v Howard, 25 M 558.

An order dismissing a motion for a new trial at the time it came on for hearing is, for the purposes of appeal, an order denying a new trial, and is appealable. McCord v Knowlton, 76 M 391, 79 NW 397; Fohl v Chicago & Northwestern, 84 M 314, 87 NW 919.

In the instant case the motion was made too late. Smith v Minneapolis Street Ry. 134 M 292, 157 NW 499, 159 NW 623.

A motion for a new trial may be heard after entry of judgment. Wilcox v Hedwall, 186 M 504, 243 NW 709.

When based upon proper grounds not raised on a first motion, a second motion for a new trial will be heard. Mitchell v Bazille, 216 M 368, 13 NW(2d) 20.

6. After trial by court

Where an action is tried by the district court, without a jury, a motion in that court for a new trial, upon the ground that the evidence does not justify any finding of fact is not necessary in order to entitle an appellant to raise the question of the sufficiency in the supreme court. St. Paul Fire v Allis, 24 M 75; Jordan v Humphrey, 31 M 495, 18 NW 450; Bannon v Bowler, 34 M 416, 26 NW 337; Nelson v Central Land, 35 M 408, 29 NW 121.

When an action is tried by a district court, without a jury, a party may, if he chooses, move for a new trial, and from the order made upon the motion an

appeal lies to the supreme court. Chittenden v German-American, 27 M 143, 6 NW 773; Ashton v Thompson, 28 M 330, 9 NW 876; Galanter v Minneapolis Fire, 160 M 6, 199 NW 886.

Where the findings are not sufficiently definite to satisfy a party, he should move for an amendment of them rather than a new trial. Adams v Knudtson, 160 M 264, 199 NW 817.

A new trial should be granted on account of the omissions in the proof and findings. Schreiber v Scott, 163 M 422, 204 NW 575.

If a party fears that an instruction given at his request was so placed in the charge that it might be misapplied by the jury, he should call attention to it at the time. Old Colony v American Savings, 165 M 417, 206 NW 720.

Where the trial judge has become incapacitated and a motion for a new trial is heard by another judge, the latter has no power to amend findings of fact, but he may amend conclusions of law, and he may grant a new trial. School District v Aiton, 175 M 346, 221 NW 424.

It was error for another judge to hold that the findings and orders of the judge who tried the case were equivalent to the findings requested and which the trial judge refused to make. Improvement of Third Street, 178 M 480, 227 NW 658.

An order granting a new trial after judgment vacates the verdict and judgment. Ayer v Chicago, Milwaukee, 189 M 359, 249 NW 581.

An affidavit to support a motion made after the entry of judgment cannot supply the absence of a settled case or bill of exceptions, and the judgment being fair on its face is affirmed. Olson v Lichten, 196 M 352, 265 NW 25.

Where defendants offered no evidence, but rested, no legal ground for reversing the order denying a new trial is to be found, either in the interest of justice or in the contention that clients should not suffer from their attorney's mistakes. Pearson v Novell, 200 M 61, 273 NW 359.

The failure of the court to make findings on issues not covered by the special verdict is not ground for a new trial of the whole cause. The remedy is a motion to the court to make necessary findings. Osbon v Hartfiel, 201 M 347, 276 NW 270.

Respondent improperly included in his brief what occurred in the first trial, there having been a new trial granted from which no appeal was taken. Settlement of Stewart, 216 M 485, 13 NW(2d) 375.

Where alternative motion for amended findings of fact and conclusions of law or new trial did not state grounds for a new trial, the order of the trial court denying a new trial must be affirmed. Williams v Allen, 217 M 634, 13 NW(2d) 736.

7. After trial by referee

A motion for a new trial is not necessary in order to question on appeal the sufficiency of the evidence to justify the findings. Teller v Bishop, 8 M 226 (195); Cooper v Breckenridge, 11 M 341 (241).

The district court has power to grant a new trial when the action is tried before a referee. Thayer v Barney, 12 M 502 (406); Cochrane v Halsey, 25 M 52; Koktan v Knight, 44 M 304, 46 NW 354; Hughley v Wabasha, 69 M 245, 72 NW 78.

8. Of less than all the issues

Issues having been tried, leaving other issues untried; the aggrieved party on motion is entitled to a new trial, at least of the untried material issues. Buerfening v Buerfening, 23 M 563; Coolbaugh v Roemer, 32 M 445, 21 NW 472; Chicago, Burlington v Porter, 43 M 527, 46 NW 75; Cobb v Cole, 44 M 278, 46 NW 364; Crich v Williamsburg, 45 M 441, 48 NW 198; Sauer v Traeger, 56 M 364, 57 NW 935; Swanson v Andrus, 83 M 505, 86 NW 465; Buck v Buck, 122 M 463, 142 NW 729, 126 M 275, 148 NW 117; Hagstrom v McDougall, 131 M 389, 155 NW 391; Smith v Great Northern, 133 M 192, 158 NW 46.

Where after trial of all the issues in a case the court grants a new trial of a single issue only, the order granting such new trial and refusing to vacate the same are renewable on appeal from the judgment entered after the second trial. Lundblad v Erickson, 180 M 185, 230 NW 473.

Submission to jury of evidence of injuries shown to have resulted from accident, together with evidence of injuries not shown to have resulted from the accident, is error requiring new trial on issue of damages. Dall v Scandrett, 201 M 316, 276 NW 281.

An order denying a motion for a new trial which fails to assign grounds therefore will not be disturbed. Belluci v Marra, 217 M 99, 13 NW(2d) 773.

9. Granted only for material error

Technical defects should be disregarded after verdict. Steele v Maloney, 1 M 347 (257); Short v McRea, 4 M 119 (78).

A new trial will not be granted even where there is error if from the whole case it is apparent that the result will not be changed. Dorr v Mickley, 16 M 20 (8); Colter v Mann, 18 M 96 (79); Lewis v St. Paul & Sioux City, 20 M 260 (234); Webb v Kennedy, 20 M 419 (374); Torinus v Matthews, 21 M 99; Maher v Winona & St. Peter, 31 M 401, 18 NW 105; Hurt v St. Paul, Minneapolis, 39 M 485, 40 NW 613; Perry v Minneapolis Street Railway, 69 M 165, 72 NW 55.

The statute provides that a new trial may be granted for error "materially affecting" the rights of the aggrieved party. Tarbox v Gotzian, 20 M 139 (122).

A new trial will not be granted for a failure to assess merely nominal damages where no question of permanent right is involved. Warner v Lockerby, 31 M 421, 18 NW 145; Harris v Kerr, 37 M 537, 35 NW 379; Knowles v Steele, 59 M 452, 61 NW 557; Jenson v Chicago Great Western, 64 M 511, 67 NW 631; United States v Koerner, 65 M 540, 68 NW 181.

The law does not concern itself with trifles and if the verdict is only a trifle more or less than it ought to have been, a new trial will not be granted. Osborne v Johnson, 35 M 300, 28 NW 510; American v Klarquist, 47 M 344, 50 NW 243; Palmer v Degan, 58 M 505, 60 NW 342; Singer v Potts, 59 M 240, 61 NW 23; Mannheim v Carleton College, 68 M 531, 71 NW 705; Nickerson v Wells-Stone, 71 M 230, 73 NW 959, 74 NW 891.

A new trial will not be granted to enable a party to litigate a question not raised by the pleadings. Bullis v Cheadle, 36 M 164, 30 NW 549.

Rule that the admission of incompetent evidence is not ground for a new trial, where fact which such evidence tends to prove is shown by other competent evidence, applies only where the other evidence conclusively establishes the fact. William Bergenthal v Security State, 98 M 414, 108 NW 301; Crowley v Burns, 100 M 178, 110 NW 969.

In the instant case the plaintiff waived the error when he consented to accept and plead to the amended answer. Church v Odell, 100 M 98, 110 NW 346.

A new trial will not be granted where the record affirmatively shows that the error did not result in prejudice. Crowley v Burns, 100 M 178, 110 NW 969; Kelly v Tyra, 103 M 176, 114 NW 750, 115 NW 636.

Failure or inability of reporter to furnish transcript of evidence no ground for new trial. Peterson v Lundquist, 106 M 339, 119 NW 50.

A motion to set aside a judgment on the ground that it was procured by perjured testimony will not be entertained when the complaint informed defendant of what plaintiff would attempt to prove, and defendant, though he answered, failed to appear at the trial. Major v Leonard, 115 M 439, 132 NW 915; Cappaletti v Citizens Insurance, 123 M 325, 143 NW 787.

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 135, 201 NW 537, 202 NW 71.

The fact that a local newspaper published an article at time of trial concerning the case is not sufficient reason for a new trial when the opposing party and his counsel are free from blame, and no prejudice shown. Ceylon v Fidelity, 163 M 280, 203 NW 985.

A new trial will not be granted for failure of the court to award nominal damages. L'Hommedieu v Wolfson, 187 M 333, 245 NW 369.

The court did not err in refusing to reduce the verdicts, nor in refusing to grant a new trial "in the interests of justice". Luck v Minneapolis Street Ry. 191 M 504, 254 NW 609.

The inquiry of the appellate court is not whether upon the record a new trial might have been granted, but whether the refusal of it involved a violation of a clear, legal right or a manifest abuse of judicial discretion. Vietor v Costello, 203 M 41, 279 NW 743.

Error in excluding Rusinko's deposition was error without prejudice. Its admission would not have affected the verdict. Porter v Grennan, 219 M 14, 16 NW(2d) 906.

The evidence being so manifestly preponderant for plaintiff on the issue of defendant's negligence, so that a directed verdict would have been justified, errors in the court's charge would not justify a new trial. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

The ignorance or incompetence of the attorney who was defendant's own selection was not ground for a new trial, there being no showing of infidelity on the part of the attorney and no certain showing of prejudice or incompetence. State v Gorman, 219 M 162, 17 NW(2d) 42.

10. Generally

Where a motion for a new trial is made on specific grounds not including the claim that the conclusions of law are not sustained by the findings of fact, such claim cannot be raised on an appeal from the order denying the motion. Holmstrom v Barstad, 147 M 172, 179 NW 737; Lindgren v Bailey, 168 M 500, 210 NW 392.

Where an appeal from an order establishing a highway is dismissed without a decision on the merits there is no basis for a new trial, and following Dodge v Bell, 37 M 382, 34 NW 739, when such motion is made, no appeal lies from the order denying it. In re Seward, 156 M 229, 194 NW 378.

An order of the court granting a new trial leaves the case as if no trial had ever been had, and, upon an appeal from an order denying a new trial after a second trial, none of the proceedings of the first trial are before the court for review. Marlow v Streefland, 156 M 450, 195 NW 488.

Having submitted his case upon one theory of the law and facts, a party cannot complain if it is correctly decided according to that theory. Friend v Friend, 158 M 39, 196 NW 814.

A specification of error in the notice of a motion for judgment on a new trial is waived if not renewed on appeal, unless it involved jurisdiction over the subject matter. Winona v Northern States, 158 M 62, 196 NW 811.

The issue as to the amount of damages being the only one not properly submitted, the new trial will be confined to that issue. Peoples Bank v Randby, 158 M 309, 197 NW 265; Flanery v Chicago, Milwaukee, 158 M 384, 197 NW 747; Morton v Griggs Cooper, 162 M 436, 203 NW 218; Becker v Nelson, 164 M 367, 205 NW 262.

Where a motion for a new trial is based upon a failure of the evidence to sustain the verdict and such failure is claimed to be due to the absence of proof of an essential fact to establish, the application is not addressed to the discretionary power of the court, but rests upon legal principles and involves exclusively a question of law. Potter v Great Northern, 167 M 168, 208 NW 641.

The theory upon which a case is tried cannot be changed after trial. Hutchins v United States, 170 M 273, 212 NW 451.

A mere mistake in the form of a verdict, as received, is not fatal if the intention of the jury clearly appears therefrom. Royal Indemnity v Township, 177 M 408, 225 NW 291.

Where a party does not move for a directed verdict at the close of the testimony, he cannot under our statutory method of precedure move for judgment notwithstanding an adverse verdict after trial, nor can the court under such circumstances enter judgment notwithstanding on a motion to "vacate and set aside" the verdict. Anderson v Newsome, 193 M 157, 258 NW 157.

Although a proceeding relating to the parentage of an illegitimate child has some features of a criminal trial, it is substantially a civil action, and after a verdict of not guilty the court may grant a new trial. State v Don Riegel, 194 M 309, 260 NW 293.

Municipal courts organized under Laws 1895, Chapter 229, while courts of record, possess only such authority as is conferred upon them by the statute under which they are organized, and such courts, like justices of the peace, have no authority to grant new trials. Untiedt v Ver Dick, 195 M 239, 262 NW 568.

The case having been tried by the court on an erroneous theory it is remanded for a new trial. County of St. Louis v Magie, 198 M 127, 269 NW 105.

Following Erickson v Minnesota, 134 M 209, 158 NW 979, a plaintiff who made out a prima facie case showing that he is entitled to damages, will, for error in dismissing his case, be granted a new trial on all issues, even though he failed to prove the amount of his damages, and where it appears that the deficiency in proof may be supplied on the second trial. Gillaley v Sampson, 203 M 233, 281 NW 3.

Although the court's instruction in respect to the emergency rule was erroneous, the error was harmless, where plaintiff's theory at the trial was that the emergency had been successfully met and avoided, where the court submitted that issue as a question of fact to the jury under appropriate instructions, and where the verdict was for defendant. Dahlstrom v Hurtig, 209 M 72, 295 NW 508.

Though not well formulated, the motion for a new trial sufficiently raised the error in the charge that that violation of the traffic act was "negligence" instead of "prima facie evidence of negligence". Hubred v Wagner, 217 M 130, 14 NW(2d) 115.

II FOR IRREGULARITY OR ABUSE OF DISCRETION

1. Construction of clause 1

An order which directs a reference in a case in which a reference is not authorized by law, is an appealable order. St. Paul & Sioux City v Gardner, 19 M 132 (99).

Where there is no formal or express waiver of an omission in the pleadings, the record must make it appear very clearly that the parties did in fact and without objection litigate the issue as though it were in the pleadings. City of Winona v Minnesota Railway, 27 M 415, 6 NW 795.

The supreme court will not review a refusal to allow an amendment to a pleading, unless the record shows what the proposed amendment was. Schumann v Mark, 35 M 379, 28 NW 927.

A cause having been called for trial, the court dismissed the same upon a motion, before any evidence had been introduced. The court, deeming his action erroneous, properly granted a new trial. Dunham v Byrnes, 36 M 106, 30 NW 402.

A right to have a cause stricken from the calendar is not waived by participating in a trial after a refusal of the court to strike from the calendar or to continue the cause. Mead v Billings, 43 M 239, 45 NW 228.

In civil actions the power of the trial courts to grant new trials is limited to the grounds specified and prescribed by statute. It follows that for errors of law occurring upon the trial, but not excepted to, a new trial cannot be granted. Valerius v Richard, 57 M 443, 59 NW 534.

The assignment of errors cannot be amended by the appellant, after his time for serving them has passed, without the consent of the respondent or leave of court. Minneapolis, St. Paul v Home Insurance, 64 M 61, 66 NW 132.

Judges of the district court have authority to appoint special, but not regular terms, for the trial of issues of fact. Flanagan v Borg, 64 M 394, 67 NW 616.

An order sustaining a demurrer to a pleading entered before hearing of the cause cannot in this court be reviewed upon a denial of a motion for a new trial. Grimes v Ericson, 94 M 461, 103 NW 334.

The municipal court was not in error in suspending sentence to a definite date. State v Fjolander, 125 M 529, 147 NW 273.

A quotient verdict should not be permitted. Reick v Great Northern, 129 M 14, 151 NW 408.

Relating to abuse of discretion. Grant v Minneapolis, St. Paul, 136 M 155, 161 NW 400.

In an action for dissolution of a partnership and an accounting, the evidence was sufficient to take the issue of division of proceeds from sale of a 99-year lease out of the statute of frauds, and make proper accounting. Carlson v Johnson, 158 M 416, 195 NW 41.

Statements made by the court in explanation of rulings made in making rulings on objections to evidence, and remarks made to plaintiff's counsel in connection with the examination of witnesses do not present reversible error. Kouri v Olson, 191 M 101, 253 NW 98.

Where after denial of a prior motion for a new trial, the trial court refused the applicant the right to dismiss before entry of the final decree, an appeal will be to review the propriety of the refusal. Mitchell v Bazille, 216 M 368, 13 NW(2d) 20.

2. Improper remarks of the court

A remark by a judge, that a decision excluding certain evidence must put an end to the defense, does not excuse the defendant from offering any other proper evidence. He must offer it, and get a decision on it. Zimmerman v Lamb, 7 M 421 (336).

The judge's remarks relating to the general characteristics of corporations held without error. Minnesota Valley v Doran, 17 M 188 (162).

It is improper for a judge, having given the instruction asked for, to weaken its effect, by using language leaving the jury in doubt as to whether the instruction was given or refused. Horton v Williams, 21 M 187.

The expressions "raise a strong presumption" and could "only be overcome by strong and convincing proof" are equivalent to the expressions "are strong evidence" or "evidence of great weight" and are unobjectionable. McArthur v Craigie, 22 M 351.

A caution to the jury not to lose their heads, and return a verdict for a lady on general principles, was not error. Bingham v Bernard, 36 M 114, 30 NW 404.

In permitting the defendant the opening and closing of the case the court exercised sound discretion. Aultman v Falkum, 47 M 414, 50 NW 471.

Declarations or statements may be so made by the court in respect to the weight and materiality of evidence as to be prejudicial and ground of exception. Haug v Haugan, 51 M 558, 53 NW 874; Webster v Roester, 173 M 529, 217 NW 933.

The trial court was fully justified in calling the attention of the jury to certain rumors affecting the conduct of one of their number, and in admonishing them as to a repetition of the alleged misconduct. State v Floyd, 61 M 467, 63 NW 1096; State v King, 88 M 175, 92 NW 965.

Certain remarks of the judge such as "if those papers were put in evidence, it was done surreptitiously" are error. State v English, 62 M 402, 64 NW 1136.

Under the circumstances, it was not error for the judge to assert that he did not see that the witness was at the time any more insane than was the attorney. State v Hayward, 62 M 474, 65 NW 63.

A remark of the court as to what is admissible under the complaint, but which remark was not a ruling on any motion or objection made by the appellant, cannot be reviewed on appeal. Smith v Kingman, 70 M 453, 73 NW 253.

In an action involving the application of the statute establishing standard time the court remarked "I shall certainly deprive this defendant, and all others, of any such buncombe as this for a defense". Possibly not in good taste, but not prejudicial. State v Johnson, 74 M 381, 77 NW 293.

While the remarks of the trial judge taking each remark separately may not be error, considering all the alleged errors together, the defendant did not have that temporate and impartial trial which is the right of every man. State v Briggs, 84 M 357, 87 NW 935.

The following remark directed to the attorneys, but heard by the jury, "The question of contributory negligence will be submitted to the jury; although the

court has some doubt about the propriety of submitting that question to the jury on the facts in this case", was held not prejudicial. Sherwood v Jenkins, 87 M 388, 92 NW 230.

The trial court charged the jury that the trial was not an oratorical contest and the jurors were not sitting "to determine which one made the most eloquent speech or emitted the largest volume of sound". Held not erroneous. State v Evans, 88 M 262, 92 NW 976.

In an action between an elevator company and its former employee, the trial judge in open court said, "I prefer, counsel, that if there is to be any stealing done on technicalities that the supreme court say so." Held error. Kramer v Northwestern, 91 M 346, 98 NW 96.

After a jury had been out 24 hours the trial judge sent them back and said among other things, "Do so in as mechanical a way as you can fairly and conscientiously, and we will hope to hear from you again more favorably". Not error. Scarlatta v Ash, 95 M 240, 103 NW 1025.

While the trial court has a wide discretion in the conduct of the trial, it must not invade the province of the jury by making comments, insinuations, or suggestions indicative of belief or unbelief in the integrity or credibility of witnesses. City of Minneapolis v Canterbury, 122 M 301, 142 NW 812; Faunce v Searles, 122 M 343, 142 NW 816.

The attorneys acting together in gathering the exhibits, by mistake included a document not in evidence. There was no showing that the document influenced the jury, and the error did not justify a new trial. Leonard v Schall, 125 M 291, 146 NW 1104.

Remarks of the court held so prejudicial to appellant that a new trial should be had. Bartlett v Ness, 156 M 407, 195 NW 39.

A trial court's talk in open court to a jury seeking further instructions is not an "irregularity", but may be reviewed as an "error of law occurring at the trial", and a settled case or bill of exceptions is necessary. Begley's Estate, 178 M 141, 226 NW 404.

It was not error for the trial court to suggest that counsel "get together" in reference to the use of an audit. Sigvertsen v Maney, 182 M 387, 234 NW 688.

Where the jury returned a general and a defective special verdict and the special verdict was corrected by the jury without returning to the jury room, there was no prejudice or error and the action of the trial judge is sustained. Olson v Myrland, 195 M 633, 264 NW 129.

Improper remarks of the court deemed reversible error. Hubbard v Wagner, 217 M 129, 14 NW(2d) 115.

Following the rule in Seitz v Clayborne, 181 M 4, 231 NW 714, irregular or indiscreet remarks by the court generally cannot be made a basis for a new trial without objection or exception thereto taken at the time the statements are made. Merchants Mutual v St. Paul Mercury, 218 M 393, 16 NW(2d) 463.

3. Other misconduct

After the jury has retired to consult the judge cannot communicate with the jury, or give them the least information, except in open court, and in the presence of, or after due notice to, the parties. Hoberg v State, 3 M 262 (181).

If the court adjourns while the jury is out, the judge cannot, in the absence of the parties, receive the verdict until the court meets. Kennedy v Raught, 6 M 235 (155).

A justice of the peace, after the jury had retired, temporarily entered the jury room. It not appearing that any communication was made by him, or any injury suffered by the unsuccessful litigant, and prevailing party being without fault, the verdict is not set aside. Helmbrecht v Helmbrecht, 31 M 504, 18 NW 449.

The court having instructed a jury in the absence of counsel, under the circumstances, an exception taken afterwards was unavailing. Rutby v Bader, 46 M 212, 48 NW 909.

The incompetency of a juror does not entitle the defeated party to a new trial as a matter of right. State v Durnam, 73 M 150, 75 NW 1127; State v Boice, 157 M 374, 196 NW 483.

The court erred in endorsing a wrong method of procedure to assess damages which counsel advised the jury to pursue. Gegere v Chicago, Northwestern, 175 M 96, 220 NW 429.

A publication in a newspaper commenting on the decision at the first trial does not necessarily result in prejudice, and it is in the discretion of the court to dismiss the jury and order a retrial. Ring v Minneapolis Street Ry. 176 M 377, 223 NW 619.

Prejudicial bias of the trial court in the divorce action is not shown by his very active examination of witnesses. Taylor v Taylor, 177 M 428, 225 NW 287.

In the instant case it would be difficult to reverse, where the trial court made the order on conflicting affidavits. Jennrich v Moeller, 182 M 445, 234 M 638.

As to whether or not a mistrial should have been ordered where plaintiff during the court's recess became hysterical, upon the facts stated in the opinion, to lie within the discretion of the trial court, and its exercise thereof was proper. Serr v Biwabik, 202 M 179, 278 NW 355.

III FOR THE MISCONDUCT OF THE JURY

1. Discretionary

The granting of a new trial for misconduct of the jury is in the sound discretion of the trial court, and it requires a clear case against its action to justify the supreme court in reversing the decision. Hewitt v Pioneer Press, 23 M 178; State v Salverson, 87 M 40, 91 NW 1; Evertson v McKay, 124 M 260, 144 NW 950.

The purity of jury trials must be jealously guarded; scrupulous conduct on the part of the jurors, litigants, and counsel is necessary. Whether there is to be a new trial for misconduct lies in the first instance with the trial judge, and his decision will not be reversed except for abuse of discretion. Brecht v Town of Bergen, 182 M 603, 235 NW 528.

The polling of the jury is for the purpose of ascertaining for a certainty that each juror agrees upon a verdict. It is not to determine whether the verdict was reached by the quotient process. Affidavits or testimony as to what transpired in the jury room are not admissible to impeach their verdict. Hoffman v City of St. Paul, 187 M 320, 245 NW 373.

Appellant is not entitled to a new trial because the jury heard the discussion between the court and counsel on the applicability of a statute read by the court to the jury. Paulos v Krelsch, 195 M 603, 263 NW 913.

The granting of a new trial for alleged misconduct of the jury, or bailiff in charge of the jury, rests almost wholly in the discretion of the trial court. State v Warren, 201 M 369, 276 NW 655.

2. Motion disfavored

Motion for a new trial was made on affidavits of persons that three of the jurymen had expressed a pre-determination to hang the defendant. The verdict of a jury will not be disturbed or set aside upon affidavits of this nature, unless there is a clear preponderance of evidence in favor of the bias charged. State v Dumphrey, 4 M 438 (340).

Where the jury brought in a sealed general verdict but overlooked a special verdict required of them, the court on the convening properly sent them back to complete their labors. Tarbox v Gotzian, 20 M 139 (122).

Misconduct of the jurors in visiting certain rooms in a hotel under guidance of a relative of the plaintiff, who was also a witness in her behalf, is such misconduct that a new trial should be ordered. Koehler v Cleary, 23 M 325.

A new trial was properly ordered where two of the jurors visited the locus in quo. Twaddle v Mendenhall, 80 M 177, 83 NW 135.

The court after inquiry into the alleged misconduct of one of the jurors rightfully found no prejudice resulted. Clancy v Daily News, 202 M 10, 277 NW 264.

The trial court did not err in refusing to grant a new trial on the ground of misconduct of two jurors, or of the defendants and their attorneys, no prejudice resulting. Peterson v Raymond, 202 M 325, 278 NW 471.

3. Necessity of objection on the trial

In proceedings relating to parentage of an illegitimate child the court in open court improperly delivered to the jurors certain papers, not exhibits, the counsel for defendant being present. There having been no objection raised a new trial cannot be granted. State v Nichols, 29 M 357, 13 NW 153.

In a "right-of-way" case the jury was sent out to view, but one of the jurors failed to attend. As the parties proceeded with the trial, without objections, the improper conduct of the juror cannot be complained of. Gurney v Minneapolis & St. Croix, 41 M 223, 43 NW 2.

During the trial two of the jurors went out one evening fishing in company with one of the parties to the action. When this was called to the attention of the court the two jurors were dismissed and by consent the trial proceeded with ten jurors. This irregularity was not grounds for a new trial. Young v Otto, 57 M 307, 59 NW 199.

The court reprimanded one of the jurors for his conduct but the case proceeded. If the rumors in question as to the juror's conduct were of so serious character as to require a dismissal of the jury, it was incumbent on counsel to move in the matter at the time, and not speculate on the result. After verdict it was too late. State v Floyd, 61 M 467, 63 NW 1096.

The use of intoxicating liquor by a juror in sufficient quantity to impair his judgment, when not participated in, assented to, or waived by the parties, constitutes such misconduct as invalidates the verdict, unless it be made to appear clearly that no prejudice resulted. State v Salverson, 87 M 40, 91 NW 1.

4. Presumption of prejudice; burden of proof

In an application for a new trial for misconduct of the jury, if it does not appear that the misconduct was occasioned by the prevailing party, or any one in his behalf, and if it does not indicate any improper bias upon the jurors' minds, and the court cannot see that it had, or might have had, an effect unfavorable to the party moving for the new trial, the verdict ought not to be set aside. If the moving party shows such misconduct that prejudice may have resulted to him from it, a new trial must be granted, unless the successful party shows that in fact such prejudice did not result. Koehler v Cleary, 23 M 325; Oswald v Minneapolis Northwestern, 29 M 5, 11 NW 112; Woodbury v City of Anoka, 52 M 329, 54 NW 189; Svenson v Chicago Great Western, 68 M 14, 70 NW 795; Rush v St. Paul City Ry. 70 M 5, 72 NW 733; Twaddle v Mendenhall, 80 M 177, 83 NW 135; State v Salverson, 87 M 40, 91 NW 1.

Where the gist of an action on trial is the condition of the locus in quo, if jurors, without permission or knowledge of the parties examine the locality, their verdict will be set aside, unless it is clear that such misconduct could not have affected their verdict. Rush v St. Paul City Ry. 70 M 5, 72 NW 733.

The affidavit of a juror is not competent as to matters occurring in the jury room to impeach the verdict, but it is admissible for such purpose as to matters occurring outside of the jury room during the progress of the trial. Rush v St. Paul City Ry. 70 M 5, 72 NW 733.

Where a prevailing party attempts to corrupt or improperly influence the action of any of the jurors in a case, a new trial, as a matter of sound public policy, should be granted. Akin v Lake Superior, 103 M 204, 114 NW 654, 837.

It is presumed that the jury understand the facts and will render an honest judgment, and will not be swayed by passion, prejudice, or unlawful sympathy. Forseth v Duluth & Superior, 202 M 447, 278 NW 904.

5. Affidavits on motion

The affidavits of jurors as to what transpired in the jury room cannot be received to impeach their verdict. St. Martin v Desnoyer, 1 M 156 (131); Knowlton v McMahon, 13 M 386 (358); State v Stokely, 16 M 282 (249); State v Beebe, 17 M 241 (218); State v Mims, 26 M 183, 2 NW 494; Bradt v Rommel, 26 M 505, 5 NW 680; Stevens v Montgomery, 27 M 108, 6 M 646; State v Lentz, 45 M 177, 47 NW 720; Gardner v Minea, 47 M 295, 50 NW 199; Aldrich v Wetmore, 52 M 164, 53 NW

1072; Svenson v Chicago, Great Western, 68 M 14, 70 NW 795; Westin v Hedberg, 68 M 434, 71 NW 616; Rush v St. Paul City Ry. 70 M 5, 72 NW 733; State v Durnam, 73 M 162, 75 NW 1127.

Affidavits of jurors as to what transpired in the jury room or to occurrences outside the jury room during the course of the trial may be received to support their verdict. St. Martin v Desnoyer, 1 M 156 (131); Eich v Taylor, 20 M 378 (330); State v Lentz, 45 M 177, 47 NW 720; Aldrich v Wetmore, 52 M 164, 53 NW 1072; Svenson v Chicago Great Western, 68 M 14, 70 NW 795.

Affidavits of persons other than jurors intended to impeach the verdict are inadmissible if they relate to statements of jurors. St. Martin v Desnoyer, 1 M 156 (131); Aldrich v Wetmore, 52 M 164, 53 NW 1072; Svenson v Chicago Great Western, 68 M 14, 70 NW 795.

Affidavits of jurors are inadmissible to show misconduct in the officer having them in charge. Knowlton v McMahon, 13 M 386 (358); Gardner v Minea, 47 M 295, 50 NW 199.

The affidavit of the officer may be received to show misconduct in the jury. Bradt v Rommel, 26 M 505, 5 NW 680.

Affidavits of persons other than jurors are admissible to impeach the verdict provided they relate to acts of the jury showing misconduct. Bradt v Rommel, 26 M 505, 5 NW 680; Swenson v Chicago Great Western, 68 M 14, 70 NW 795.

While an affidavit of a third party of statements made to him by a juror is not admissible to impeach a verdict, yet if the juror make affidavit in support of the verdict, an affidavit of a third party is admissible in impeachment. Aldrich v Wetmore, 52 M 164, 53 NW 1072.

Affidavits of jurors respecting matters occurring outside the jury room during the progress of the trial are admissible to impeach their verdict. Rush v St. Paul City Ry. 70 M 5, 72 NW 733; Twaddle v Mendenhall, 80 M 177, 83 NW 135; Pierce v Brennan, 83 M 422, 86 NW 417.

The impeachment of a juror cannot be received to impeach the verdict, unless it appears that the matters to which he testifies took place outside the court. Hurlburt v Leachman, 126 M 180, 148 NW 51.

The affidavit of all the jurors may be received to show that, by a clerical error of the jury, the verdict returned in court was the opposite of the verdict unanimously agreed upon by them. Paul v Pye, 135 M 13, 159 NW 1070.

Misconduct of the jury cannot be predicated upon statements made by a juror as to matters discussed in the jury room. Kronberg v Bondhus, 164 M 446, 205 NW 371.

Conflicting affidavits. Powell v Standard Oil Co. 168 M 248, 210 NW 55.

Affidavits on the testimony of jurors as to what transpired in the jury room, even to attack the verdict as a quotient one, are not admissible to impeach the verdict. Hoffman v City of St. Paul, 187 M 320, 245 NW 373.

A new trial will not be granted on the affidavit of members of the jury that they misunderstood the charge, or to show misconduct. Collings v Northwestern, 202 M 139, 277 NW 910.

6. Separation of the jury

During the progress of a trial, the jury may be allowed to separate. Bitansky v State, 3 M 427 (313); State v Ryan, 13 M 370 (343).

Where in a criminal case, after the jury has retired to deliberate, if a juror separates himself from his fellows, without the attendance of the officer having charge, a new trial will be granted for that cause alone. Maher v State, 3 M 444 (329).

A jury which had leave to bring in a sealed verdict, stated to the officer in charge that they had agreed, though they had not, and they were allowed to separate, and the next morning two of them protested against the verdict; and they were sent out again, and finally agreed. Such misconduct justified a new trial. Aetna v Grube, 6 M 82 (32).

It is error to allow a jury in a criminal case to separate, without being in charge of an officer, after the case is finally submitted to them. State v Parrant, 16 M 178 (157).

A temporary separation of a juror from his fellows, after the withdrawal of the jury, under the charge of the court, for deliberation upon their verdict, is no ground for a new trial, when it clearly appears that no prejudice resulted. State v Conway, 23 M 291; State v Matakovich, 59 M 514, 61 NW 677; State v Georgian, 124 M 515, 145 NW 385.

It was error for the court in a criminal case to instruct the jury, against the objection of the defendant, that in case they should agree upon a verdict after adjournment of the court for the day, they might separate and bring in a sealed verdict at the opening of court on the following day. State v Anderson, 41 M 104, 42 NW 786.

Incompetency of a juror will not per se constitute ground for a new trial. A motion on that ground is addressed to the judicial discretion of the trial court. State v Durnam, 73 M 162, 75 NW 1127.

Separation during trial, and a temporary dispersion at adjournment and before the final argument is not error unless defendant was clearly injuriously affected by such separation. State v Salverson, 87 M 40, 91 NW 1.

It is discretionary with the trial court whether in capital cases the jury selected to try the case should be committed to the care of the sheriff, and not permitted to separate during trial. State v Nelson, 91 M 143, 97 NW 652.

7. Drinking intoxicating liquor

The use of intoxicating liquor by a juror or jurors while engaged in the trial of an action is highly reprehensible, and when this indulgence is such as to unfit the juror or jurors for an intelligent, fair and impartial consideration of the case, when not participated in, assented to, or waived, constitutes such misconduct as vitiates and invalidates the verdict unless it be made to clearly appear that no prejudice resulted therefrom. Cole v Curtis, 16 M 182 (161); State v Adamson, 43 M 196, 45 NW 152; State v Madigan, 57 M 425, 59 NW 490; State v Salverson, 87 M 40, 91 NW 1; State v King, 88 M 175, 92 NW 965; State v Snow, 130 M 206, 153 NW 526.

8. Visiting locus in quo

A view by the jury is not allowed for the purpose of furnishing evidence upon which a verdict is to be found, but for the purpose of enabling the jury better to understand and apply the evidence given in court. Chute v State, 19 M 271 (230).

In case of an application for a new trial, for misconduct of jury, if it does not appear that the misconduct was occasioned by the prevailing party or someone in his behalf, and if the visit to the locus in quo did not create bias in the juror's mind, and if the court cannot see that it might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside. If the moving party shows such misconduct that prejudice may have resulted to him, a new trial will be granted, unless the prevailing party shows no prejudice could result. Koehler v Cleary, 23 M 325.

New trial granted. Aldrich v Wetmore, 52 M 164, 53 NW 1072; Woodbury v City of Anoka, 52 M 329, 54 NW 187; Rush v St. Paul City Ry. 70 M 5, 72 NW 733; Pierce v Brennan, 83 M 422, 86 NW 417.

New trial denied. Twaddle v Mendenhall, 80 M 177, 83 NW 135; Lyons v Dee, 88 M 490, 93 NW 899; Thoreson v Quinn, 126 M 48, 147 NW 716; Gunderson v Minneapolis Street Ry. 126 M 168, 148 NW 61; Bisping v Kummer, 202 M 19, 277 NW 255.

The appellate court defers largely to the trial court's judgment whether visits by members of the jury to the locus in quo warrants a new trial. Newton v Minneapolis Street Ry. 186 M 439, 243 NW 684.

Even though the jurors had no intention of wrongdoing, the effect of what they did was to try the case upon evidence not received in court and was misconduct which requires a new trial. Spinner v McDermott, 190 M 390, 251 NW 908.

9. Unauthorized communications with jury

After the jury has retired to consult, the judge cannot communicate with the jury, or give them information, except in open court, and in the presence of, or after due notice to, the parties. Hoberg v State, 3 M 262 (181).

New trial granted on account of improper communications made to a jury viewing the locus in quo. Hayward v Knapp, 22 M 5.

Where the communication could not have influenced the juror a new trial will not be granted. Chalmers v Whittemore, 22 M 305; Oswald v Minneapolis and Northwestern, 29 M 5, 11 NW 112; Helmbrecht v Helmbrecht, 31 M 504, 18 NW 449; State v Lentz, 46 M 177, 47 NW 720; State v Floyd, 61 M 467, 63 NW 1096; Lucas v Ganley, 166 M 7, 206 NW 934.

Where "the jury in one breath both condemned and exonerated" both defendants, "this was of course fatal to the verdict." Bell v Northern Pacific, 112 M 493, 128 NW 831; Begin v Liederbach, 167 M 84, 208 NW 546.

Conversations between jurors and litigants during a trial may or may not amount to such misconduct as to warrant a new trial; at any rate such communication is subject to criticism. Explanations are addressed to the discretion of the trial court. The burden is on the guilty party to show no misconduct. Nelson v Kuhfeld, 158 M 163, 206 NW 934, 937; Ryan v International, 204 M 177, 283 NW 129.

The misconduct of members of respondent's family and of one juror not sufficient to cause reversal. State ex rel v Wheeler, 179 M 557, 230 NW 91.

The giving of candy and cigars to the jurors by the defendants, who had a favorable verdict, the participation of the court officers therein, and the talk of later giving a banquet, made grounds for a new trial. Hillius v Nelson, 188 M 336, 247 NW 385.

10. Other misconduct

Miscellaneous cases involving questions of misconduct. St. Martins v Desnoyer, 1 M 156 (131); State v Dumphrey, 4 M 438 (340); Aetna v Grube, 6 M 82 (32); McNulty v Stewart, 12 M 434 (319); Eich v Taylor, 20 M 378 (330); Bradt v Rommel, 26 M 505, 5 NW 680; Stevens v Montgomery, 27 M 108, 6 NW 646; Gurney v Minneapolis & St. Croix, 41 M 223, 43 NW 2; Young v Otto, 57 M 307, 59 NW 199; State v Bragg, 90 M 7, 95 NW 578; Floody v Great Northern, 102 M 81, 112 NW 875, 1081; Goss v Goss, 102 M 346, 113 NW 690; Burho v Minneapolis & St. Louis, 121 M 326, 141 NW 300; Evertson v McKay, 124 M 260, 144 NW 950.

Where a prevailing party attempts to corrupt or improperly influence the actions of any of the jurors in a case, a new trial, as a matter of sound policy, should be granted without reference to the question whether or not the attempt was successful. Akin v Lake Superior, 103 M 204, 114 NW 654, 837.

The attack upon the verdict as being of the quotient variety fails because there is no showing that, in advance of the computation made by the jurors to ascertain the average of sums suggested one by each of them, there was an agreement to be bound by the result. Havenmaier's Estate, 163 M 218, 203 NW 958.

On inquiring of the jurors as to their connection with a certain insurance company, without any showing that defendant carried any insurance with such company, was misconduct but harmless. Eichhorn v Lundin, 172 M 591, 216 NW 537.

There was no misconduct in permitting the jury to attend a theatrical performance, even if the plot had some vague similarity to the case on trial. State v Nichols, 179 M 301, 229 NW 99.

The fact that a juror lodged and boarded during the trial in the home of plaintiff's stepson and witness, where plaintiff and his wife took their noonday meals with the juror, is ground for a new trial. Engstrom v Duluth, Missabe, 190 M 208, 251 NW 134.

IV FOR MISCONDUCT OF COUNSEL

1. Improper remarks on the trial

Misconduct of counsel, in addressing the jury, is not ground of error, unless excepted to at the time, and included in the bill of exceptions on case. St. Martin v

Desnoyer, 1 M 156 (131); State v Brown, 12 M 538 (448); State v Freling Lausen, 43 M 265, 45 NW 432; Schulze v Schneckberger, 81 M 380, 84 NW 119; Leitz v Claybourne, 181 M 4, 231 NW 714.

An application to set aside a verdict and grant a new trial, upon the ground that the jury has been improperly and unfairly influenced by counsel, is largely addressed to the judicial discretion of the trial court. Knowles v VanGorder, 23 M 197; Loucks v Chicago, Milwaukee, 31 M 526, 18 NW 651; Olson v Gjertson, 42 M 407, 44 NW 306; State v Adamson, 43 M 196, 45 NW 152; Mykleby v Chicago, St. Paul, 49 M 457, 52 NW 213; Riley v Chicago, Milwaukee, 71 M 425, 74 NW 171; Jung v Hamm, 95 M 367, 104 NW 233; Balder v Zenith, 103 M 345, 114 NW 948; Parmelee v Tri-State, 103 M 530, 115 NW 1135; Kloppenburg v Minneapolis, St. Paul, 123 M 177, 143 NW 322.

Cases involving improper remarks on trial. Rheiner v Stillwater Street Ry. 31 M 193, 17 NW 279; Smith v Wilson, 36 M 334, 31 NW 176; Johnson v Chicago, Burlington, 37 M 519, 35 NW 438; State v Reid, 39 M 277, 39 NW 497; Watson v St. Paul City Ry. 42 M 46, 43 NW 904; Corrigan v Elsinger, 81 M 42, 83 NW 492; Wells v Moses, 87 M 432, 92 NW 334; Fisher v Weinholzer, 92 M 347, 99 NW 1132; McKenzie v Banks, 94 M 496, 103 NW 497; Bremer v Minneapolis, St. Paul, 96 M 469, 105 NW 494; Bjoraker v Chicago, Milwaukee, 103 M 400, 115 NW 202; Graseth v Northwestern, 128 M 245, 150 NW 804; James v Suess, 155 M 489, 194 NW 5; Savings Bank v Schaal, 156 M 424, 195 NW 141; Kitchen v Fashion Garage, 158 M 136, 196 NW 929; Reynolds v Great Northern, 159 M 370, 199 NW 108; Polin v St. Paul Union, 159 M 410, 199 NW 87; Leonczak v Minneapolis, St. Paul, 161 M 304, 201 NW 551; Bujalski v Minneapolis Street Ry. 169 M 303, 211 NW 309.

Assignments of error as to misconduct are not well taken, where no exceptions were taken, nor attention of court called thereto, nor ruling invoked. Ludwig v Spicer, 99 M 400, 109 NW 832.

Determination of the question whether improper remarks of counsel were prejudicial rests largely in the discretion of the trial court. Sonnesyn v Hawbaker, 127 M 15, 148 NW 476; Wadman v Trout Lake, 130 M 80, 153 NW 269; Smith v Great Northern, 133 M 192, 158 NW 46; Hagerty v Phoenix, 162 M 359, 203 NW 50; Parris v McKasy, 165 M 241, 206 NW 393; Weckwerth v Proudfoot, 171 M 321, 214 NW 52; Munkel v Chicago, Milwaukee, 202 M 264, 278 NW 41; Santee v Haggart, 202 M 361, 278 NW 520; Ryan v International, 204 M 177, 283 NW 129.

A claim of misconduct of counsel cannot be urged as a ground for reversal, unless it is made a ground of the motion for new trial in the trial court. Price v Minnesota, Dakota, 130 M 229, 153 NW 532.

Where it appears that a seemingly excessive verdict probably was contributed to by misconduct of the prevailing party, the supreme court will order a new trial in the interest of orderly administration of justice. Hanskett v Broughton, 157 M 83, 195 NW 794.

It is the duty of the trial court to control trials and, on its own motion, to stop a jury argument predicated on personal abuse of opposing counsel, or upon matters not pertinent to the issues. Brown v Burrow, 171 M 219, 213 NW 890.

"I am glad there is one woman who had the nerve to come into court and face John Oleson, because there was a hundred others who didn't have the nerve to do it" in an address to the jury is prejudicial and a new trial is granted. Westwell v Oleson, 174 M 151, 218 NW 548; 180 M 340, 230 NW 792.

Misconduct not sufficiently prejudicial to warrant new trial. Scholte v Brabec, 177 M 13, 224 NW 259; Poppleston v Pantages, 175 M 153, 220 NW 418; First National v Schroder, 175 M 341, 221 NW 62; Dumbeck v Chicago, Great Western, 177 M 261, 225 NW 111; Eichhorn v Lundin, 172 M 591, 216 NW 537; Harkness v Zube, 182 M 594, 235 NW 281; Horsman v Bigelow, 184 M 514, 239 NW 250; Olson v Purity Baking, 185 M 571, 242 NW 283; Marckel v Raven, 186 M 125, 242 NW 471; Romann v Bender, 190 M 420, 252 NW 80; Kouri v Olson, 191 M 101, 253 NW 98; Kassmer v Prudential, 191 M 353, 254 NW 446; Clark v Banner Grain, 195 M 44, 261 NW 596; Schaedler v New York Life, 201 M 327, 275 NW 235; Drown v Minneapolis, 202 M 66, 277 NW 423.

Misconduct in argument held prejudicial, and new trial granted unless plaintiff consent to a stated reduction. Baird v Chicago Milwaukee, 179 M 127, 228 NW 552.

Misconduct of counsel cannot be based upon a statement made when a document is offered, where it appears that part of the document, received in evidence by consent, gave the jury the same information. Hoch v Byram, 180 M 298, 230 NW 823.

Plaintiff's counsel in his closing argument to the jury mistakenly or wrongfully stated that defendant's counsel had made false statements to the court and jury. A new trial was granted. Romann v Bender, 184 M 586, 239 NW 596; Burmeister v Minneapolis Street Railway, 185 M 167, 240 NW 359.

Plaintiff's counsel was guilty of misconduct in repeatedly asking questions to which objections were being sustained, and in stating to the jury, "They say it is all right to kill this boy because he is guilty of contributory negligence." Campbell v Sargent, 186 M 293, 243 NW 142.

Until the adoption of district court rule number 27 (f) it had been necessary to interrupt counsel in order to save exceptions to proper argument. The rule permits exceptions be taken at the close of the argument. Jovaag v O'Donnell, 189 M 315, 249 NW 676.

The conduct of plaintiff's counsel in wrongfully criticizing conduct of defendant's counsel, it being a close case, is sufficient cause for a new trial. Swanson v Swanson, 196 M 298, 265 NW 39; Krenik v Westerman, 201 M 255, 275 NW 849.

A new trial is ordered for misconduct of counsel and failure of the trial court to correct it. Ferraro v Taylor, 197 M 5, 265 NW 829.

The improper remarks of plaintiff's counsel were prejudicial and went beyond the bounds of permissible retaliation for previous objectionable conduct of opposing counsel. The trial court failed to comply with request to instruct the jury to disregard the remarks. It was an abuse of judicial discretion to refuse to grant a new trial. Anderson v Hawthorne, 201 M 580, 277 NW 259.

Statement by counsel for plaintiff relative to the interest of an insurance company in the case was misconduct, but as the trial court did not grant a new trial, the appellate court rests on the judicial discretion of the trial court. Eystad v Stambaugh, 203 M 392, 281 NW 526.

The record contains nothing to provoke the intemperate utterances found in the address to the jury of plaintiff's attorney, and for that alone a new trial might well be granted. Noesen v Minneapolis, St. Paul, 204 M 239, 283 NW 246.

Remarks not deemed misconduct. Warren v Marsh, 215 M 615, 11 NW(2d) 528; Waters v Fiebelkorn, 216 M 489, 13 NW(2d) 461.

Remarks during final argument deemed reversible error. Hubred v Wagner, 217 M 129, 14 NW(2d) 115.

Although there is ample evidence of the liability of the defendant, the verdict for plaintiff if sufficiently large to indicate passion and prejudice, must be set aside because of improper remarks of counsel. James v Chicago, St. Paul, 218 M 333, 16 NW(2d) 188.

Plaintiff's counsel in his argument to the jury misstated the evidence, but as that statement was corrected and the jury admonished to disregard the misstatement, there was no ground for new trial. There was no indication of abuse of discretion on the part of the trial judge. The jury may be credited with sufficient good judgment not to be prejudiced. Smith v Barry, 219 M 182, 17 NW(2d) 324.

Persisting in discussing improper evidence after being repeatedly warned by the court. Belyea v Minneapolis, St. Paul, 61 M 224, 63 NW 627.

Alleged misconduct of prosecuting attorney. State v Floyd, 61 M 467, 63 NW 1096; State v Nelson, 91 M 143, 97 NW 652; State v Cotter, 167 M 263, 209 NW 4.

Remarks regarding the supreme court. Martin v Courtney, 81 M 112, 83 NW 503.

Improper disclosure that defendant carried liability insurance. Hackett v Palon, 169 M 218, 210 NW 996.

Questioning defendant as to his carrying insurance. Falk v Poucher, 169 M 229, 210 NW 997; Anderson v Duban, 170 M 155, 212 NW 180; Storhaugen v Motor Truck, 171 M 47, 213 NW 372.

Counsel in his closing argument to the jury strenuously argued upon a point of evidence excluded by the court. The consideration of that which the court

had kept out of the case should not be argued to the jury. Minneapolis, St. Paul v Fitzpatrick, 201 M 461, 277 NW 394.

Where testimony tending to incite prejudice was erroneously admitted, and the conduct of plaintiff's attorney also tended to incite prejudice, and as verdict is excessive, defendants are entitled to a new trial. Morner v Kohen, 172 M 543, 216 NW 233.

The trial court did not err in refusing a new trial on the alleged act of defendant's counsel in suppressing the evidence of Warren Scott a witness to the accident. Peterson v Raymond Bros. 202 M 320, 278 NW 471.

Plaintiff's counsel in cross-examining defendant and witnesses asked questions bearing on prejudice or sympathy rather than to bring out evidence on the merits. This error in the instant case was not ground for new trial because the court sustained objections to the questions, and admonished the jury to disregard the questions. Walker v Stecher, 219 M 152, 17 NW(2d) 317.

V FOR ACCIDENT OR SURPRISE

1. Discretionary

It is well settled that new trials on the ground of surprise occurring at the trial which ordinary prudence could not have guarded against should be granted with great caution, and that granting or refusing motions founded on this ground rests on the sound discretion of the trial court. Hull v Minneapolis Street Ry. 64 M 402, 67 NW 218; Holland v Sheehan, 106 M 545, 119 NW 217; Dobrowoloske v Parpala, 121 M 455, 141 NW 803.

Amendment of pleadings on trial is a matter lying almost wholly in the discretion of the trial court, and its action will not be reversed on appeal except for clear abuse of discretion. Peterson v Parviainen, 174 M 297, 219 NW 180.

The record does not show any sufficient cause for the granting of a new trial on the grounds of accident and surprise or on the ground of newly discovered evidence. Petterson v Fosseen, 194 M 265, 260 NW 225.

"Full faith and credit" as modified by the Minnesota doctrine of "fraud" in obtaining foreign judgments. 20 MLR 160.

2. Necessity of objection on the trial

A new trial could not be granted on account of the absence of a material witness, as there is no showing of a subpoena having been issued, and the defendant went to trial without objection, and no motion was made for continuance. Eich v Taylor, 17 M 172 (142).

The instant case is clearly one of legal surprise, resulting in an unjust verdict on false testimony, and the injured party applied promptly for relief and it was the duty of the court, in the exercise of his discretion to grant a new trial. Nudd v Home Insurance, 25 M 100; Forman v Jones, 32 M 7, 19 NW 83.

New trial on ground of newly discovered evidence properly denied. Ward v Hackett, 30 M 150, 14 NW 578; Lowe v Minneapolis Street Ry. 37 M 283, 34 NW 33; Hendrickson v Tracy, 53 M 404, 55 NW 622; Nelson v Carlson, 54 M 90, 55 NW 821.

New trial granted on the ground of surprise. Russell v Reed, 32 M 45, 19 NW 86; Miller v Layne, 84 M 221, 87 NW 605.

New trial denied on the ground of surprise. Cheney v Drywood, 34 M 440, 26 NW 236; State v Bogan, 41 M 285, 43 NW 5; Adamant v Pete, 61 M 464, 63 NW 1027; Wester v Hedberg, 68 M 434, 71 NW 616; Otterness v Botley, 80 M 430, 83 NW 382.

Practice on discovering a biased juror in the panel. Wells v Bowman, 59 M 364, 61 NW 135.

The trial court did not abuse its discretion in refusing to dismiss this case, on plaintiff's request, at the close of his case, and the verdict for defendant was properly directed. Lando v Chicago, St. Paul, 81 M 279, 83 NW 1089.

3. Affidavits on motion

Affidavits stating facts and circumstances insufficient to warrant relief. Desnoyer v McDonald, 4 M 515 (402); Eich v Taylor, 17 M 172 (145); Feltus v Balch, 27 M 357, 7 NW 688; Cheney v Dry Wood Co. 34 M 440, 26 NW 236; State v Bogan, 41 M 285, 43 NW 5; Caughey v Northern Pacific, 51 M 324, 53 NW 545; State v Madigan, 57 M 425, 59 NW 490; Scott v Sharvey, 62 M 528, 64 NW 1132.

4. Motion granted

In the following cases the motion for a new trial was granted. Shaw v Henderson, 7 M 480 (386); Nudd v Home Insurance, 25 M 100; Farnam v Jones, 32 M 7, 19 NW 83; Russell v Reed, 32 M 45, 19 NW 86; Huntress v Wyman, 55 M 262, 56 NW 896; Miller v Layne, 84 M 221, 87 NW 605; Trainor v Maturen, 100 M 127, 110 NW 370; O'Neil v Conner, 184 M 281, 238 NW 679.

5. Motion denied

In the following cases the motion was denied. Desnoyer v McDonald, 4 M 515 (402); Deuel v Hawke, 2 M 50 (37); Zimmerman v Lamb, 7 M 421 (336); Eich v Taylor, 17 M 172 (145); Wintermute v Stinson, 19 M 394 (340); Gardner v Kellogg, 23 M 463; Feltus v Balch, 27 M 357, 7 NW 688; Sheffield v Mullin, 28 M 251, 9 NW 756; Cheney v Dry Wood Co. 34 M 440, 26 NW 236; Webb v Barnard, 36 M 336, 31 NW 214; Barrows v Fox, 39 M 61, 38 NW 777; Wilcox v Arbuckle, 50 M 523, 52 NW 926; Caughey v Northern Pacific, 51 M 324, 53 NW 545; Nelson v Carlson, 54 M 90, 55 NW 821; State v Madigan, 57 M 425, 59 NW 490; First National v Steele, 58 M 126, 59 NW 959; Wells v Bowman, 59 M 364, 61 NW 135; Adamant v Pete, 61 M 464, 63 NW 1027; Scott v Sharvy, 62 M 528, 64 NW 1132; Hull v Minneapolis, 64 M 402, 67 NW 218; Kurtz v St. Paul and Duluth, 65 M 60, 67 NW 808; Bristol v Schultz, 68 M 106, 70 NW 872; Wester v Hedberg, 68 M 434, 71 NW 616; State v Durnam, 73 M 150, 75 NW 1127; Keegan v Minneapolis & St. Louis, 76 M 90, 78 NW 965; Latusek v Davies, 79 M 279, 82 NW 587; Otterness v Botten, 80 M 430, 83 NW 382; State v Fay, 88 M 269, 92 NW 978; State v Gallebergh, 89 M 213, 94 NW 723; State v Bongard, 89 M 426, 94 NW 1093; Smith v Herz, 92 M 254, 99 NW 1134; Stitt v Rat Portage, 92 M 365, 100 NW 1125; Village v Hewitt, 98 M 265, 107 NW 815; Strand v Great Northern, 101 M 85, 111 NW 958; Dobrowoloske v Parpala, 121 M 455, 141 NW 803; Smith v Minneapolis Street Ry. 134 M 292, 157 NW 499, 159 NW 623; Rockey v Joslyn, 134 M 468, 158 NW 787; Norberg v Pearson, 134 M 481, 159 NW 1095; Wilkinson v Turnbull, 166 M 29, 206 NW 950; Schendel v Chicago, Milwaukee, 168 M 152, 210 NW 70; Petterson v Fosseen, 194 M 265, 260 NW 225.

VI FOR NEWLY DISCOVERED EVIDENCE

1. To be granted with extreme caution

Motions for a new trial on the ground of newly discovered evidence are regarded jealously, and construed with strictness. It is in derogation of and exception to the rule which requires litigants to submit all their evidence in the first instance. The matter subject to certain rules is within the jurisdiction of the trial court. Lampsen v Brander, 28 M 526, 11 NW 94; Peck v Small, 35 M 465, 29 NW 69; Cirkel v Croswell, 36 M 323, 31 NW 513; Nelson v Carlson, 54 M 90, 55 NW 821.

A motion for a new trial on the ground of newly discoverd evidence is addressed to the discretion of the trial judge, upon full consideration of all the evidence given at the trial and the legitimate effect which new evidence taken in connection therewith ought, upon legal principles, to have toward producing a different result. Bunker v United Order, 97 M 361, 107 NW 392; Hewitt v Board, 103 M 41, 114 NW 261; Gragg v Empey, 105 M 229, 117 NW 421; Shaw v Chicago, Milwaukee, 105 M 393, 117 NW 465; Greenhut Cloak v Oreck, 130 M 304, 153 NW 613; Hormel v Minneapolis, 130 M 469, 153 NW 867; Gates v Chicago, Milwaukee, 131 M 3, 154 NW 441; Bonyea v Wendt, 135 M 374, 160 NW 1030; Boyle v Boileau, 174 M 546, 219 NW 866.

The garnishees appealed from an order granting the plaintiff leave to file a supplemental complaint. Appeal dismissed. Medgarden v Paulson, 172 M 368, 215 NW 516.

There being no showing of diligence the court properly denied defendant's motion for a new trial. Hoppe v Boulevard, 172 M 516, 215 NW 852; Kubat v Zika, 193 M 522, 259 NW 1.

The matter of granting a new trial on the ground of newly discovered evidence rests largely in the sound discretion of the trial court and is to be exercised cautiously and sparingly, and only in furtherance of substantial justice. Usher v Eckhardt, 176 M 210, 222 NW 924; Gau v Borgerding, 177 M 276, 225 NW 22; Kuske v Jevne, 178 M 296, 226 NW 938; State v Stephen, 179 M 80, 228 NW 335; Milliren v Federal Life, 186 M 115, 242 NW 546; Donaldson v Carstensen, 188 M 443, 247 NW 522; Johlfs v Cattoor, 193 M 553, 259 NW 57; Fredrick v Koetter, 197 M 524, 267 NW 473.

Record does not show sufficient cause to grant a new trial on the ground of alleged fraud and perjury, or on the ground of surprise and newly discovered evidence. Petterson v Fosseen, 194 M 265, 260 NW 225.

If the new evidence is doubtful in character, not so material as to make probable a different result on a new trial, or merely cumulative or impeaching, relief will be denied; nor will relief be granted if the facts brought to light could, by proper diligence have been discovered and presented at the first trial. Vietor v Costello, 203 M 41, 279 NW 743.

In an action for damages arising out of an automobile collision, newly discovered evidence tending to show perjury on part of defendant driver regarding speed at which he was travelling and circumstances regarding accident did not justify order granting new trial. Vasataka v Matsch, 216 M 530, 13 NW(2d) 483.

2. Necessity of applying for continuance

To lay a foundation for a new trial the petitioner should lay the foundation in the trial court by asking for a continuance for the purpose of obtaining the absent testimony. Lowe v Minneapolis Street Railway, 37 M 283, 34 NW 33; State v Bogan, 41 M 285, 43 NW 5; Hendrickson v Tracy, 53 M 404, 55 NW 622.

3. Showing on motion

A motion for a new trial will not be granted, on the ground of newly discovered evidence, where such evidence is conflicting or cumulative, or where no facts are shown why it could not have been discovered before the trial by reasonable diligence, strict proof must be made and facts not conclusions stated. Meeks v City of St. Paul, 64 M 220, 66 NW 966; Bradley v Norris, 67 M 48, 69 NW 624; Helm v Smith, 76 M 328, 79 NW 171; Wellendorf v Tesch, 77 M 512, 80 NW 629; State v Fay, 88 M 269, 92 NW 978; McDonald v Smith, 101 M 476, 112 NW 627; Crowley v Farley, 129 M 460, 152 NW 872.

Fact issues are for the trial court. Gau v Borgerding, 177 M 276, 225 NW 22.

Alleged newly discovered evidence was contradictory and impeaching; and there was no showing of diligence. Le Veaux v Holt Motor Co. 181 M 355, 232 NW 622.

Affidavits supporting a motion for a new trial on the ground of newly discovered evidence must show exercise of reasonable diligence. Klugman v Schwartz, 186 M 139, 242 NW 625; State v Padares, 187 M 622, 246 NW 369; Jeddeloh v Altman, 188 M 404, 247 NW 512; Engstrom v Duluth, Missabe, 190 M 208, 251 NW 134; Whitman v Fitzpatrick, 190 M 633, 251 NW 901; Zane v Home Insurance, 191 M 382, 254 NW 453; Jensvold v Minnesota Commercial, 192 M 482, 257 NW 86; Kubat v Zika, 193 M 522, 259 NW 1; Jorstad v Benefit Assn. 196 M 568, 265 NW 814; Stack v Fryberger, 197 M 399, 267 NW 368; Clarizio v Castigliano, 201 M 590, 277 NW 262; Peterson v Raymond, 202 M 320, 278 NW 471; Vietor v Costello, 203 M 41, 279 NW 743; State v Bergeson, 203 M 88, 279 NW 837.

The record does not support the action of the trial court in granting a new trial. Kruchowski v St. Paul City Ry. 195 M 537, 263 NW 616, 265 NW 303, 821.

As the newly discovered evidence could easily have been procured at the first trial, a new trial will not be granted. Manemann v Manemann, 216 M 516, 13 NW(2d) 474; Vasatka v Matsch, 216 M 530, 13 NW(2d) 483.

4. Affidavits of new witnesses

Upon application for a new trial, on the ground of newly discovered testimony of witnesses, the affidavits of such witnesses should be produced, or some satisfactory reason for not doing so shown; and the failure to produce the witnesses on the trial must be sufficiently excused. Keough v McNitt, 6 M 513 (357); Eddy v Caldwell, 7 M 225 (166); State v Fay, 88 M 269, 92 NW 978.

5. Counter affidavits

In opposition to a motion for a new trial for newly discovered evidence, counter affidavits may be received in opposition. Finch v Green, 16 M 355 (315); Peterson v Faust, 30 M 22, 14 NW 64.

Motion fully met by counter affidavits. Stokke v Mikkelson, 185 M 28, 239 NW 658.

The affidavits alleging newly discovered evidence, part of which was cumulative, and those of the opposition thereto, presented a question of fact, and there was no abuse of discretion on the part of the trial court in denying a new trial. Farrell v Kruger, 189 M 165, 248 NW 720.

6. Nature of new evidence

Newly discovered evidence is not a ground for a new trial if it is merely cumulative. Nininger v Knox, 8 M 140 (110); State v Nelson, 91 M 143, 97 NW 652;

Or if it could have been discovered before trial by the exercise of due diligence. Knoblauch v Kronechnabel, 18 M 300 (272);

Or if it not so material as to make probable a different result on a new trial. Lampsen v Brander, 28 M 526, 11 NW 94;

Or if it is merely contradictory or impeaching. Peck v Small, 35 M 465, 29 M 69; Cirkel v Croswell, 36 M 323, 31 NW 513.

When the evidence in support of the verdict is contradictory, and not decisive, a new trial may be granted upon the ground of newly discovered evidence, although cumulative, contradictory, and impeaching, provided such evidence may have the effect of changing the result on a new trial. Hanson v Bailey, 96 M 274, 104 NW 969.

A new trial will not ordinarily be granted to enable a party to avail himself of impeaching evidence. Williams v Kemper, 99 M 301, 109 NW 242.

There was no error in denying a motion for a new trial on the ground of newly discovered evidence. Day v Duluth Street Ry. 121 M 446, 141 NW 795; Sandstone v Kettle River, 122 M 510, 142 NW 885; Peterson v Phelps, 123 M 319, 143 NW 793; Gunn v McAlpine, 125 M 343, 147 NW 111; Mark v Fink, 125 M 401, 147 NW 279; Laurisch v Minneapolis, St. Paul, 132 M 114, 155 NW 1074; Antel v St. Paul City Ry. 133 M 156, 157 NW 1073; Rockey v Joslyn, 134 M 468, 158 NW 787; Paine v U. S. F. & G. Co. 135 M 9, 159 NW 1075; International v Miller, 135 M 292, 160 NW 793; Gilbert v Case, 136 M 257, 161 NW 515; McConnell v Bristow, 155 M 487, 194 NW 19; Hinkle v Berg, 156 M 307, 194 NW 637; Punstinen v Saari, 156 M 501, 194 NW 627; Lahti v Davis, 157 M 338, 196 NW 470; Flaaten v Lyons, 157 M 362, 196 NW 478; State v Burnstein, 158 M 122, 196 NW 936; State v Ahlgren, 158 M 334, 197 NW 738; State v Swedberg, 159 M 292, 198 NW 815; Wentworth v Stone, 159 M 464, 199 NW 110; State v Frost, 160 M 317, 200 NW 295; State v Wiese, 161 M 28, 200 NW 746; State v Witt, 161 M 96, 200 NW 933; Guthrie v Hagen, 162 M 447, 203 NW 216; Farmers v Fidelity, 163 M 334, 204 NW 33; Carpenter v Gantzer, 164 M 105, 204 NW 550; Johnson v Elinborg, 165 M 67, 205 NW 628; Sprandel v Nims, 165 M 293, 206 NW 434; Moscrip v Webster, 163 M 476, 204 NW 326; State v Potter, 167 M 523, 209 NW 313; State v Gleeman, 170 M 197, 212 NW 203.

The refusal to grant a new trial on account of newly discovered evidence was within the discretion of the trial court. Egerdahl v Larson, 160 M 49, 199 NW 889; State v Daly, 161 M 26, 200 NW 746; State v Upson, 162 M 9, 201 NW 913; State v Skogman, 171 M 515, 213 NW 923; Boyle v Boileau, 174 M 545, 219 NW 866; Sorum v Klement, 178 M 87, 226 NW 208; Kuske v Jevne, 178 M 296, 226 NW

938; Buro v Morse, 183 M 518, 237 NW 186; Dahmen v Simmons, 192 M 407, 256 NW 891; Clark v Banner Grain, 195 M 44, 261 NW 596; Merek v Graves, 200 M 418, 274 NW 402; Vietor v Costello, 203 M 41, 279 NW 943.

A new trial should have been granted on the ground of newly discovered evidence. Geisler v Geisler, 160 M 463, 200 NW 742.

The new evidence being merely cumulative or impeaching, a new trial or amendment is not justified. State v Bauer, 171 M 345, 214 NW 262; McLear v Village of Wayzata, 176 M 200, 223 NW 97; King v Minneapolis Street Ry. 192 M 163, 255 NW 626; Peterson v Raymond, 202 M 320, 278 NW 471; Weinstein v Schwartz, 204 M 189, 283 NW 127.

There is no error in refusing a new trial based upon the affidavit of a juror that he did not believe the evidence of the state's principal witness and consented to a verdict of guilty merely to put an end to the case. State v Keegel, 171 M 503, 214 NW 474.

There was no showing of due diligence or reasons why the new evidence was not available at the first trial. Neal v Erickson, 175 M 618, 221 NW 641; LeVeaux v Holt, 181 M 355, 232 NW 622; Whitman v Fitzpatrick, 190 M 633, 251 NW 901; Kubat v Zika, 193 M 522, 259 NW 1; Bickle v Bickle, 194 M 375, 260 NW 361.

A new trial may be granted upon the ground of newly discovered evidence though the evidential facts sought to be proved arose after the trial. State ex rel v Watrous, 177 M 25, 224 NW 257.

Not of sufficient importance to warrant a new trial. Dumbeck v Chicago Great Western, 177 M 261, 225 NW 111; Miller v Phillips, 182 M 108, 233 NW 855; Wendt v Wallace, 188 M 488, 247 NW 569; Stone v Sigel, 189 M 47, 248 NW 285; Szyperski v Swift, 201 M 567, 277 NW 235.

As the evidence proposed was probably incompetent, the trial court rightfully denied a new trial. State v Sanderson, 179 M 436, 229 NW 564.

Where the testimony at the trial discloses the existence of certain facts, such facts cannot be considered newly discovered evidence. Engeln v Kolling, 180 M 264, 230 NW 778.

A showing that a litigant after trial remembers what he should have remembered at the trial does not constitute newly discovered evidence entitling him to a new trial. Farmers Bank v Cunningham, 182 M 244, 234 NW 320.

Grounds stated in motion too vague. Zobel v Boutelle, 184 M 172, 238 NW 49.

Motion fully met by counter affidavits. Stakke v Mikkelsen, 185 M 28, 239 NW 658; State ex rel v City of Eveleth, 189 M 234, 249 NW 184; Peterson v Schober, 192 M 315, 256 NW 308.

The alleged newly discovered evidence related to a value placed on property, but as valuations have changed since the written statement was made the new testimony would have small evidentiary value. Skinner v Overend, 190 M 456, 252 NW 418.

A new trial will not be granted upon the claim of newly discovered evidence if such be doubtful in character, not so material as to make probable a different result on a new trial, or merely cumulative or impeaching; nor will relief be granted, even though material facts be brought to light, if they could, by the exercise of diligence, have been presented on the first trial. State v Bergeson, 203 M 88, 279 NW 837.

The newly discovered evidence being merely cumulative, a new trial was properly denied. Kane v Locke, 216 M 170, 12 NW(2d) 495.

There was no abuse of discretion in the denial of plaintiff's motion for a new trial, as the newly discovered evidence was discredited by evidence brought out in the first trial. Bravo v Reil, 218 M 315, 15 NW(2d) 871.

VII FOR EXCESSIVE OR INADEQUATE DAMAGES

1. Under either clause 5 or clause 7

In actions to recover unliquidated damages, such as actions for personal injuries, libel or slander, and similar actions, where plaintiff's damages cannot be computed by mathematical computation, are not susceptible of proof by opinion

evidence, and are within the discretion of the jury, the motion should be made under clause 5. In all actions, whether sounding in tort or contract, where the amount of damages depends on opinion evidence, as the value of property converted or destroyed, the nature and extent of injuries to person or property, the motion should be made under clause 7. In case of doubt, or where both elements of damages are involved, the motion should be made under both clauses. State v Shevlin, 66 M 217, 68 NW 973; First National v City of St. Cloud, 73 M 219, 75 NW 1054; Blume v Scheer, 83 M 409, 86 NW 446; Emerson v Pacific Coast, 92 M 523, 100 NW 365; Mohr v Williams, 95 M 261, 104 NW 12.

Where an order granting a new trial is not accompanied by a memorandum of the trial court, setting forth that the verdict was not sustained by the evidence, it will not be assumed by the appellate court to have been a discretionary order. Where a new trial either under clause (5) or clause (7), is granted in the exercise of judicial discretion, the order or memorandum should so indicate. King v Board, 116 M 437, 133 NW 1018.

Cases where appeals have been taken because verdicts were claimed to be excessive or inadequate. McGrath v Northern Pacific, 121 M 258, 141 NW 164; Burho v M. & St. L. 121 M 327, 141 NW 300; Farrell v Minneapolis & Rainy River, 121 M 357, 141 NW 491; Carver v Luverne Brick & Tile Co. 121 M 388, 141 NW 488; Day v Duluth Street Ry. 121 M 445, 141 NW 795; Dobrowoloske v Parpala, 121 M 455, 141 NW 803; Teryll v St. Paul City Ry. 121 M 530, 141 NW 304; Larson v Anderson, 122 M 39, 141 NW 847; Williams v Dickson, 122 M 49, 141 NW 849; Maki v St. Lukes, 122 M 444, 142 NW 705; Sandstone v Kettle River, 122 M 510, 142 NW 885; Bartnes v Pittsburgh Iron Ore, 123 M 131, 143 NW 116; Kloppenburg v M. St. P. & S. S. M. 123 M 173, 143 NW 322; First State Bank v Stevens Land Co. 123 M 218, 143 NW 355; Maroney v M. & St. L. 123 M 480, 144 NW 149; Robinson v Great Northern, 123 M 495, 144 NW 220; Hively v Golnick, 123 M 498, 144 NW 213; Johnson v Wild Rice Boom Co. 123 M 523, 143 NW 111; Gillespie v Great Northern, 124 M 2, 144 NW 466; Falkenberg v Bazille, 124 M 19, 144 NW 431; Ploetz v Holt, 124 M 169, 144 NW 745; Bodkin v Great Northern, 124 M 219, 144 NW 937; Campbell v Canadian Northern, 124 M 245, 144 NW 772; Harris v Great Northern, 124 M 357, 145 NW 115; Jenkins v M. & St. L. 124 M 368, 145 NW 40; Magnuson v Burgess, 124 M 374, 145 NW 32; Potts v Minneapolis, St. P. & S.S.M. 124 M 413, 145 NW 161; Marfia v Great Northern, 124 M 466, 145 NW 385; McMillan v Northern Pacific, 125 M 7, 145 NW 613; Krahn v Owens, 125 M 33, 145 NW 626; Anderson v Wood, 125 M 102, 145 NW 791; Mark v Fink, 125 M 401, 147 NW 279; Teryll v St. Paul City Ry. 125 M 528, 147 NW 273; Lund v Great Northern, 126 M 259, 148 NW 112; Cox v Edwards, 126 M 350, 148 NW 500; Rief v Great Northern, 126 M 430, 148 NW 309; Heath v M. St. P. & S.S.M. 126 M 470, 148 NW 311; Record v Village of Farmington, 126 M 488, 148 NW 296; Weide v City, 126 M 491, 148 NW 304; Wendt v Bowman & Libby, 126 M 509, 148 NW 568; McMahon v Illinois Central, 127 M 1, 148 NW 446; Sonnesyn v Hawbaker, 127 M 15, 148 NW 476; O'Brien v Great Northern, 127 M 87, 148 NW 893; Boos v Minneapolis, St. Paul & Saulte St. Marie, 127 M 381, 149 NW 660; Mahr v Forrestal, 127 M 475, 149 NW 938; Puls v C. B. & Q. Ry. 127 M 507, 150 NW 175; State ex rel v Bashko, 127 M 519, 148 NW 1082; Perry v Illinois Central, 128 M 119, 150 NW 382; Arveson v Boston Coal Dock, 128 M 178, 150 NW 810; Padrick v Great Northern, 128 M 228, 150 NW 807; Engebretson v Bremer, 128 M 232, 150 NW 897; Quinn v St. Paul Boiler, 128 M 270, 150 NW 919; Otos v Great Northern, 128 M 283, 150 NW 922; Stash v Great Northern, 128 M 329, 151 NW 124; Daly v Curry, 128 M 449, 151 NW 274; Kommerstad v Great Northern, 128 M 505, 151 NW 177; Reick v Great Northern, 129 M 14, 151 NW 408; Morgan v City of Albert Lea, 129 M 59, 151 NW 532; Cady v Twin City Taxi Cab Co. 129 M 70, 151 NW 537; Palon v Great Northern, 129 M 101, 151 NW 894; Wheeler v Tyler, 129 M 206, 152 NW 137; Lawler v Minneapolis, St. Paul & Saulte St. Marie, 129 M 506, 152 NW 882; Duer v Gagnon, 129 M 517, 152 NW 880; Otos v Great Northern, 129 M 523, 151 NW 1102; Grignon v Minneapolis & St. Louis, 130 M 36, 153 NW 117; Wadman v Trout Lake, 130 M 80, 153 NW 269; Johnson v Quinn, 130 M 134, 153 NW 267; Conley v Dow, 130 M 186, 153 NW 323, 593; McCaughey v Wilson, 130 M 196, 153 NW 310; Price v Minnesota, Dakota & Western Ry. 130 M 229, 153 NW 532; Sherwood v Crescent Creamery, 130 M 263, 153 NW 525; Barnett v Minneapolis & St. Louis, 130 M 300, 153 NW 600; Brennan v Minn., Dak., & Western, 130 M 314, 153 NW 611; Knapp v Great Northern, 130 M 405,

153 NW 848; Gruber v Trout Lake Lumber, 130 M 531, 153 NW 271; Zuponcic v Val Blatz, 131 M 112, 154 NW 790; Nash v Minneapolis & St. Louis, 131 M 166, 154 NW 957; Armstrong v Great Northern, 131 M 236, 154 NW 1075; Donovan v Tilden, 131 M 327, 155 NW 104; Froslee v Bank, 131 M 435, 155 NW 619; Burch v Hoy & Elzy, 131 M 475, 155 NW 767; Haugen v Northern Pacific, 132 M 54, 155 NW 1058; Sclawr v City of St. Paul, 132 M 238; 156 NW 283; Roemer v Schmidt, 132 M 399, 157 NW 640; Patterson v Blatti, 133 M 23, 157 NW 717; Falk v Chicago & N. W. Ry. 133 M 41, 157 NW 904; Swaney v Crawley, 133 M 57, 157 NW 910; Seith v Electric Traction Co. 133 M 367, 158 NW 611; McNab v Wallin, 133 M 370, 158 NW 623; Brody v Foster, 134 M 91, 158 NW 824; Mahowald v Thompson-Storrett, 134 M 113, 158 NW 913; Wentworth v Butler, 134 M 382, 159 NW 828; Hillstrom v City of St. Paul, 134 M 451, 159 NW 1076; Holt v Ten Broeck, 134 M 458, 159 NW 1073; Wien v Flemming, 134 M 477, 159 NW 1095; Zenner v G. N. 135 M 37, 159 NW 1087; Manning v Chic., Great Western, 135 M 229, 160 NW 787; Eckert v Chicago, Rock Island, 135 M 372, 160 NW 1020; Baer v Chowning, 135 M 453, 161 NW 144; Grant v Electric Traction Co. 136 M 155, 161 NW 400; Riser v Smith, 136 M 417, 162 NW 520.

Cases where the award of damages was not so excessive as to justify an appellate court interfering with the verdict. James v Warter, 156 M 247, 194 NW 754; Moody v Canadian Northern, 156 M 211, 194 NW 639; Jensen v Chicago, Milwaukee, 156 M 218, 194 NW 620; Sticha v Benzich, 156 M 52, 194 NW 752; Frye v Chicago, Rock Island, 157 M 52, 195 NW 629; Parker v Chicago, Great Western, 157 M 184, 195 NW 892; Flatten v Lyons, 157 M 362, 196 NW 478; Winans v Northern States, 158 M 62, 196 NW 811; Brandt v City of Duluth, 158 M 104, 196 NW 932; Anderson v Satterlund, 158 M 205, 197 NW 102; Yencho v Kruly, 158 M 408, 197 NW 752; Allen v Brown, 159 M 61, 198 NW 137; Barrett v Lumber Exchange, 159 M 326, 198 NW 804; Rappaport v Stockdale, 160 M 78, 199 NW 513; Roberts v Village of Buhl, 160 M 398, 200 NW 354; Boushor v Kuhlmann, 161 M 64, 200 NW 748; Pach v Chippewa Springs, 161 M 125, 201 NW 293; Leonczak v Minneapolis, St. Paul & Saulte St. Marie, 161 M 304, 201 NW 551; Bradley v Minneapolis Street Ry. 161 M 322, 201 NW 606; Fostrom v Grossman, 161 M 440, 201 NW 929; Iverson v Regola, 161 M 487, 202 NW 27; Madole v Chicago, Rock Island, 161 M 535, 201 NW 937; Automotive Co. v Natl. Fire Insurance, 162 M 34, 202 NW 32; Quinn v Chicago, Milwaukee, 162 M 87, 202 NW 275; Ream v Chicago, Rock Island, 162 M 96, 202 NW 276; Elliason v Western Coal, 162 M 213, 202 NW 485; Larson v Great Northern, 162 M 419, 203 NW 57; Goar v Village of Stephen, 162 M 464, 203 NW 62; Mahoney v Erickson, 162 M 509, 202 NW 68; McClain v City of Duluth, 163 M 198, 203 NW 776; Bank v Natl. Surety Co. 163 M 257, 203 NW 969; Elder v Chicago, Rock Island, 163 M 457, 204 NW 557; Schendel v Chicago, Rock Island, 163 M 460, 204 NW 552; Repensik v Bernick, 163 M 511, 203 NW 983; Peneff v Duluth, Missabe & Northern, 164 M 6, 204 NW 524; Jackson v Chicago, Great Western, 165 M 58, 205 NW 689; Reliance Motor v St. Paul Fire & Marine Insurance, 165 M 442, 206 NW 655; Yorek v Potter, 166 M 131, 207 NW 188; Zacherl v Goldberg, 166 M 193, 207 NW 305; Weasler v Murphy Transfer, 167 M 211, 208 NW 657; Whitcomb v Automobile Insurance, 167 M 362, 209 NW 27; Jankowski v Clausen, 167 M 437, 209 NW 317; Erickson v Koch, 168 M 105, 209 NW 624; Noe v Great Northern, 168 M 259, 209 NW 905; Ryan v St. Paul Union Depot, 168 M 287, 210 NW 32; Powell v Standard Oil, 168 M 248, 210 NW 55; Duffy v Stratton, 169 M 136, 210 NW 866; Hackett v Palon, 169 M 218, 210 NW 996; Falk v Poucher Printing, 169 M 229, 210 NW 997; Anderson v Dubon, 170 M 155, 212 NW 180; Herbert v Village of Hibbing, 170 M 211, 212 NW 186; Carter v Duluth Yellow Cab, 170 M 250, 212 NW 413; Merrill v St. Paul City Ry. 170 M 332, 212 NW 533; Estate of Ellen Johnson, 170 M 451, 212 NW 815; Giliuson, Ellingsen & Erickson v Priest, 171 M 25, 213 NW 47; Storhaugen v Motor Truck Service, 171 M 47, 213 NW 372; Huovila v Frederick, 165 M 358, 206 NW 443; Lucas v Ganley, 166 M 7, 206 NW 934; Abramowitz v Continental, 170 M 215, 212 NW 449.

The verdict was so excessive that the trial court should have granted a new trial. Levan v Chicago, Rock Island, 158 M 69, 196 NW 673.

New trial should be granted unless the prevailing party consents to a reduction. Levan v Chicago, Rock Island, 158 M 69, 196 NW 673; Kitchen v Fashion Garage, 158 M 136, 196 NW 929; Flanery v Chicago, Milwaukee, 158 M 384, 197 NW 747; Drobnich v Bach, 159 M 258, 198 NW 669; Fries v Chicago, Rock Island, 159 M 328, 198 NW 998; Kowalski v Chicago & North Western, 159 M 388, 199

NW 178; Lemm v Great Northern, 159 M 436, 199 NW 20; Peterson v Mauer, 162 M 114, 202 NW 344; Krafting v Quick, 167 M 272, 208 NW 804; Getz v Standard Oil, 168 M 347, 210 NW 78.

Allowance deemed to be inadequate. Shearer v Puent, 166 M 425, 208 NW 182; Holmberg v Murphy, 167 M 232, 208 NW 808; Gunderson v Danielson, 169 M 399, 211 NW 471; Severson v Danielson, 169 M 397, 211 NW 472.

Cases where the award of damages was not so excessive as to justify an appellate court interfering with the verdict. Weckwerth v Proudfoot, 171 M 321, 214 NW 52; Letnes v Davis, 171 M 399, 214 NW 761; Nelson v City of Duluth, 172 M 76, 214 NW 774; Rimmer v Cohen, 172 M 134, 215 NW 198; Kline v Byrom, 172 M 284, 214 NW 890; Crouch v Chicago, Great Western, 172 M 447, 216 NW 234; Davis v Street Ry. Co. 173 M 186, 217 NW 99; Greene v Freeman, 173 M 622, 217 NW 485; Sieg v Wagner, 173 M 439, 217 NW 493; Kloss v Minneapolis Street Ry. 174 M 294, 219 NW 179; Boyle v Boileau, 174 M 545, 219 NW 866; McCabe v Duluth Street Ry. 175 M 22, 220 NW 162; Ring v Minneapolis Street Ry. 176 M 377, 223 NW 619; Scholte v Brabec, 177 M 13, 224 NW 259; Mullin v Minkel, 177 M 42, 224 NW 255; Tegels v Tegels, 177 M 222, 225 NW 85; Johnson v Lindquist, 177 M 270, 224 NW 839; Ellis v Lindmark, 177 M 390, 225 NW 395; Tuttle v Wickland, 178 M 353, 227 NW 203; Luther v Dornach, 179 M 528, 229 NW 784; Bokelmann v Bokelmann, 180 M 100, 230 NW 478; Lundblad v Erickson, 180 M 185, 230 NW 473; Hoch v Byrom, 180 M 298, 230 NW 823; Wolf v Chicago, Milwaukee, 180 M 310, 230 NW 826; Waggoner v Gummerum, 180 M 391, 231 NW 10; Rockwell v Rockwell, 181 M 13, 231 NW 718; Christmann v Great Northern, 181 M 97, 231 NW 710; Klaman v Hitchcock, 181 M 109, 231 NW 716; Carlson v Naddy, 181 M 180, 232 NW 3; Pitzen v Pitzen, 181 M 338, 232 NW 344; Erickson v Northland Transportation, 181 M 406, 232 NW 715; Schanil v Branton, 181 M 381, 232 NW 708; Shotts v Standard Oil, 181 M 386, 232 NW 712; Harrsch v Breilien, 181 M 400, 232 NW 710; Miller v Phillips, 182 M 108, 233 NW 855; Lund v Olson, 182 M 204, 234 NW 310; Randall v Great Northern, 182 M 259, 234 NW 298; Hansen v Moore, 182 M 321, 234 NW 462; Prevey v Watzke, 182 M 332, 234 NW 470; Jennrich v Moeller, 182 M 445, 234 NW 638; Martin v Schiska, 183 M 256, 236 NW 312; Kieffer v Sherwood, 184 M 205, 238 NW 331; Flink v Zopel, 184 M 376, 238 NW 791; Olson v Purity Baking, 185 M 571, 242 NW 283; Marcel v Cudahy Packing, 186 M 336, 243 NW 265; Ludwig v Haugen Motor Company, 187 M 315, 245 NW 371; Hoffman v City of St. Paul, 187 M 320, 245 NW 373; Northern States v Barnard, 187 M 353, 245 NW 609; Heitman v Klubertanz, 188 M 486, 247 NW 583; Patzwold v Patrick, 188 M 557, 248 NW 43; Stone v Sigel, 189 M 47, 248 NW 285; Ellering v Gross, 189 M 68, 248 NW 330; Foslien v Secker, 189 M 118, 248 NW 731; Mills v Harstead, 189 M 193, 248 NW 70; Brown v Murphy Transfer, 190 M 81, 251 NW 5; Orth v Wickman, 190 M 193, 251 NW 127; Thorson v Albert Lea Publishing, 190 M 200, 251 NW 177; Schreder v Litchy, 190 M 264, 251 NW 513; Johnston v Selfe, 190 M 269, 251 NW 525; Borwege v City of Owatonna, 190 M 394, 251 NW 915; Fryklind v Jackson, 190 M 356, 252 NW 232; Knutson v Haugen, 191 M 420, 254 NW 464; Luck v Minneapolis Street Ry. 191 M 503, 254 NW 609; Johnston v Jordan, 193 M 298, 258 NW 433; Fredhom v Smith, 193 M 569, 259 NW 80; Gross v General Investment, 194 M 23, 259 NW 557; Citrowski v Libert, 194 M 269, 260 NW 297; Gustafson v Roberts Hotel, 194 M 575, 261 NW 447; Dickey v Haes, 195 M 292, 262 NW 869; Paulos v Koelsch, 195 M 603, 263 NW 913; Mattson v Northland Utilities, 196 M 334, 265 NW 51; Hartel v Warren, 196 M 465, 265 NW 282; Buchanan v Marcusen, 196 M 520, 265 NW 319; Hoppe v Peterson, 196 M 538, 265 NW 338; Hammerstad v Arrow Head Steel, 196 M 561, 265 NW 433; Schmidt v Riemenschneider, 196 M 612, 265 NW 816; Anderson v Eastern Power Co. 197 M 144, 266 NW 702; Callahan v City of Duluth, 197 M 403, 267 NW 361; Birdsall v Duluth Superior Transit, 197 M 411, 267 NW 363; Wells v Weed, 197 M 464, 267 NW 379; Useman v Minneapolis Street Ry. 198 M 79, 268 NW 866; Finney v Norwood, 198 M 554, 270 NW 592; Sweeney v Meyers, 199 M 21, 270 NW 906; Arnao v Minneapolis & St. Paul, 199 M 34, 270 NW 910; Taaje v St. Olaf Hospital, 199 M 113, 271 NW 109; Findley v Brittenham, 199 M 197, 271 NW 449; Timmerman v March, 199 M 376, 271 NW 697; Olson v Kennedy Trading Co. 199 M 493, 272 NW 381; Lacheck v Duluth Superior Transit, 199 M 519, 273 NW 366; Piche v Halvorson, 199 M 526, 272 NW 591; Thorstad v Doyle, 199 M 543, 273 NW 255; Wyatt v Wyett, 200 M 106, 273 NW 600; Brossard v Koop, 200 M 410, 274 NW

241; Eilola v Oliver Iron Mining, 201 M 77, 275 NW 408; Koski v Muccilli, 201 M 549, 277 NW 229; Butler v Northwestern Hospital, 202 M 282, 278 NW 37; Santee v Haggart Construction, 202 M 361, 278 NW 520; Forseth v Duluth Superior Transit, 202 M 447, 278 NW 904; Baker v City of South St. Paul, 202 M 491, 279 NW 211; Paine v Gamble Stores, 202 M 462, 279 NW 257; Hoge v Teegarden, 202 M 592, 279 NW 401; McKeown v Argetsinger, 202 M 595, 279 NW 402; Peterson v Minneapolis Street Ry. 202 M 630, 279 NW 588; Hennek v Lundh, 203 M 154, 280 NW 180; Hallen v Montgomery Ward, 203 M 349, 281 NW 291; Schorr v Minnesota Utilities Co. 203 M 384, 281 NW 523; Eystad v Stambaugh, 203 M 392, 281 NW 526; Hughes v City of Duluth, 204 M 1, 281 NW 871; Anderson v Standard Oil, 204 M 337, 283 NW 571; Daley v Nilson, 204 M 488, 283 NW 757; Johnson v Kutches, 205 M 383, 285 NW 881.

New trial granted unless the prevailing party consents to a reduction. Arrell v Davies, 171 M 472, 214 NW 287; Setosky v Duluth, South Shore, 173 M 7, 216 NW 245; Pearson v Zacher, 173 M 365, 217 NW 369; Gau v Borgerding & Co. 175 M 150, 220 NW 412; Knopp v McDonald, 176 M 83, 222 NW 580; McDermott v Minneapolis, St. Paul, 176 M 203, 223 NW 94; Garedpy v Chicago, Milwaukee, 176 M 331, 223 NW 605; Cox v Chicago, Great Western, 176 M 437, 223 NW 675; Krienke v Citizens Bank, 182 M 549, 235 NW 24; Martin v Tracy, 187 M 529, 246 NW 6; Bolster v Cooper, 188 M 364, 247 NW 250; Farrell v Kruger, 189 M 165, 248 NW 720; Fox v Minneapolis Street Railway, 190 M 343; 251 NW 916; Luck v Minneapolis Street Ry. 191 M 503, 254 NW 609; Knudsen v Weiber, 192 M 30, 255 NW 246; Peterson v Fulton, 192 M 360, 256 NW 901; Brossard v Koop, 200 M 410, 274 NW 241; Tunnmire v Jefferson, 202 M 307, 278 NW 159; Santee v Haggart Construction, 202 M 361, 278 NW 520; Ekdahl v Minnesota Utilities, 203 M 374, 281 NW 517; Schorr v Minnesota Utilities, 203 M 384, 281 NW 523; Jennings v Chicago, R. I. & P. Ry. 43 F(2d) 397; Ross v Duluth, Missabe, 207 M 157, 290 NW 566.

Cases where verdicts have been held excessive. Soper v Erickson, 172 M 377, 215 NW 865; Cox v Chicago, Great Western, 173 M 239, 217 NW 128; Nahan v Stevenson, 182 M 269, 234 NW 297; Howard v Village of Chisholm, 191 M 245, 253 NW 766; Prescott v Swanson, 197 M 325, 267 NW 251; Kemerer v Mock, 198 M 316, 269 NW 832.

Claim of error in the amount of the judgment must first be submitted to the trial court. Farmer's Bank v Mellum, 173 M 325, 217 NW 381.

Damages are recoverable for the flooding of land causing damage to land and crops. Lynch v Minnesota Power, 174 M 443, 219 NW 459.

In a tort action where the amount of the damages is not based on the estimate of experts or the calculation of other witnesses, the defendant, who desires to move for a new trial because the verdict is excessive, should base his motion on clause 5 of section 447.01. Boyle v Boileau, 174 M 545, 219 NW 866.

Damages for breach of contract of employment are actual and in no way speculative or conjectural. Olson v Naymark, 177 M 383, 225 NW 275.

Failure to award nominal damages is not ground for a new trial. Dreelan v Karon, 191 M 330, 254 NW 433.

Inadequacy of damages awarded by the jury is not an error at law, and where the only ground assigned for an order granting a new trial is inadequacy of damages, the order is not appealable. Under the statute relating to new trials, "errors occurring at the trial" do not include a mistake of the jury in disposing of the facts. Roelofs v Baber, 194 M 166, 259 NW 808.

The following precedents in the fixing of the amount of damages held may be taken as to changes in economic conditions and the difference in the purchasing power of money. Turnmire v Jefferson Transportation, 202 M 307, 278 NW 159.

If personal injury verdict exceeds what can be said to be sustained by substantial evidence viewed most favorably to plaintiff it is attributable to passion, prejudice, or sympathy. Jennings v Chicago, Rock Island, 43 F(2d) 397.

In assessing damages instant cost of living and general financial conditions may be taken into consideration. Kerzie v Rodine, 216 M 44, 11 NW(2d) 771.

Absent an assessment of actual damages the issue as to treble damages was immaterial. Meixner v Buecksler, 216 M 586, 13 NW(2d) 754.

Damages not excessive. Bimberg v Northern Pacific, 217 M 187, 14 NW(2d) 410.

Verdict of $14,000 for permanent back injuries to switchman 54 years of age with annual earnings of more than $2,000, whose actual loss of wages to time of trial ($3,300) was not excessive. James v C. St. P. M. & O. Ry. 218 M 333, 16 NW(2d) 188.

Injuries consisting of concussion of the brain, cut on forehead leaving scar, bruised nose, fractured rib, and punctured lung, warranted a compensation in the amount of $2,450. Christenson v Village of Hibbing, 219 M 141, 16 NW(2d) 881.

Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced rests in the sound discretion of the trial court, and upon review the appellate court will be guided by the general rule applicable to other discretionary orders. Maas v Laursen, 219 M 461, 18 NW(2d) 233.

2. General principles

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; Slette v Great Northern, 53 M 346, 55 NW 137; Blume v Scheer, 83 M 409, 86 NW 446; Jenkins v Minneapolis & St. Louis, 124 M 369, 145 NW 40.

To warrant a trial court to set aside a verdict for excessive damages, the damages must be not merely more than the court would have awarded, had it tried the case, but they must so greatly and grossly exceed what would be adequate in the judgment of the court, that they cannot reasonably be accounted for, except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion or of prejudice. Pratt v Pioneer Press, 32 M 217, 18 NW 836; Woodward v Glidden, 33 M 108, 22 NW 127; Olson v St. Paul & Duluth, 45 M 536, 48 NW 445; Hall v Chicago & Burlington, 46 M 439, 49 NW 239; Slette v Great Northern, 53 M 341, 55 NW 137; Peterson v Western Union, 65 M 18, 55 NW 137; Mohr v Williams, 95 M 261, 104 NW 12; Ott v Tristate, 127 M 373, 149 NW 544.

That disfigurement will ordinarily be concealed by clothing goes to the amount of damage, rather than the right to recover. Carlson v Naddy, 181 M 180, 232 NW 3.

3. Necessity of passion or prejudice

When the motion is made under clause 5, the trial court is not authorized to grant a new trial unless it is manifest that the damages were given under the influence of passion or prejudice. Pratt v Pioneer Press, 32 M 217, 18 NW 836, 20 NW 87; Nelson v Village, 55 M 497, 57 NW 149; Peterson v Western Union, 65 M 18, 55 NW 137; Blume v Scheer, 83 M 409, 86 NW 446; Mohr v Williams, 95 M 261, 104 NW 12.

It is not enough that the court would have assessed them differently. Pratt v Pioneer Press, 32 M 217, 18 NW 836, 20 NW 87.

Affidavits are inadmissible to prove the existence of passion and prejudice. The court must base its decision solely on the evidence submitted on the trial. Moran v Mackey, 32 M 266, 20 NW 159; Blume v Scheer, 83 M 409, 86 NW 446.

Ordinarily the fact of passion or prejudice appears from the verdict being so large or small, when compared with what the evidence indicates it ought to be, that the court must conclude that the jury did not arrive at the amount upon a fair and impartial consideration of the evidence. Dennis v Johnson, 42 M 301, 44 NW 68; Nelson v Village, 55 M 497, 57 NW 149; Goss v Goss, 102 M 346, 113 NW 690.

It is not enough that the court believes them unreasonably large. Nelson v Village, 55 M 497, 57 NW 149.

Decisions relating to the existence or absence of passion or prejudice based upon a judicial examination of the evidence. Faunce v Searles, 122 M 343, 142 NW 816; State v Brooks, 122 M 400, 142 NW 717; Virtue v Creamery Package,

123 M 17, 142 NW 930; Heath v Minneapolis & St. Paul, 126 M 470, 148 NW 311; Ott v Tri-State, 127 M 373, 149 NW 544; Ottertail v Brostad, 128 M 415, 151 NW 198; Strite v Lyons, 129 M 372, 152 NW 765; Burke v Chicago, Northwestern, 131 M 209, 154 NW 960; Whitney v Kaliske, 131 M 261, 154 NW 1100; Petruschke v Kamerer, 131 M 320, 155 NW 205; Froslee v Lund's Bank, 131 M 435, 155 NW 619; Morrow v Tourtellotte, 135 M 248, 160 NW 665; Moehlenbrock v Parke, Davis, 141 M 156, 169 NW 541.

A claim that a jury's verdict was given under passion and prejudice is not available when not presented to the lower court in the first instance. Beehler v Fawcett, 179 M 297, 229 NW 87.

Where under the workmen's compensation law an insurance company paid certain medical and hospital expense, no prejudice resulted from that information reaching the jury. Arvidson v Slater, 183 M 446, 237 NW 12.

Excessive damages may be reduced for reasons other than passion or prejudice. Cavallero v Travelers, 197 M 417, 267 NW 370.

Dentist evicted from his office, recovered $300.00 actual, and $600.00 exemptory damages. There is nothing to indicate prejudice. Sweeney v Meyers, 199 M 21, 270 NW 906.

Smallness of verdict indicates no prejudice from counsel's remarks. Elkins v Minneapolis Street Ry. 199 M 63, 270 NW 914.

Record discloses no evidence of passion or prejudice. Pearson v Novell, 200 M 58, 273 NW 359.

Indication of passion or prejudice not sufficient to warrant a new trial. Noetzelman v Webb, 204 M 26, 283 NW 481; Ness v Fischer, 207 M 561, 292 NW 196.

The damages awarded being less than actual damages, clearly no passion or prejudice. Underwood v Town of Empire, 217 M 385, 14 NW(2d) 459.

4. Remitting excess

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; Pratt v Pioneer Press, 35 M 251, 28 NW 708; Blume v Scheer, 83 M 409, 86 NW 446; Plant v Railway Transfer, 90 M 499, 97 NW 433; McKnight v Minneapolis, St. Paul, 96 M 480, 105 NW 673; Goss v Goss, 102 M 346, 113 NW 690; Pulaski v American Surety, 123 M 222, 143 NW 715; Stevens v Wisconsin Farm Land, 124 M 421, 145 NW 173; Erickson v Montgomery, 171 M 518, 213 NW 919.

Where liability has been admitted in a personal injury suit and the verdict as reduced by the trial judge on motion for a new trial, is plainly not excessive, the supreme court will not consider assignments of error directed to rulings on evidence and the amount of recovery. Pearson v Zacher, 173 M 365, 217 NW 369; Kemerer v Mock, 198 M 320, 269 NW 832.

Where verdict is excessive, it may be cured by remission, a new trial being ordered unless remittitur is filed. Klaman v Hitchcock, 181 M 109, 231 NW 716; Ebacher v First Bank, 188 M 268, 246 NW 903; Hackenjos v Kemper, 193 M 37, 257 NW 518, 258 NW 433; Birdsall v Duluth Superior, 197 M 411, 267 NW 363; Useman v Minneapolis Street Ry. 198 M 79, 268 NW 806; Glubka v Teegarden, 202 M 594, 279 NW 567.

Where a verdict is not only grossly excessive but against the great weight of evidence, there should be a new trial rather than an attempt to reduce the wrong of the jury by cutting the verdict in two. Hallen v Montgomery, 203 M 349, 281 NW 291.

Denial of new trial on plaintiff's consent to remittitur, 16 MLR 185.

5. Successive verdicts

The trial court seems to have regarded the damages as excessive, but did not set it aside because this is a second verdict in the case, the former verdict being set aside as excessive. In the instant case, the verdict is supported by no

justice and should be set aside, no matter how many similar verdicts have been previously returned. Peterson v Western Union, 65 M 18, 67 NW 646.

As a rule, the court will not set aside a second verdict on account of excessive damages, but in the instant case, passion and prejudice are so clearly indicated that a new trial must again be granted. Bathke v Krassin, 78 M 272, 80 NW 950.

Three verdicts, increasing each time; last verdict reduced. The appellate court is not justified in further reducing the verdict or granting a new trial. Cherpeski v Great Northern, 131 M 493, 154 NW 943.

The award to owner was $1,775 and the petitioner appealed. In the first trial the jury awarded $3,500 which the court set aside as excessive. On the second trial the court properly refused to grant a new trial after an award of $3,200. Northern States v Barnard, 187 M 355, 245 NW 609.

Appealability of second order. 16 MLR 117.

6. When granted as of course

A new trial should be granted as a matter of course:

Where improper items of damage ar included in the verdict. Grant v Wolf, 34 M 32, 24 NW 289;

Where the jury clearly made a miscalculation. Wyman v Erickson, 35 M 202, 28 NW 240;

Or where it is clear that the jury assessed the damages in accordance with an erroneous instruction. Ward v Anderberg, 36 M 300, 30 NW 890.

A new trial is ordinarily granted as a matter of course, unless the error can be corrected by a remittitur. Reif v G. N. 126 M 430, 148 NW 309.

7. For inadequate damages

The amount of damages is for the jury, and in the instant case while the amount is small, the verdict is not perverse, and the court will not disturb the estimate of the jury. Peck v Small, 35 M 465, 29 NW 69; Young v G. N. 80 M 123, 83 NW 32.

The amount allowed is inadequate and disproportionate to the nature of the damage, and the verdict ought not to stand, and the case should be submitted to another jury. Henderson v St. Paul & Duluth, 52 M 479, 55 NW 53; Conrad v Dobmeier, 57 M 147, 58 NW 870; Marsh v Minneapolis Brewing, 92 M 182, 99 NW 630; Rowitzer v St. Paul City Railway, 94 M 494, 103 NW 499; Ford v Minneapolis Street Ry. 98 M 96, 107 NW 817; Alton v Chicago, Milwaukee, 107 M 457, 120 NW 749; Leonard v Rosendahl, 133 M 320, 158 NW 419.

In an action against purchasers for conversion of property, a verdict for less than amount due on conditional contract of sale is not necessarily perverse. Pennig v Schmitz, 189 M 262, 249 NW 39.

The verdict is small but does not compel the conclusion that it is inadequate or that prejudice influenced the jury. Stone v Kahler, 190 M 368, 251 NW 665; King v Minneapolis Street Ry. 192 M 163, 255 NW 626; Litman v Walso, 211 M 402, 1 NW(2d) 391.

The appellate court will not in the instant case reverse an order denying a new trial because nominal damages should have been allowed. Hoppman v Persha, 190 M 480, 252 NW 229.

The granting or refusal of a new trial upon the ground of inadequate damages appearing to have been given under the influence of passion or prejudice rests in the discretion of the trial court. Wright v Engelbert, 193 M 509, 259 NW 75; Pye v Diebold, 204 M 319, 283 NW 487.

Verdict so inadequate as to indicate prejudice on the part of the jury. Hill v Ross, 198 M 199, 269 NW 396; Flaugh v Egan, 202 M 615, 279 NW 582; Ulrich v Kessler, 204 M 74, 282 NW 801.

The verdict for plaintiff was in the sum of $1,800 against one defendant. From the evidence it might have been $2,150. It might have been against all three defendants. There was, however, evidence on which the jury could have rejected

some of the items of plaintiff's claim. The verdict may stand. Hamilton v Thurber, 56 F(2d) 827.

Inadequate verdict; denial of new trial on defendant's consent to additur. 19 MLR 661.

VIII FOR ERRORS OF LAW ON THE TRIAL

1. What are errors on the trial

It is only error of law occurring at the trial that may be made the basis of a motion for a new trial under clause 6 of section 547.01. In case of errors of law occurring before or after trial, the remedy is either an appeal from the judgment. City of Winona v Minnesota Ry. 27 M 415, 6 NW 795, 8 NW 148; 28 M 68, 11 NW 228; Schumann v Mark, 35 M 379, 28 NW 927; Minneapolis, St. Paul v Home Insurance, 64 M 61, 66 NW 132;

Or a motion for a new trial under clause 1 of section 547.01. St. Paul & Sioux City v Gardner, 19 M 132 (99); Mead v Billings, 43 M 239, 45 NW 228.

The phrase "at the trial" means during the course of the trial. When a cause is called for the trial of issues of fact, any erroneous and prejudicial order or overruling thereafter made is ground for a new trial. Thompson v Pioneer Press, 37 M 285, 33 NW 856; McAllister v Welker, 39 M 535, 41 NW 107; Lueck v St. Paul & Duluth, 57 M 30, 58 NW 821; Hine v Myrick, 60 M 518; 62 NW 1125.

When the trial is by jury, the trial continues until the jury is discharged. Tarbox v Gotzian, 20 M 139 (122); Manny v Griswold, 21 M 506; Varco v Chicago, Milwaukee, 30 M 18, 13 NW 921; Nichols v Wadsworth, 40 M 547, 42 NW 541; Hudson v Minneapolis, Lyndale, 44 M 52, 46 NW 314; Reilly v Bader, 46 M 212, 48 NW 909.

When the trial is by court or referee, the trial terminates with the final decision of the case. Volmer v Stagerman, 25 M 234.

Orders or overrulings of the trial court considered on appeal. McGrath v N. P. 121 M 258, 141 NW 164; Larson v Anderson, 122 M 39, 141 NW 847; Virtue v Creamery Package, 123 M 17, 142 NW 930; Coppoletti v Citizens Insurance, 123 M 325, 143 NW 787; Carel v Haedecke, 123 M 435, 143 NW 1124; Hiveley v Golnick, 123 M 498, 144 NW 213; Johnson v Wild Rice, 123 M 523, 143 NW 111; Gillespie v G. N. 124 M 2, 144 NW 466; Bolstad v Armour, 124 M 155, 144 NW 462; Harris v G. N. 124 M 359, 145 NW 115; Magnuson v Burgess, 124 M 374, 145 NW 32; Nichols v Atwood, 127 M 425, 149 NW 672; Johnson v Wild Rice Boom, 127 M 490, 150 NW 218; Schaar v Conforth, 128 M 460, 151 NW 275; Heide v Lyons, 128 M 488, 151 NW 139; Anderson v Wormser, 129 M 8, 151 NW 423; Skow v Dahl, 129 M 324, 152 NW 755; Gran v Gran, 129 M 531, 152 NW 269; Grimes v Minneapolis, St. Paul, 130 M 285, 153 NW 596.

The admissions and overrulings of the court on the admission of evidence are sustained. Bazille v American Eagle, 155 M 475, 194 NW 14.

The admission over objection, of an answer relating to an irrelevant matter having no bearing upon the issues tried, does not justify the granting of a new trial. State v School, 156 M 424, 195 NW 141.

Where the defense to a suit on a contract is based upon fraud, and a rescission because of such fraud, it is error not to instruct the jury that the rescission claimed is an essential element of the defense. Such error, being with respect to a principle controlling the case, can be taken advantage of on motion for a new trial, even though there was no exception to the charge, and it was not otherwise called to the attention of the trial judge. Wilcox v Rosenberger, 156 M 487, 195 NW 489.

It was error to deny defendant's motion to take from the jury all matters of epilepsy or insanity, there being no evidence to support it. Hanson v Minneapolis Street Ry. 157 M 133, 195 NW 777.

The charge relating to contributory negligence and assumption of risk as applied to interstate commerce was confusing, but was correctly stated later in the charge, and there was no reversible error. Fries v Chicago, Rock Island, 159 M 328, 198 NW 998.

The admission of evidence, which should have been rejected, must have actually prejudiced the excepting and defeated party to give him a right to a new trial. Gibbon v Herschmann, 160 M 326, 200 NW 293.

The errors assigned upon rulings at the trial do not warrant granting a new trial. Finlayson v Northfield, 161 M 166, 200 NW 938; Farmers Bank v National Surety, 163 M 257, 203 NW 969; Lundman v U. S. F. & G. Co. 163 M 303, 204 NW 159; Erickson v Macomber, 163 M 514, 204 NW 313; Caldwell v First National, 164 M 401, 205 NW 282; Farm Mortgage v Pederson, 164 M 425, 205 NW 286; Kronberg v Bondhus, 164 M 446, 205 NW 371; Northern Oil v Birkeland, 164 M 466, 206 NW 380; Zuercher v Woodward, 165 M 262, 206 NW 168; Whitcomb v Automobile Ins. 167 M 362, 209 NW 27; Getz v Standard Oil, 168 M 347, 210 NW 78; Speiss' Estate, 170 M 221, 212 NW 167.

No reversible error in the charge of the court to the jury. Black v Central Association, 162 M 265, 202 NW 823; Olson v Nannestad, 162 M 412, 203 NW 59; Monn v Weivoda, 163 M 473, 204 NW 466; La Jambe v Chicago Box, 165 M 65, 205 NW 701; Johnson's Estate, 170 M 451, 212 NW 815; Merrill v St. Paul City Ry. 170 M 332, 212 NW 533; Firth v Briarton, 170 M 472, 212 NW 805.

A formal offer of proof is not necessary when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. Linderoth v Kieffer, 162 M 440, 203 NW 415.

Failure to take an exception to the judge's charge, or move for a new trial is fatal to right of review. Peterson v Township, 162 M 486, 203 NW 432.

A failure to produce or the suppression of evidence within the control of a party may justify an inference of fact unfavorable to him, but whether it should be drawn is a question for the jury. A failure of the trial court to so inform the jury is not reversible error. Knott v Hawley, 163 M 239, 203 NW 785.

The trial court was justified in granting a new trial on account of seemingly contradictory statements and errors in the charge. McGovern v Snyder, 165 M 208, 206 NW 379.

The failure of the court to charge the jury on a particular point is not ground for a new trial in the absence of a request for an instruction covering it; nor has the court authority on its own motion to grant a new trial. Parker v Fryberger, 165 M 374, 206 NW 716.

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.

Where the trial court grants a new trial solely upon an alleged error in the charge, and the charge given was proper, the order granting a new trial is reversed. Herberg v Feldman, 168 M 218, 210 NW 44.

Where the court in excluding an exhibit intimates that it might later be offered and no subsequent offer is made, there is no reversible error. Piscor v Hibbing, 169 M 478, 211 NW 952.

In an action for alienation of the affections of plaintiff's wife where the charge to the jury was prejudicial to defendant because argumentative, the verdict was set aside and a new trial granted. Doucette v Gagnon, 171 M 516, 213 NW 537.

In a statutory arbitration, the award may be reviewed if it is "contrary to law and evidence." This permits the district court to vacate an award if there is no evidence to sustain it. Borum v Minneapolis, St. Paul, 184 M 137, 238 NW 4.

Where testimony tending to incite prejudice was erroneously admitted, and the verdict is excessive and indicates prejudice, a new trial may be granted. Morner v Kohen, 172 M 543, 216 NW 233.

New trial granted because of remarks of the court and admission of prejudicial evidence. State v Hansen, 173 M 158, 217 NW 146.

New trial properly granted for errors in the admission of evidence and in cross-examination. Wright v Avenson, 174 M 97, 218 NW 453.

Evidence tending to prove that the tax expert had never been employed and that no reduction had been effected was erroneously excluded. Love v National Credit, 174 M 573, 219 NW 913.

The trial court, subject to abuse of privilege, has complete control of allowance of leading questions. Usher v Eckhardt, 176 M 210, 222 NW 924.

Direction of verdict, if erroneous, is an error of law occurring at the trial. Gale v Pearce, 176 M 631, 220 NW 156.

Where it was admitted that the defendant was insured, the questions relating to insurance were not prejudicial. Scholte v Brabec, 177 M 13, 224 NW 259.

In view of the divergence between the complaint and the proof, the submission of the case was so confusing as to warrant a new trial. Moll v Bester, 177 M 420, 225 NW 393.

Where the findings of the trial court are decisive of all issues presented, a new trial will not be granted on the ground that more specific findings covering particular items and claims could properly have been made. Gerlich v Thompson, 177 M 425, 225 NW 273.

Trial court's rulings regarding privilege of liens not grounds for new trial. Schnirring v Stubbe, 177 M 441, 225 NW 389.

The trial court exercises judicial discretion as to what foundation must be laid for the introduction of documentary evidence or memoranda. Garbisch v American Railways, 177 M 494, 225 NW 432.

The extrinsic evidence admitted was surplusage as the question to which it applied could have been construed in no other way. Martin v Fee, 177 M 592, 226 NW 203.

Trial court's talk in open court to a jury seeking further instructions may be reviewed as an "error of law occurring at the trial." Begley's Estate, 178 M 141, 226 NW 404.

In the reception of evidence, the error, if any, was harmless. Holt v Rural Weekly, 178 M 471, 227 NW 491.

Testimony erroneously received through mistake or inadvertence, but promptly stricken when the court's attention was directed thereto, does not require a new trial, no prejudice resulting. Drabek v Wedrickas, 182 M 217, 234 NW 6.

The trial court properly granted a new trial because of erroneous instructions relating to the rights and duties of a host or driver of a car. Kossmir v Oreckovsky, 182 M 324, 234 NW 473.

Upon the verdict rendered, plaintiffs were entitled to judgment, and the findings, being consistent with the verdict, may be regarded as surplusage. Commercial Union v Connolly, 183 M 8, 235 NW 634.

Where a verdict may have been based upon an erroneous instruction, there must be a new trial, unless it conclusively appears the verdict is sustained upon other grounds. General Electric v Florida, 183 M 178, 235 NW 876.

Reception of hearsay evidence ground for a new trial. Edie v School District, 183 M 522, 237 NW 177.

A new trial is granted because the charge may have been confusing, and it did not state the law applicable to the case. LeTourneau v Johnson, 185 M 46, 239 NW 768.

The charge to the jury fully and fairly submitted all issues involved. The criticism of a single statement will not warrant a new trial. Milliren v Federal Life, 186 M 115, 242 NW 546.

Erroneous reception in evidence of a memorandum is ground for a new trial. Ylijarvi's Estate, 186 M 288, 243 NW 103.

Error in excluding evidence is ground for new trial. Newton v Minneapolis Street Ry. 186 M 439, 243 NW 684.

Refusal to admit evidence of the result of explorations up to the time of trial was not of sufficient importance to warrant a new trial. Patterson v Shattuck, 186 M 611, 244 NW 281.

Instruction to the jury relating to the liability of the lessor for the acts of the sheriff, was erroneous and grounds for a new trial. Donaldson v Mona Motor, 190 M 231, 251 NW 272.

A party may not try his case on one theory only, and upon motion for a new trial or on appeal, shift to another theory. Peoples Bank v Dickie, 191 M 558, 254 NW 782.

"Errors occurring at the trial" do not include a mistake of the jury in disposing of facts. Roelofs v Baber, 194 M 166, 259 NW 808.

Where objectionable evidence is received, but before submission, the court instructs the jury to disregard it, the presumption is that no prejudice resulted. Lorberbaum v Christopher, 198 M 289, 269 NW 646.

Considering the charge as a whole, a statement by the court to the jury that a passenger was "presumably negligent" in boarding a trolley car when in motion was without prejudice. Ensor v Duluth-Superior, 201 M 152, 275 NW 618.

Submission to a jury of evidence of injuries shown to have resulted from accident, together with evidence of injuries not shown to have resulted from accident, is error requiring a new trial on issue of damages. Doll v Scandrett, 201 M 316, 276 NW 281.

A new trial must be allowed because in trial of a civil action for damages evidence of defendant having pleaded guilty before a justice of the peace was wrongfully admitted. Warren v Marsh, 215 M 615, 11 NW(2d) 528.

Plaintiff is not entitled to a new trial when at the trial counsel formally acquiesced in the ruling of the court as to admission of evidence. Krahmer v Koch, 216 M 421, 13 NW(2d) 370.

The court properly granted a new trial because of failure to instruct that violation of a statute was prima facie evidence of negligence. Flitton v Dalekl, 216 M 549, 13 NW(2d) 477.

Although error to admit the evidence a new trial will not be granted as the evidence could not have affected the result. Martin v Tucker, 217 M 104, 14 NW(2d) 105.

Errors of law occurring at trial. 5 MLR 153.

2. How far discretionary

A motion for a new trial based upon alleged errors in law occurring at the trial presents purely legal questions in the determination of which the trial court exercises no discretion. Fitger v Guthrie, 89 M 330, 94 NW 888; Faribault v Storlie, 143 M 487, 173 NW 400.

The trial court at the close of plaintiff's case dismissed the action; and later granted a new trial. No ground was stated in the order. The order is not appealable. Karnofsky v Wells-Dickey, 183 M 566, 237 NW 425.

Where there are errors in the charge and the trial court grants a new trial on the ground the errors were prejudicial, its decision is a matter of discretion. Naylor v McDonald, 185 M 518, 241 NW 674.

It was fully within the court's discretionary power to grant a new trial because of his error in his charge to the jury. Hanse v St. Paul City Railway, 217 M 432, 14 NW(2d) 473.

3. Necessity of exceptions; notice of trial

A party cannot take advantage of any errors occurring at the trial and not excepted to, unless he specifies them in his notice of motion availing himself of the benefit of Laws 1901, Chapter 113. Cappis v Wiedemann, 86 M 156, 90 NW 368; Olson v Berg, 87 M 277, 91 NW 1103; Rice v Madelia, 87 M 398, 92 NW 225; Parker v Pine Tree Lumber, 89 M 500, 95 NW 323; Conan v City of Ely, 91 M 127, 97 NW 737; Cady v Cady, 91 M 137, 97 NW 580.

Notices held sufficiently specific. King v Burnham, 93 M 288, 101 NW 302; McGray v Cobb, 130 M 434, 152 NW 262, 153 NW 736.

The use of the word "inevitable" in the sense of "likely" was error, but could not in view of facts disclosed be prejudicial. Davis v Minneapolis Street Railway, 173 M 186, 217 NW 99.

Plaintiff objected to the admission of certain evidence and there was an adverse ruling. As no exceptions were taken at the time nor in a motion for a new trial, such rulings are not for review on appeal. Gilmore v Douglas County, 187 M 132, 244 NW 557.

Action under the subrogation clause of the workmens compensation act by employer against an employee growing out of death of fellow employee. As

errors in the instruction were not raised in the motion for a new trial, the only question in the instant case is that of contributory negligence of the plaintiff. Thornton v Reese, 188 M 5, 246 NW 527.

IX FOR INSUFFICIENCY OF EVIDENCE

1. General rules

A new trial should be granted only in cases of manifold injustice. State v Miller, 10 M 313 (246); Johnson v Winona & St. Peter, 11 M 296 (204).

If different persons might reasonably draw different conclusions from the evidence, the verdict should not be disturbed. Johnson v Winona & St. Peter, 11 M 296 (204); Eich v Taylor, 17 M 172 (145); Hinkle v Lake Superior, 18 M 297 (270); Linn v Rugg, 19 M 181 (145); Ohlson v Manderfeld, 28 M 390, 10 NW 418.

A new trial should not be granted on conflicting evidence, unless the verdict is so manifestly contrary to the preponderance of the evidence as to warrant the inference that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling, or caprice, instead of dispassionately and honestly exercising their judgment on all the evidence. Johnson v Winona & St. Peter, 11 M 296 (204); Schmeltzer v St. Paul City Ry. 80 M 50, 82 NW 1092.

If there is not manifest and palpable preponderance of evidence in favor of verdict, order granting a new trial for insufficiency of evidence will not be reversed. Hicks v Stone, 13 M 434 (398).

An order granting a new trial will not be sustained, as one having been based upon the ground that the verdict or findings were not sustained by the evidence, and therefore a discretionary order, within the rule of Hicks v Stone, 13 M 434 (398), unless it affirmatively appears from the record to have been so granted, following Fitger v Guthrie, 89 M 330, 94 NW 888. Bradley v Bradley, 97 M 130, 106 NW 338.

It is the duty of the court to consider the credibility of the witnesses, and to weigh the evidence, and the court must not adopt inconsiderately the opinion of the jury. Johnson v Howard, 25 M 558; McCord v Knowlton, 76 M 391, 79 NW 397.

A court ought to exercise not merely a cautious, but a strict and sure judgment before setting aside a verdict as not justified by the evidence. A verdict should not be set aside unless palpably against the evidence. Rheiner v Stillwater Street Ry. 29 M 147, 12 NW 449.

Although there may be some evidence reasonably tending to support the verdict, it should be set aside if manifestly unreasonable in view of all the evidence. Rheiner v Stillwater Street Ry. 29 M 147, 12 NW 449; Buenemann v St. Paul, Minneapolis, 32 M 390, 20 NW 379; Voge v Penney, 74 M 525, 77 NW 422.

The court may properly take into consideration that on another trial, stronger evidence might be adduced. Emerson v Hennessy, 47 M 461, 50 NW 603.

A verdict which obviously rests on mere possibility, speculation, or conjecture, should be set aside. Ellison v Truesdale, 49 M 240, 51 NW 918; Minneapolis Sash Door v G. N. 83 M 370, 86 NW 451; Swenson v Erlandson, 86 M 263, 90 NW 534; Martin v Courtney, 87 M 197, 91 NW 487; Truax v Minneapolis, St. Paul, 89 M 143, 94 NW 440.

Where the evidence wholly fails to establish a material issue under the pleadings, the motion is not addressed to the discretion of the court and is to be determined by the application of legal principles. Gustafson v Gustafson, 92 M 139, 99 NW 631.

Cases following or related to the doctrine laid down in the case of Hicks v Stone, 13 M 434 (398), holding that if there is not manifest and palpable preponderance of evidence in the verdict, order granting a new trial for insufficiency of evidence will not be reversed. Farmer v Stillwater Water Co. 99 M 119, 108 NW 824; Nelson v Mississippi & Rum River, 99 M 484, 109 NW 1118; Kramer v Perkins, 102 M 455, 113 NW 1062; Bengraf v Byrnes, 102 M 511, 113 NW 1133; Skajewski v Zantarski, 103 M 27, 114 NW 247; Avery v Halliston, 104 M 178, 116 NW 354; Hansen v Lee, 104 M 232, 116 NW 482; Flakne v Minnesota Farmers, 105 M 479, 117 NW 785.

Cases relating to the sufficiency or insufficiency of evidence in applications for new trial and following or modifying the doctrine laid down in Hicks v Stone, 13 M 434 (398), and Rheiner v Stillwater Street Railway Co. 29 M 147, 12 NW 449. Poplar v Minneapolis & St. Paul, 121 M 413, 141 NW 798; Sembum v Duluth & Iron Range, 121 M 439, 141 NW 523; Dobrowoloske v Parpala, 121 M 455, 141 NW 803; Natl. Bank v Jessup, 121 M 458, 141 NW 525; Narbonne v Storer, 121 M 505, 141 NW 835; Green & DeLaittre v Fasbender & Son, 122 M 17, 141 NW 789; Summer v Chicago & Northwestern, 122 M 44, 141 NW 854; Bruner v Jacobson, 122 M 66, 141 NW 1097; Campbell v N. P. 122 M 102, 141 NW 855; Hanowitz v G. N. 122 M 241, 142 NW 196; Pennington v Roberge, 122 M 295, 142 NW 710; Murphy v Twin City Taxicab Co. 122 M 363, 142 NW 716; State v Brooks-Scanlon, 122 M 400, 142 NW 717; Hanson v Red Wing Sewer Pipe, 122 M 415, 142 NW 804; Prosser v Manley, 122 M 448, 142 NW 876; Sandstone Spring Water v Kettle River Co. 122 M 510, 142 NW 885; Murphy v Kuntze, 122 M 530, 142 NW 1134; Backus v City of Virginia, 123 M 48, 142 NW 1042; Hitchcock v Consolidated School District, 123 M 119, 143 NW 120; Fullerton v Thompson, 123 M 136, 143 NW 260; Beaton v Great Northern, 123 M 178, 143 NW 324; Bank v Stevens Land Co. 123 M 218, 143 NW 355; Peery v Illinois Central, 123 M 264, 143 NW 724; Peterson v Phelps, 123 M 319, 143 NW 793; Loche v Hayter, 123 M 367, 143 NW 917; Maroney v Minneapolis & St. Louis, 123 M 480, 144 NW 149; Nelson v Saari, 123 M 492, 144 NW 137; Robinson v G. N. 123 M 495, 144 NW 220; Petterson v Butler Brothers, 123 M 516, 144 NW 407; Bank v Haubris, 123 M 530, 145 NW 1123; Weiss v Peterson, 124 M 84, 144 NW 450; Brasch v Reeves, 124 M 114, 144 NW 744; State v Weingarth, 124 M 124, 144 NW 745; Shevlin-Carpenter v Taylor, 124 M 132, 144 NW 472; Kennison v Hau, 124 M 140, 144 NW 452; Novak v G. N. 124 M 141, 144 NW 751; Ploetz v Holt, 124 M 169, 144 NW 745; Roy v Dannehr, 124 M 233, 144 NW 758; Evertson v McKay, 124 M 260, 144 NW 950; Jones v Burgess, 124 M 265, 144 NW 954; Stevens v Minneapolis Fire Dept. Relief Assn. 124 M 381, 145 NW 35; Greenberg v Van Duzee, 124 M 411, 145 NW 124; Marfia v G. N. 124 M 466, 145 NW 385; Zeitler v Natl. Casualty Co. 124 M 478, 145 NW 395; Lewis v Chicago Great Western, 124 M 487, 145 NW 393; Owens v Neils Lumber Co. 125 M 15, 145 NW 402; Mitchell v Green, 125 M 24, 145 NW 404; Miller v Miller, 125 M 49, 145 NW 615; Smith v Armstrong, 125 M 59, 145 NW 617; Koury v Chicago Great Western, 125 M 78, 145 NW 786; Bouck v Shere, 125 M 122, 145 NW 808; Goldish v Schoch Grocery, 125 M 134, 145 NW 803; Pierson v Modern Woodmen, 125 M 150, 145 NW 806; Helback v N. P. 125 M 155, 145 NW 799; Leonard v Schall, 125 M 291, 146 NW 1104; Bartroot v St. Paul City Ry. 125 M 308, 146 NW 1107; Gunn v McAlpine, 125 M 343, 147 NW 111; Nadeau v Johnson, 125 M 365, 147 NW 241; Eisenmenger v St. Paul City Ry. 125 M 399, 147 NW 430; Fairchild v Fleming, 125 M 431, 147 NW 434; Melberg v Wild Rice Lumber Co. 125 M 469, 147 NW 427; Sinclair v Matter, 125 M 484, 147 NW 655; Anderson v Peterson, 125 M 534, 147 NW 426; Freeburg v Honemann, 126 M 52, 147 NW 827; McColl v Cameron, 126 M 144, 148 NW 108; Wardwell v Cameron, 126 M 149, 148 NW 110; Gunderson v Minneapolis Street Ry. 126 M 168, 148 NW 61; Lund v G. N. 126 M 259, 148 NW 112; Buck v Buck, 126 M 275, 148 NW 117; Alexander v Ward, 126 M 340, 148 NW 123; Cox v Edwards, 126 M 350, 148 NW 500; Volpe v Cederstrand, 126 M 355, 148 NW 119; Hubachek v Estate of Brown, 126 M 359, 148 NW 121; Heiberg v Wild Rice Boom Co. 127 M 8, 148 NW 517; Mastin v May, 127 M 93, 148 NW 983; Murphy v Anderson, 128 M 106, 150 NW 387; Schulz v Duel, 128 M 213, 150 NW 786; Engebretson v Bremer, 128 M 232, 150 NW 897; Wortz v Wortz, 128 M 252, 150 NW 809; Bank of Hastings v Corporation Securities, 128 M 341, 150 NW 1084; Heide v Lyons, 128 M 488, 151 NW 139; Cady v Twin City Taxicab Co. 129 M 70, 151 NW 537; Diebel v Wolpert, Davis & Co. 129 M 77, 151 NW 541; Fitzgerald v Armour & Co. 129 M 81, 151 NW 539; Williams v Pullman Co. 129 M 97, 151 NW 895; Palon v G. N. 129 M 101, 151 NW 894; Gill v Electric Traction Co. 129 M 142, 151 NW 896; Strite Governor v Lyons, 129 M 372, 152 NW 765; Lawler v Minneapolis, St. Paul, 129 M 506, 152 NW 882; Duer v Gagnon, 129 M 517, 152 NW 880; Luche v Gas Traction Co. 129 M 522, 151 NW 273; Chamberlain v Gordon, 129 M 523, 151 NW 529; McCaughey v Wilson, 130 M 196, 153 NW 310; Sullivan v Thorn, 130 M 297, 153 NW 616; Barnett v Minneapolis & St. Louis, 130 M 300, 153 NW 600; Wandersee v Wandersee, 132 M 321, 156 NW 348; Roemer v Schmidt Brewing, 132 M 399, 157 NW 640; Leonard v Rosendahl, 133 M 321, 158 NW 419; Brody v Foster, 134 M 91, 158 NW 824; Holt v Ten Broeck, 134 M 458, 159 NW 1073; Carvell v Southern Colonization, 134 M

467, 158 NW 788; Paine & Nixon v U. S. Fidelity, 135 M 9, 159 NW 1075; International Realty v Miller, 135 M 292, 160 NW 793; Baer v Chowning, 135 M 453, 161 NW 144; La Plant v Loveland, 142 M 89, 170 NW 920; Caldwell v Bank of Lakefield, 164 M 401, 205 NW 282; Chinander v De Laittre, 171 M 11, 213 NW 44.

Facts stated by plaintiff are so improbable, and his testimony was discredited to such an extent that there should be a new trial. Durst v Minneapolis, St. Paul, 171 M 164, 213 NW 738.

In this action for dissolution and accounting which arose on contract and comes under clause 7 of this section, no question arose except as to whether the judgment was excessive, and as no question was raised on the trial, the decision of one trial court is affirmed. Erickson v Montgomery, 171 M 518, 213 NW 919.

Evidence was insufficient to support a finding that the note dated February 18, 1922, was given in payment of one dated August 17, 1921. Thompson v Helmbrecht, 172 M 22, 214 NW 760.

Where a trial court erroneously withdrew from the consideration of the jury, the only evidence upon which a verdict in defendant's favor could be predicated, the verdict so rendered is "not justified by the evidence and contrary to law." Hertogs v Red-E-Oil Co. 172 M 598, 216 NW 333.

New trial granted because of error in the charge of the trial judge, and because the evidence was insufficient to sustain a verdict on the issue of negligence in failing to warn plaintiff. Holz v Chicago, Milwaukee, 176 M 575, 244 NW 241.

It is the right and duty of the trial court to direct a verdict when the state of the evidence is such as not to warrant a verdict for a party, and if a verdict were rendered, the other party would be entitled to a new trial. Manos v St. Paul City Ry. 173 M 402, 217 NW 377.

In a tort action where the amount of the damages is not based upon experts or the calculation of other witnesses, the defendant, who desires to move for a new trial because excessive, must base his motion in clause 5 of this section. Boyle v Boileau, 174 M 545, 219 NW 866.

A verdict for the negative of an issue assailed as not being supported by the evidence must stand (in the absence of error), unless the evidence is such as to compel a finding for the affirmative. Schendel v Chicago, Milwaukee, 181 M 395, 232 NW 629.

When the evidence taken as a whole is manifestly contrary to a finding, it is an abuse of discretion not to grant a new trial, even if there be some evidence tending to sustain the finding. National Pole v Gilkey, 182 M 21, 233 NW 810.

On an appeal from a judgment entered on the verdict of the jury, no motion for a new trial having been made, and the only assignment of error being that the court erred in refusing to direct a verdict and in denying a motion for judgment non obstante, the one question presented for review is whether the evidence reasonably sustains the verdict. Freeman v Morris, 185 M 503, 241 NW 677.

Where the only evidence of negligence to support a verdict against the employer is evidence of the negligence of a codefendant employee, in whose favor the jury finds a verdict, the verdict against the employer is perverse, and a new trial is granted. Ayer v Chicago, Milwaukee, 187 M 169, 244 NW 681.

A verdict and judgment sustained by the great preponderance of the evidence cannot be vacated on the ground that substantial justice has not been done. Ayer v Chicago, Milwaukee, 189 M 359, 249 NW 581.

Order denying a new trial reversed because the evidence is in manifest preponderance against the verdict. Holdys v Swift, 198 M 258, 269 NW 468.

Where verdicts in favor of wife and husband for injuries sustained by the wife are opposed by a clear preponderance of evidence and the verdicts are excessive, the interests of justice require a new trial. Becker v Megan, 204 M 283, 283 NW 401.

In proceedings to establish the parentage of an illegitimate child, and where the prosecutrix was the only witness and her evidence improbable and inconsistent, a new trial was properly granted. State v Dreschner, 219 M 146, 17 NW(2d) 160.

Under the evidence, verdict for plaintiff based on mere possibility, speculation, or conjecture, cannot be upheld. Huntley v Brandt, 219 M 94, 17 NW(2d) 290.

The jury's findings of fact. 14 MLR 240.

2. Memorandum

When motion is on ground that verdict is not supported by the evidence and for errors of law occurring at trial, and the order granting a new trial does not specify on what ground motion is granted, memorandum of trial court may be referred to, to ascertain on what ground order was granted, notwithstanding omission of word "memorandum" in clause 7, section 547.01. Gay v Kelley, 109 M 101, 123 NW 295.

A former order granting new trial which is responsible to the motion cannot be impeached by the court's memorandum. Pinkerton v Wisconsin Steel Co. 109 M 117, 123 NW 60.

Where it does not appear from memorandum on what ground order is based, a new trial cannot be presumed to have been granted on ground that the verdict was not justified by the evidence. Independent Brewing v Burt, 109 M 323, 123 NW 932.

Substantial evidence reasonably sustains the district court's findings. Estate of Lund, 217 M 625, 15 NW(2d) 426.

3. Upon a dismissal

A dismissal on the trial for insufficiency of evidence is a "decision" within the meaning of the statute, and the motion for a new trial may be made on a settled case. Volmer v Stagerman, 25 M 234.

An order at the trial dismissing an action on the ground that the complaint stated no cause of action, is not appealable. Thorp v Lorenz, 34 M 350, 25 NW 712.

A cause having been called for trial, the court dismissed the same upon motion before any evidence had been introduced. The court subsequently, deeming this to have been erroneous, properly granted a new trial. Dunham v Byrnes, 36 M 106, 30 NW 402.

4. After trial by court

Where a cause is tried by the court without a jury, a new trial may be granted on the ground that the findings of fact are not justified by the evidence. Groh v Bassett, 7 M 325 (254); Ashton v Thompson, 28 M 330, 9 NW 876; Knappen v Swensen, 40 M 171, 41 NW 948.

In actions of an equitable nature where the main issues are first tried, leaving ancillary issues for future trial, a new trial of the main issues may be granted before a decision on the ancillary issues. Ashton v Thompson, 28 M 330, 9 NW 876.

Erroneous findings afford no ground for a new trial where it is obvious that if such findings had been different, the result necessarily would have been the same. Scheufler v Grand Lodge, 45 M 256, 47 NW 799; Bank v Shea, 57 M 180, 58 NW 985; Newport v Smith, 61 M 277, 63 NW 734; Clark v Dewey, 71 M 108, 73 NW 639; Fidelity v Crays, 76 M 450, 79 NW 531.

The court, having on the first trial decided that it was a case for specific performance, and that plaintiff had fully performed, directed that defendant be allowed to perform within 30 days, and if he failed to do so, the question of damages should be tried. The defendant cannot complain that instead of a mandatory order, the option was left open for him. Mealey v Finnegan, 46 M 507, 49 NW 207.

Where several independent findings of fact are made by the trial court, any one of which is decisive of the case, the fact that one of such findings will not be sustained by the evidence will not affect the result or require a new trial. Sollar v Sollar, 176 M 225, 222 NW 926.

5. After trial by referee

The district court may vacate the findings of a referee on the ground that they are not justified by the evidence and grant a new trial. Thayer v Barney, 12 M 502 (406); Cochrane v Halsey, 25 M 52; Kaktan v Knight, 44 M 304, 46 NW 354.

Where the district court reviews the findings of a referee, it is the right and duty of the judge who passes on motion for a new trial to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, except that such discretion must be exercised entirely with reference to the evidence disclosed by the record. Hughley v City of Wabasha, 69 M 245, 72 NW 78; First National v City of St. Cloud, 73 M 219, 75 NW 1054.

6. After denial of motion to dismiss

When facts are undisputed or conclusively proved, and there is no reasonable chance for drawing conclusions from them, the question of negligence becomes one of law for the court; and even if there be a controversy in the evidence as to some facts, yet if those that are uncontroverted clearly and indisputedly establish negligence, it is still a question of law for the court. Abbett v Chicago, Milwaukee, 30 M 482, 16 NW 266.

7. After successive verdicts

An appellate court will not necessarily sustain an order granting a second or third new trial because it has sustained one granting a first. Wilcox v Landberg, 30 M 93, 14 NW 365.

Where a trial court is of opinion that a verdict, although supported by some evidence, is against the weight of evidence, they may be justified in setting it aside and submitting the case to a second jury when they would not feel warranted in disturbing a second verdict, although rendered on the same evidence. Buenemann v St. Paul, Minneapolis, 32 M 390, 20 NW 379.

Where there have been several trials with the same result, the trial court properly granted a new trial, because clearly the finding of the jury was not supported by a clear preponderance of the evidence. Coole v Byrne, 38 M 534, 38 NW 620; Bathke v Krassin, 78 M 272, 80 NW 950; Ladwig v Supreme Assembly, 125 M 72, 145 NW 798.

A court might be justified in the exercise of its discretion in granting a second trial on the ground that the verdict was against the evidence when it would not be justified in granting a third or subsequent trial on the same ground. Van Doren v Wright, 65 M 80, 67 NW 668, 68 NW 22; Netzer v Crookston, 66 M 357, 68 NW 1099; Park v Electric, 75 M 349, 77 NW 988; Atwood v Watkins, 94 M 464, 103 NW 332; Fischer v Sperl, 100 M 198, 110 NW 853.

Successive trials resulting in differing verdicts. Anderson v Ambroise, 174 M 481, 219 NW 769; 179 M 461, 229 NW 579.

8. Remitting excess

There was no error in the court's denying plaintiff's motion for a new trial on condition that the defendant remit from the verdict to the extent to which the damages awarded were excessive. Brown v Doyle, 69 M 543, 72 NW 814; Hodge v Eastern Railway, 70 M 193, 72 NW 1074.

Where a verdict is not only grossly excessive but against the great weight of the evidence, there should be a new trial rather than an attempt to reduce the wrong of the jury by cutting the verdict in two. Hallen v Montgomery, 203 M 349, 281 NW 291.

9. Presumption on appeal

There is no presumption on appeal that a new trial is granted on the ground that the verdict was not justified by the evidence. Halvorsen v Moon, 87 M 18, 91 NW 28; Berg v Olson, 88 M 392, 93 NW 309; Fitzer v Guthrie, 89 M 330, 94 NW 888; Whitcomb v Ramsey County, 91 M 238, 97 NW 879; Hillestad v Lee, 91 M 335, 97 NW 1055; Owens v Savage, 93 M 468, 101 NW 790; Briggs v Rutherford, 94 M 23, 101 NW 954; Merrill v Pike, 94 M 186, 102 NW 393; Kolander v Dunn, 95 M 422, 104 NW 371, 483; Bradley Estate Co. v Bradley, 97 M 161, 106 NW 110; Hoatson v McDonald, 97 M 201, 106 NW 311; Sather v Sexton, 101 M 544, 112 NW 1142; Buck v Buck, 122 M 463, 142 NW 729.

X WHEN VERDICT IS CONTRARY TO LAW

An appellate court, when considering the question whether a verdict is contrary to law, must assume that state of facts most favorable to the verdict, which, under the charge, the jury was at liberty to find. Alden v City of Minneapolis, 24 M 254.

A motion for a new trial on the ground that the verdict is contrary to law is somewhat in the nature of a demurrer to the evidence; that is, conceding all that the evidence tends to prove, the verdict is not supported by the principles of law applicable to the facts. On the other hand, in an earlier case, (Valerius v Richard, 57 M 443, 59 NW 534), it was held that the phrase "contrary to law" means contrary to the instruction, and that it is not enough to justify a new trial that a principle of law not embodied in an instruction was disregarded by the jury. First National v Strait, 71 M 69, 73 NW 645.

Where a motion for a new trial is made on the ground that the verdict is contrary to law, the motion should be granted if, as a matter of law, there is no sufficient evidence to support it; that is, when the evidence is such that, conceding all that it tends to prove, it will not justify a verdict as a matter of law. Buck v Buck, 122 M 463, 142 NW 729.

Where two claims of negligence were submitted to the jury as grounds for recovery, and a general verdict for damages was returned, if the evidence fails to sustain one of the claims submitted, a new trial should be granted. Gamradt v DuBois, 176 M 312, 223 NW 296.

A verdict against officers of a bank for soliciting deposits in a failing bank is not supported by the evidence and contrary to law and a new trial must be ordered. Olson v Nelson, 177 M 354, 225 NW 276.

A verdict against a corporation, and in favor of its managing officer, a co-defendant, and the one who had sole charge of the business and who personally made the sale, is perverse and requires a new trial. Tiedje v Haney, 184 M 569, 239 NW 611; Bracke v Lepinski, 187 M 585, 246 NW 249; Szyperski v Swift, 198 M 154, 269 NW 401.

A verdict which on account of mistake or other cause, fails to include interest is not perverse. Newberg v Conley, 190 M 459, 252 NW 221.

Where a party does not move for a directed verdict at the close of the testimony, he cannot, under our statutory method of procedure, move for judgment non obstante, nor can the court enter judgment non obstante on a motion to "vacate and set aside" the verdict. Anderson v Newsome, 193 M 157, 258 NW 157.

That the evidence was in conflict is not necessarily ground for new trial. Peterson v Raymond, 202 M 320, 278 NW 471.

547.02 BASIS OF MOTION.

HISTORY. R.S. 1851 c. 71 s. 60; P.S. 1858 c. 61 s. 60; G.S. 1866 c. 66 s. 236; 1875 c. 60 s. 1; G.S. 1878 c. 66 s. 254; G.S. 1894 s. 5399; R.L. 1905 s. 4199; 1907 c. 450; G.S. 1913 s. 7829; G.S. 1923 s. 9326; M.S. 1927 s. 9326.

The basis for the motion for the new trial is disclosed by the affidavits presented by the respective parties, and the statement of the judge (or referee) who presided at the trial. Hudson v Minneapolis, Lyndale, 44 M 52, 46 NW 314; Pinney v Russel, 52 M 443, 54 NW 484.

When a motion is made on the minutes, a case or a bill of exceptions, in the event of an appeal, must be proposed within the time prescribed; but a stay of proceedings with an extension of time within which to propose and settle a case may be obtained as in other cases. Van Brunt v Williams, 51 M 337, 53 NW 643; Loveland v Cooley, 59 M 259, 61 NW 138; Hendrickson v Back, 74 M 90, 76 NW 1019.

While a motion on the minutes must regularly be made at the term of court at which the trial is had, the statutory requirement in this regard is waived by failure of the opposite party to make a timely objection. Larson v Ross, 56 M 74, 57 NW 323; Gribble v Livermore, 64 M 396, 67 NW 213; Letourneau v Board, 78 M 82, 80 NW 840.

After moving on the minutes, a party cannot, as of right, renew the motion on a settled case. Case v Huffman, 86 M 30, 90 NW 5.

Return on appeal in connection with stipulation of parties, certain orders of the court, and certificates to the return by the clerk of such court, was in the instant case sufficient to constitute a settled case in substance and to present certain questions for review. First National v Towle, 118 M 514, 137 NW 291.

A party may make a motion for a new trial after judgment entered if, without fault or laches on his part, he has no reasonable opportunity to make it and bring it to a determination before judgment, and if he use reasonable diligence in doing so afterwards. Noonan v Spear, 125 M 475, 147 NW 654.

Where a new trial is granted upon a motion based upon the minutes of court and upon affidavits, the appellate court will not reverse the trial court, unless a settled case or bill of exceptions is contained in the record. Thoreson v Quinn, 126 M 48, 147 NW 716.

Service of notice short of due time. Noonan v Spear, 129 M 528, 152 NW 270.

In the absence of a settled case or bill of exceptions all questions covered by the findings of the trial court will be presumed to have been litigated by consent. Betcher v City of Hastings, 131 M 249, 154 NW 1072.

To entitle a defendant to urge as error the direction of a verdict in favor of a codefendant, the latter must be made a party to the motion for a new trial when the motion is based in part upon the claim that the court erred in so directing a verdict. Riley v Minneapolis & St. Louis, 132 M 194, 156 NW 272.

A motion for a new trial upon the trial court's minutes made and heard the day after the verdict was rendered, is in time. Pust v Holtz, 134 M 266, 159 NW 564.

No settled case or bill of exceptions is necessary to review an order disposing of a motion for new trial made to correct a clerical error, the affidavits on which the motion is made being returned. Paul v Pye, 135 M 13, 159 NW 1070.

An attempted appeal from an order denying a new trial based upon the minutes of the court was dismissed because of absence of settled case or bill of exceptions. Scheffer v Hage, 157 M 14, 195 NW 453.

When the printed record does not contain all the evidence of the settled case, nor is a fair and full condensation thereof into narrative form, as provided by rules of the supreme court, the appellate court will not consider whether the verdict has sufficient support. Guthrie v Hagen, 162 M 447, 203 NW 216.

Refusal of writ of certiorari does not prevent application to the trial court for order vacating order granting a new trial. Cox v Selover, 165 M 50, 205 NW 691.

Where there is no settled case or bill of exceptions, the only question is whether the findings sustain the conclusions and judgment. Teal v Forest Lake Bank, 173 M 625, 217 NW 597.

In the absence of an extension of time as provided by section 547.02, the court cannot grant a motion for a new trial upon the minutes of the court after the lapse of 30 days from the coming in of the verdict. Edelstein v Levine, 179 M 136, 228 NW 558; Smith v Wright, 192 M 424, 256 NW 890.

Affidavits to supplement testimony on motion for new trial cannot be considered. Mair v Schwartz, 179 M 586, 229 NW 565; Pettersen v Fosseen, 194 M 265, 260 NW 225.

Without a case or bill of exceptions, errors in a charge to the jury are not reviewable. Andersen v City of Minneapolis, 182 M 243, 234 NW 289.

Affidavits cannot be used on motion for a new trial to show alleged improper remarks of counsel in addressing the jury. Sigvertsen v Maney, 182 M 387, 234 NW 688.

An order in a criminal case, made on defendant's failure to plead after disallowance of his demurrer, found him guilty, but directed him to appear at a later date for sentence. The order is not appealable, not being a final judgment imposing sentence. State v Putzier, 183 M 423, 236 NW 765.

Where a party moves only for judgment and does not ask for a new trial, he waives the errors which might have given him a new trial. Yager v Held, 186 M 71, 242 NW 469; Guild v Miller, 199 M 141, 271 NW 332.

On joint motion for new trial, a co-party, against whom no cause of action was proved, is entitled to relief. McDermott v Ralich, 188 M 501, 247 NW 683.

In a personal injury action, unless evidence of the negligence of the defendant is wanting, or the evidence of the plaintiff's negligence is clear, a motion by the defendant for judgment, notwithstanding the verdict, will not be granted. Stritzke v Chicago, Great Western, 190 M 323, 251 NW 532.

An appeal from an order denying a new trial will be dismissed where there is no settled case or bill of exceptions. Odegaard v Thomas, 195 M 352, 263 NW 110.

The defense that a government corporate instrumentality is immune from suit will be noticed, even if raised for the first time after trial on argument of alternative motion. Casper v Regional Corporation, 202 M 433, 278 NW 896.

Affidavits supporting the motion for a new trial on the ground of accident or surprise do not disclose facts which indicate an abuse of discretion in denying the motion on this ground. Lind v Johnson, 204 M 30, 282 NW 661.

Amendment to a pleading on the trial is a matter almost entirely within the discretion of the trial court and will not be reversed except for clear abuse of discretion. Raspler v Seng, 215 M 596, 11 NW(2d) 440.

The court having announced its decision a motion for a new trial may be made without waiting the filing of the findings of fact and conclusions. Mitchell v Bazille, 216 M 368, 13 NW(2d) 20.

A defendant cannot under the guise of seeking a modification of a divorce decree, obtain a new trial after time to appeal has expired. Anich v Anich, 217 M 259, 14 NW(2d) 289.

Where the issues of mental capacity and undue influence were determined by the jury, proceedings for a new trial, taken before there was a decision by the court on the issue of due execution of the will, was premature. Cunningham's Estate, 219 M 80, 17 NW(2d) 85.

547.023 STAY OF PROCEEDINGS, EXTENSION.

HISTORY. 1945 c. 52 s. 1.

547.03 EXCEPTIONS TO RULING, ORDER, DECISION, OR INSTRUCTION OF COURT.

HISTORY. R.S. 1851 c. 71 ss. 55 to 57, 60; P.S. 1858 c. 61 ss. 55 to 57, 60; G.S. 1866 c. 66 ss. 233, 234, 236; 1875 c. 60 s. 1; G.S. 1878 c. 66 ss. 251, 252, 254; G.S. 1894 ss. 5396, 5397, 5399; 1901 c. 113; R.L. 1905 s. 4200; G.S. 1913 s. 7830; 1919 c. 115 s. 1; G.S. 1923 s. 9327; M.S. 1927 s. 9327; 1945 c. 282 s. 1.

1. Rulings
2. Orders
3. Decisions
4. Instructions
5. Objections and exceptions
6. Specifications of error
7. Generally

1. Rulings

Questions not objected to cannot be availed of on appeal. Bank v Keller, 126 M 203, 148 NW 113.

If appropriate questions are asked, and due exceptions taken to the ruling sustaining objections thereto, the correctness of the ruling is presented for review without an offer or statement of what the cross-examiner proposes to elicit. Ulman v Farm Stock & Home, 126 M 444, 148 NW 102.

No review of rulings unless the trial court is advised of the ground of the objection. Thoreson v Susens, 127 M 84, 148 NW 891.

On an appeal from a judgment upon trial by the court, there being objections at the trial but not exceptions, and no motion being made for a new trial and therefore no specifications of error, errors in rulings on evidence are not available. Cincinnati v Loe, 152 M 374, 188 NW 1011.

Where exception is not taken when ruling is made, the ruling is not subject to review, unless assailed in the motion for a new trial. Gage v Van Dusen, 156 M 332, 194 NW 769.

Where an objection to a question was made upon several grounds, but not the one urged on appeal, and it appears that in the subsequent testimony similar questions were put and answered without objection, no error can be assigned on the ruling. Lorenz v Lerche, 157 M 437, 196 NW 564.

No exceptions to rulings being noted when made, or taken in a motion for a new trial, there is nothing to review on appeal. Crandall v Kroening, 169 M 120, 210 NW 637.

Ruling permitting an amendment of the answer at the trial cannot be reviewed, for there was no objection or exception. Paull v Columbian, 171 M 118, 213 NW 539.

When no exception is taken to a ruling on evidence at the trial, and there is no motion for a new trial with specifications of error, the ruling is not reviewable on appeal from the judgment. Runge v Schroeder, 174 M 131, 218 NW 455; Mutual Trust v Berg, 187 M 503, 246 NW 9.

The opposing party, not having objected to the court's entertaining a motion for a directed verdict which failed to specify the grounds for the motion, nor having assigned such defect in the motion as a ground for a new trial cannot raise the point for the first time on appeal. Andrews v Flour City, 176 M 52, 222 NW 340.

A sufficient showing of conditions amounting to prejudice, and the trial court should have granted the continuance. State ex rel v Wheeler, 179 M 557, 230 NW 91.

There may be an error in the exclusion of evidence, but it does not appear that the answer to the suggested question would be favorable to plaintiff, and he made no offer of proof. Tierney v Graves, 185 M 114, 239 NW 905.

An oral plea of guilty to a violation of the state highway regulation act is not admissible as evidence in a civil action. Warren v Marsh, 215 M 615, 11 NW(2d) 528.

Where counsel has stated acquiescence to a ruling of the court, he is not entitled to urge a new trial based on that ruling. Krahmer v Koch, 216 M 421, 13 NW(2d) 370.

A ruling excluding evidence, in which appellant acquiesced at the trial and which he did not assign as error in his notice of motion for a new trial, will be sustained on appeal. Porter v Grennan, 219 M 19, 16 NW(2d) 906.

2. Orders

Where a demurrer to a petition was overruled and thereafter judgment was entered without notice, but no application was made to the trial court either for leave to answer or to vacate the judgment, the question as to whether defendant was entitled to answer or to have the judgment vacated, cannot be considered or determined by this court. State ex rel v Jack, 126 M 367, 148 NW 306.

Defendant, having failed to question an allowance for expert witness fees, set out on plaintiff's notice of taxation of costs, is precluded from objecting thereto on the ground that it was an ex parte order made by a judge who had not tried the case. Daly v Curry, 128 M 449, 151 NW 274.

There was no settled case. On the record the findings and refusal to make the order are presumed to be correct. West Duluth v Northwestern, 176 M 588, 224 NW 245.

An order before judgment granting defendant's motion to file a supplemental answer is not appealable; nor is an order denying a motion for amended findings. Hoyt v Kittson Bank, 180 M 93, 230 NW 269.

3. Decisions

Assignment that decision is not justified by the evidence and is contrary to law is insufficient to call in question the findings of fact. Nye v Kahlaw, 98 M 81, 107 NW 733.

A trial court has no authority to grant a new trial for errors not duly excepted to on the trial, or on motion for a new trial, as provided for in Revised Laws 1905, Section 4200 (section 547.03), modifying Bank v Lawler, 78 M 135, 80 NW 868. Farris v Kaplan, 113 M 397, 129 NW 770.

Insufficiency of findings may be availed of in the first instance on appeal. McMahon v Illinois Central, 127 M 5, 148 NW 446.

If the verdict as incorporated in the settled case conflicts with the original verdict as filed, the latter will be regarded on appeal as the true verdict. Sonnesyn v Hawbaker, 127 M 15, 148 NW 476.

Construction of findings. Sinclair v Fitzpatrick, 127 M 530, 149 NW 1070.

There having been no motion for a new trial, the only question to be decided on appeal is whether the evidence is sufficient to sustain the verdict. Sheehy v Minneapolis & St. Louis, 132 M 309, 156 NW 346.

No appeal lies from an order denying defendant's motion for judgment non obstante, when no motion for a new trial had been made. Carlstrom v North Star, 132 M 467, 155 NW 1039.

Where a judgment in favor of the plaintiff in an equity suit fails to contain a provision favorable to the defendants and authorized by the findings, the remedy of the defendants is by motion and not by appeal. Cherveny v Hemza, 134 M 39, 158 NW 810.

Matters available to appellee. McAlpine v Fidelity Company, 134 M 192, 158 NW 967.

Where defendant entered judgment after appeal was taken, the court dismissed the appeal on its own motion that plaintiff might appeal from the judgment and obtain a decision on the merits. Tergeon v Johnson, 165 M 482, 205 NW 888.

Findings of fact having substantial support in the evidence will not be disturbed simply because there is a substantial amount of evidence in opposition. Colman v Mironowski, 174 M 507, 219 NW 758.

Objection to the form of the judgment cannot be raised in the appellate court, there having been no application to the court below for correction. Fagerstrom v Rappaport, 176 M 254, 223 NW 142.

Where an action for the cancelation of a mortgage was tried upon the assumption that plaintiff was the owner of the property, it is too late on appeal to raise the question of lack of proof of plaintiff's ownership; that should have been done during the trial. Wittles v Howe, 177 M 119, 224 NW 696; Luebke v Case, 178 M 40, 226 NW 415.

On an appeal from a judgment without settled case or bill of exceptions, the only question before the appellate court is whether the findings of fact support the judgment. Wright v Avenson, 178 M 415, 227 NW 357.

In reviewing an order for judgment on the pleadings, a settled case is necessary. State ex rel v Youngquist, 178 M 442, 227 NW 891.

In the absence of a settled case, the claim of insufficiency of evidence to sustain the verdict or findings of fact will not be considered by the appellate court. Zimmer v St. Anthony, 179 M 536, 229 NW 873.

Even if improper to enter judgment on the verdict without the order of court, the correction was the province of the trial court. Deacon v Haugen, 182 M 540, 235 NW 23.

4. Instructions

The provision relieving from the necessity of taking an exception does not relieve from the necessity of calling the attention of the court to any indefinite or inaccurate statement in the charge, where the charge as a whole is correct. Steinbauer v Stone, 85 M 274, 88 NW 754; State v Lewis, 86 M 174, 90 NW 318; Holden v O'Brien, 86 M 297, 90 NW 531; N. P. v Duncan, 87 M 91, 91 NW 271; Applebee v Perry, 87 M 242, 91 NW 893; Schmitt v Murray, 87 M 250, 91 NW 1116; Olson v Berg, 87 M 277, 91 NW 1103; Rutherford v Selover, 87 M 495, 92 NW 413; Beede v Wisconsin Central, 90 M 37, 95 NW 454; State v Ames, 90 M 183, 96 NW 330; Lahr v Kraemer, 91 M 27, 97 NW 418; Mountain v Day, 91 M 249, 97 NW 883; Cady v Duluth Street Ry. 94 M 74, 102 NW 201, 397; Olson v Chicago,

Milwaukee, 94 M 241, 102 NW 449; Turriton v Chicago, St. Paul, 95 M 408, 104 NW 225; Schornak v St. Paul Fire, 96 M 299, 104 NW 1087; Kolbe v Boyle, 99 M 110, 108 NW 847; Minneapolis & St. Paul v Enggren, 111 M 372, 127 NW 391; Schmitt v U. S. F. & G. 169 M 106, 210 NW 846.

It does not abrogate the above rule that an omission to charge on a particular point is not error in the absence of a request to charge thereon. Olson v Aubolee, 92 M 312, 99 NW 1128; Ellington v G. N. 92 M 470, 100 NW 218; Kramer v Northwestern Elevator, 97 M 44, 106 NW 86.

Waiver of claim that instruction was indefinite or misleading is not a waiver of right to assign error to erroneous instructions deliberately given. Kincaid v Jungkunz, 109 M 400, 123 NW 1082.

Unchallenged instructions are deemed law. Dobrowoloske v Parpala, 121 M 455, 141 NW 803; Demeroy v G. N. 121 M 516, 141 NW 804.

Failure of the trial court to instruct on manslaughter was, in the instant case, not error. State v Rusk, 123 M 276, 143 NW 782.

No reversible error either in rulings or instructions. Buck v Buck, 126 M 275, 148 NW 117.

Verbal inaccuracies in the recital of certain evidence in the charge, to which the attention of the jury 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; Kruta v Lough, 131 M 15, 154 NW 514; Powers v American Traffic, 167 M 327, 209 NW 16; Anderson v Burg, 170 M 53, 212 NW 9; Zobel v Boutelle, 184 M 172, 238 NW 49; Pearson v Northland, 184 M 560, 239 NW 602.

Following Coe v N. P. 101 M 12, 111 NW 651, the failure of the trial court to expressly call attention of the jury to the degree of care imposed upon defendant in respect to the maintenance of the right-of-way fence, was an inadvertence, and since no exception was taken at the trial, is not reversible error. Turner v Chicago, Rock Island, 136 M 383, 162 NW 469.

Instructions to the jury not excepted to is the law of the case. Riser v Smith, 136 M 417, 162 NW 520; Shepard v Alden, 161 M 135, 201 NW 537, 202 NW 71; Converse v Glenn, 162 M 513, 202 NW 732; Smith v Gray, 169 M 45, 210 NW 618; Rochester v Rapinwax, 193 M 244, 258 NW 302.

The general exception to the charge is, under the evidence, insufficient. Peterson v G. N. 159 M 308, 199 NW 3.

A verbal inaccuracy in the statement of the falsus in uno rule, not called to the court's attention before the jury retired, is not ground for reversal. Kowalski v Chicago & Northwestern, 159 M 388, 199 NW 178; Schaedler v New York Life, 201 M 327, 276 NW 235.

An instruction relating to a material issue, if fundamentally wrong, is ground for a new trial and may be assigned as error on a motion for a new trial, although no exception to it was taken at the time of trial, but failure to instruct on every possible hypothesis must be called to the court's attention before the jury retires following Sassen v Hoegle, 125 M 441, 147 NW 445. Soderberg v Crosier, 160 M 468, 200 NW 629.

An erroneous instruction to the jury, even on a controlling proposition of law, cannot be reviewed upon an appeal from the judgment, there having been no exception or motion for a new trial. Peterson v Township of Manchester, 162 M 486, 203 NW 432; Bergren v Nelson, 164 M 414, 205 NW 276.

An erroneous statement of fact in the judge's charge must be called to the attention of the court so he may correct it before the jury retires. An exception taken at the close of the charge is not sufficient. Lucas v Ganley, 166 M 7, 206 NW 934; State v Solum, 183 M 36, 235 NW 390.

Failure to take exception prevents review of charge. Andrews v Andrews, 170 M 175, 212 NW 408, 213 NW 899; Erickson v Montgomery, 171 M 518, 213 NW 919; Davis v Minneapolis Street Ry. 173 M 186, 217 NW 99; Kessler v Kruidenier, 174 M 434, 219 NW 552; Pitzen v Nord, 174 M 216, 218 NW 891; Garedpy v Chicago, Milwaukee, 176 M 331, 223 NW 605; Hawley v Stuntz, 178 M 411, 227 NW 358; Rahn v First National, 185 M 246, 240 NW 529; Saunders v Commercial Credit, 192 M 272, 256 NW 142; Greene v Mathiowetz, 212 M 171, 3 NW(2d) 97.

Inadvertent statement in the charge to the jury must be called to the court's attention under the rule of Steinbauer v Stone, 85 M 274, 88 NW 754, which is

applicable in criminal as well as in civil actions. State v Kaufman, 172 M 139, 214 NW 785; McCabe v Duluth Street Ry. 175 M 22, 220 NW 162; Magnuson v Bouck, 178 M 242, 226 NW 702; Romann v Bender, 190 M 419, 252 NW 80; State v Sprague, 201 M 419, 276 NW 744; Gates v Herberger, 202 M 610, 279 NW 711.

The appellate court cannot consider assignments of error involving questions not presented to the trial court. State Bank v Forney, 174 M 402, 219 NW 546; O'Donnell v Benson, 175 M 382, 221 NW 426.

The instructions of the court were susceptible to a construction embracing an erroneous measure of damages in that they involved a double recovery. Johnson v Wright, 175 M 236, 220 NW 946.

A trial court's talk in open court to a jury seeking further instructions is not an "irregularity," but may be reviewed as "error of law occurring at the trial," and a settled case or bill of exceptions is necessary. Begley's Estate, 178 M 141, 226 NW 404.

In the instant case, the law of the case as based on the charge is not applicable. Harrsch v Breilien, 181 M 403, 232 NW 710.

Instructions unobjected to become the law of the case. The rule does not apply in cases where the record or the evidence conclusively shows that the prevailing party is not entitled to a verdict. Bullock v New York Life, 182 M 192, 233 NW 858; Duluth v McCarthy, 183 M 414, 236 NW 766; Flower v King, 189 M 461, 250 NW 43; Kovaniemi v Sherman, 192 M 395, 256 NW 661; Oxborough v Murphy, 194 M 335, 260 NW 305.

Without a case or bill of exceptions, errors in a charge to the jury are not reviewable. Andersen v City of Minneapolis, 182 M 243, 234 NW 289.

An error in the reception of certain testimony is deemed cured when the court, on its own motion, struck it from the record and directed the jury to disregard it. Martin v Schiska, 183 M 256, 236 NW 312.

In absence of requests to instruct or suggestions of inadvertent omissions, the charge cannot be attacked as inadequate. Renn v Wendt, 185 M 461, 241 NW 581.

Where there are errors in the charge and the trial court grants a new trial, the decision is largely a matter of discretion and will not be reversed unless there is an abuse of discretion. Naylor v McDonald, 185 M 518, 241 NW 674.

Instructions not challenged on the motion for a new trial cannot be attacked on appeal. Carr v Grant, 188 M 216, 246 NW 743.

The exception to the whole charge that it is argumentative and so worded as to excite prejudice does not avail plaintiff. Good practice does not permit such an assignment of error where there are paragraphs of correct and pertinent instructions. Knight v Dirnberger, 192 M 387, 256 NW 657.

Where in his motion for a new trial, appellant did not raise the question, it is too late on appeal to claim error of the court in over-emphasizing respondent's theory of the case. Delva's Estate, 195 M 192, 262 NW 209.

On appeal from a judgment where there has been no motion for a new trial, the sole question for the appellate court is whether the evidence reasonably sustains the verdict. Robbins v New York Life, 195 M 205, 262 NW 210, 872; Taylor v Northern States, 196 M 22, 264 NW 139.

Instructions of trial court in respect to duties of respective parties approaching intersection approved. Useman v Minneapolis Street Railway, 198 M 82, 268 NW 866.

The court's cautionary charge that the fact that defendant's truck ran out of gas and if that was negligence, it was not such as contributed to the collision, and is not to be so considered, is not prejudicial, as it is conceded that plaintiff was not basing his case on that theory. Hartwell v Progressive, 198 M 488, 270 NW 570.

Right of counsel to call attention to omission or inadvertence in a charge, or to take exception thereto, imposes a duty upon him to exercise such right. Dehen v Berning, 198 M 522, 270 NW 602; Doody v St. Paul City Ry. 198 M 573, 270 NW 583; State v Van Guilder, 199 M 214, 271 NW 473.

Defendant was not prejudiced by the irregular manner in which plaintiff objected to the charge of the court. Vondrachek v Dignan, 200 M 530, 274 NW 609.

Whether the case be tried by jury or by court, no error in a ruling may be reviewed on appeal from a judgment, if appellant did not take an exception on the trial or include such in a motion for new trial. Johnson v Gustafson, 201 M 629, 277 NW 252.

Defendant neither requested that the issue of contributory negligence be submitted, nor objected to the charge of the court that plaintiff was not guilty of such, hence a new trial cannot be awarded on that issue. Forseth v Duluth-Superior, 202 M 447, 278 NW 904.

An exception should single out each instruction challenged and clearly specify alleged error. Strand v Boehland, 203 M 9, 279 NW 746.

An erroneous instruction, if not objected to, is the law of the case. Kane v Locke, 216 M 170, 12 NW(2d) 495.

When both the court and counsel overlooked the change in the law whereby the rule of evidence had been changed, the error though not called to the court's attention at the trial may be assigned as grounds for a new trial. Hubred v Wagner, 217 M 129, 14 NW(2d) 115.

Upon appeal from a judgment entered in favor of defendant notwithstanding a verdict for plaintiff, plaintiff cannot complain of errors in instructions where she made no motion for a new trial. Kundiger v Metropolitan, 218 M 273, 15 NW(2d) 487.

Inaccuracies in instructions not specifically called to the trial court's attention and which could not have affected the result will be disregarded on appeal. James v Chicago, St. Paul, 218 M 334, 16 NW(2d) 188; Moeller v St. Paul City Ry. Co. 218 M 353, 16 NW(2d) 289.

There being no objection to the charge of the court when delivered or in the motion for a new trial, the charge became the law of the case, even though erroneous. Kane v Locke, 218 M 486, 16 NW(2d) 545.

Where no objection is made or exception taken to instructions to the effect, that the defendant was guilty of negligence if a condition shown by the evidence was of such a dangerous character as to require him to protect the public against the danger and that under the evidence plaintiff's alleged contributory negligence was a fact question, the instructions, whether right or wrong, become the law of the case and the rule for determining whether the evidence is sufficient to sustain a recovery. Christenson v Village of Hibbing, 219 M 141, 16 NW(2d) 881.

Defendant could not complain on appeal that trial court failed to give a certain instruction where defendant made no request for such charge and his motion for a new trial made no mention of it. Walker v Stecher, 219 M 152, 17 NW(2d) 317.

In absence of exceptions, errors of law on trial will not be considered on motion for a new trial or on appeal unless they are clearly specified in the notice of motion for a new trial. Ranum v Swenson, 220 M 170, 19 NW(2d) 327.

The statute permitting exceptions to instructions to be taken in the notice of motion for new trial does not permit ambiguous or verbally inaccurate instructions to be so challenged, and error, if any, arising from such defects can be asserted only where they are called to the court's attention at the time with a request for correction. Donea v Mass. Mutual, 220 M 204, 19 NW(2d) 378.

5. Objections and exceptions

The failure of the court to submit to the jury a question of fact in issue by the pleadings, and which was not abandoned at the trial is error; and under Laws 1901, Chapter 113, requests to submit such issue, and exceptions for failure so to do, are not necessary. Steinbauer v Stone, 85 M 274, 88 NW 754, and other cases of similar holding distinguished. Robertson v Burton, 88 M 151, 92 NW 538.

Necessity of taking exceptions. Ogren v City of Minneapolis, 121 M 243, 141 NW 120; Ebiling v International, 125 M 466, 147 NW 441; Quinn v St. Paul Boiler, 128 M 270, 150 NW 919; Dybvig v Minneapolis, 128 M 292, 150 NW 905; Palmer v Palmer, 161 M 526, 201 NW 537; Cawing v Cawing, 161 M 533, 201 NW 936; State v Padares, 187 M 622, 246 NW 369.

Objections to remarks or conduct of counsel as improper, if urged as a ground for a new trial, must first be urged in trial court. Wadman v Trout Lake, 130 M 80, 153 NW 269; Price v Minnesota Dakota, 130 M 242, 153 NW 532.

Record of appellant must show his grounds of exception or objection. Northwestern Bank v Mickelson, 134 M 422, 159 NW 948.

Where no exception was taken to a denial of the motion for a directed verdict either at the trial or in the motion for a new trial, a ruling cannnot be reviewed on appeal. Flaaten v Lyons, 157 M 362, 196 NW 478.

An objection will not be considered, unless it specifies the ground therefor, and is preserved by an exception to the ruling. Cosmopolitan Bank v Sommervold, 158 M 356, 197 NW 743.

An objection that a contract for the sale of real estate is unenforceable for the non-payment of the mortgage registry tax comes too late when made for the first time by an objection to the entry of judgment. State Bank v Sylte, 162 M 72, 202 NW 70.

Objection to the appointment of a receiver should be made at the time the matter of the appointment is being considered. It is too late to raise the question on an appeal from an order assessing stockholders. In re Southwestern Minnesota Land Co. 162 M 83, 202 NW 69.

Inadvertent inaccurate statement by the court in charge to jury calls for prompt action by counsel. Ceylon v Fidelity, 163 M 280, 203 NW 985; Monn v Weivoda, 163 M 473, 204 NW 466.

Misconduct of an attorney in making improper argument to the jury cannot be assigned as error, unless objection was made at the time the language was used. Weber's Estate, 163 M 389, 204 NW 52.

The charge was substantially correct, and if counsel considered it misleading, it was counsel's duty to call the court's attention to the error. Old Colony v Moeglein, 165 M 118, 205 NW 885; Parris v McKay, 165 M 241, 206 NW 393.

An exception by counsel to the charge of the court claiming "instructions as to first and second causes of action were not accurate or correct and could not be under the testimony" is ineffectual because it fails to indicate the alleged error. Reed v Northrup, 165 M 210, 206 NW 400.

Where there is no motion for a new trial, the record must show exceptions to rulings at the time they were made in order to have them reviewed on appeal. Taylor v Chicago Great Western, 165 M 266, 206 NW 404; Wood's Estate, 167 M 417, 209 NW 1.

An objection that testimony is incompetent, irrelevant, and immaterial, does not present the objection that it is hearsay or self-serving. Pleason v Kleinman, 165 M 342, 206 NW 645.

If a party fears that an instruction given at his request was so placed in the charge that it might be misapplied by the jury, he should call attention to it at the time. Old Colony v American Savings, 165 M 417, 206 NW 725.

Rulings at the trial and instructions to the jury not excepted to and not assigned as error in a motion for new trial are not reviewable on appeal. Johnson v Long, 168 M 453, 210 NW 626; Donaldson v Carstensen, 188 M 443, 247 NW 522; Papke v Pearson, 203 M 131, 280 NW 183.

Evidence received, objected to, and received subject to plaintiff's objection; no rulings were ever made, a motion to amend findings was denied, but there having been no motion for a new trial there can be no review in the appellate court. Weiss v Hancock, 178 M 120, 226 NW 516; Johnson v Hansen, 197 M 496, 267 NW 486.

Where testimony is received at the trial without objection, the appellant cannot on motion for a new trial or on appeal raise the question that under the statute the witness was not competent to give such testimony. Dale v First National, 178 M 452, 227 NW 501.

Where the parties without objection submitted their case on affidavits, it is too late on appeal to object that the hearing should have been oral. Halper v Halper, 179 M 488, 229 NW 791.

Unless there is a clear case of abuse of discretion, the decision of the industrial commission refusing to admit newly discovered evidence will not be disturbed. Cooper v Mitchell, 188 M 560, 247 NW 805.

Where a motion to strike out an answer on one ground only, its propriety as against another and different ground will not be reviewed in appellate court. Johnston v Selfe, 190 M 269, 251 NW 525.

An auditor's report was offered in evidence with a reservation of ruling as to its admissibility. No ruling was made. The report must be considered as in evidence. Smith v Tolverson, 190 M 410, 252 NW 423.

The question of postponement because of poor sales conditions, of the sale or partition of property cannot be raised on appeal, when not suggested to the trial court. Grimm v Grimm, 190 M 474, 252 NW 231.

The court did not err in refusing to strike out part of the testimony of defendant Van Slooten which had been received without objection. Kouri v Olson, 191 M 101, 253 NW 98.

Objection not sufficiently broad or specific to cover the fact that proper foundation had not been laid. Kassmir v Prudential, 191 M 340, 254 NW 446.

The defendant contends the plaintiff accepted a responsibility without expectation of pay; but the evidence does no compel such a conclusion, and the record does not present the question, and there was no request for an appropriate charge. The verdict is not affected. Knutson v Haugen, 191 M 420, 254 NW 464.

In the absence of exceptions and in the absence of clear specifications in appellant's motion for a new trial, he may not assign as error a ruling on evidence. Clark v Warner, 193 M 564, 259 NW 62.

Where both parties introduced evidence relating to a certain ground of negligence, it is immaterial that the complaint did not allege it. Dziewczynski v Lodermeier, 193 M 580, 259 NW 65.

The fact that claimant had not complied with the statute in bringing these proceedings cannot be raised for the first time on appeal. Bethesda v Benson, 193 M 589, 259 NW 384.

Necessity for timely objection. Mattson v Northland, 196 M 334, 265 NW 51; Harris v Eggermont, 196 M 469, 265 NW 322; Foster v Schmahl, 197 M 608, 268 NW 631; Peterson v Board, 199 M 455, 272 NW 391; Eilola v Oliver Company, 201 M 77, 275 NW 408.

A formal offer of proof is unnecessary when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. Patterson v Dunn, 201 M 308, 276 NW 737.

Error cannot be assigned in receiving the evidence of an expert witness as to the cause of the accident, to whose testimony no objection is made upon the trial. Baker v City of South St. Paul, 202 M 491, 279 NW 211.

It was not error to refuse to strike from the record a city ordinance received by consent. 203 M 161, 280 NW 288.

A party is not only barred to make specific objections at the time the evidence is offered, but he is also limited on appeal to the objections he raised in the court below. Becker v Davis, 204 M 603, 284 NW 789.

Ordinarily it is enough for a litigant to interpose one objection to a given line of evidence offered on course of conduct pursued by his adversary. If his objection is overruled, he need not repeat the objection in order to save the point as a basis for an assignment of error on appeal. State v Saporen, 205 M 358, 285 NW 898.

The settled case has the corroboration of the court and of the court reporter. A stipulation between the parties cannot be substituted for the settled case or bill of exceptions except with the approval of the trial court. Remarks of the court during trial cannot be made the basis of a new trial unless objection or exception is taken at the time. Merchants Mutual v St. Paul Mercury, 218 M 393, 16 NW(2d) 463.

The impropriety of counsel becoming a witness for his client in a case which he was trying is waived where no objection is made to his continuing the ex-

amination of witnesses after he had testified or to his arguing the case to the jury. Pogue v Fegan, 219 M 80, 17 NW(2d) 85.

6. Specifications of error

On motion for a new trial, a party cannot take advantage of any errors occurring on the trial and not excepted to unless he specifies them in his notice of motion. See Laws 1901, Chapter 113. Cappis v Wiedemann, 86 M 156, 90 NW 368; Olson v Berg, 87 M 277, 91 NW 1103; Rice v Madelia Farmer's, 87 M 398, 92 NW 225; Parker v Pine Tree Lumber, 89 M 500, 95 NW 323; Conan v City of Ely, 91 M 127, 97 NW 737; Cady v Cady, 91 M 137, 97 NW 580; Clark v Thompson, 93 M 443, 101 NW 1133; Still v Rat Portage, 98 M 52, 107 NW 824; American Engine v Crowley, 105 M 233, 117 NW 428; Moneyweight Scale v Hjerpe, 106 M 47, 118 NW 62; Larson v Barlow, 112 M 246, 127 NW 924; Farris v Koplau, 113 M 397, 129 NW 770; Argall v Sutor, 114 M 371, 131 NW 466.

Assigned errors reviewable only when discussed. Staples v East State Bank, 122 M 419, 142 NW 721.

Assigned error to be considered must be raised in motion. Sanders v Thiesen, 122 M 533, 142 NW 1134.

An instruction fundamentally wrong in a cause well pleaded and proven, may be assigned as error on a motion for a new trial, even though the attorney had stated he had no objection to the charge. The rule is otherwise for failure to instruct on every hypothesis, or inadequate treatment of some phase of the controversy. Sassen v Haegle, 125 M 441, 147 NW 445.

If, after verdict, the unsuccessful party moves for judgment, notwithstanding the verdict, but does not move in the alternative for a new trial, he cannot on appeal be awarded a new trial. Northwestern v Williams, 128 M 514, 151 NW 419; Helmer v Shevlin, 129 M 25, 151 NW 421.

Excessive damages must be specified as a ground. Cady v Twin City, 129 M 70, 151 NW 537.

Grounds for new trial not assigned in trial court will not be considered on appeal. Pink v Metropolitan, 129 M 353, 152 NW 725.

Assignments of error must be based on exceptions taken. Nordheimer v Kanter, 129 M 529, 152 NW 270.

Errors must be excepted to or specified. Petruschke v Kamerer, 131 M 320, 155 NW 205; Schaefer v Marshall Milling, 133 M 73, 157 NW 993; State Bank v Ronan, 144 M 237, 174 NW 892.

Assignments of error not discussed and assignments which do not point out the alleged error in the record will not be considered on appeal. Sticha v Benzick, 156 M 52, 194 NW 752.

The findings of fact challenged by the assignment of error have sufficient support in the record. Legal News v Iron Trail, 156 M 90, 194 NW 109.

An assignment of error that the granting of a divorce is not supported by the evidence is too general to reach any of the several findings of fact made by the court. Blodine v Blodine, 158 M 296, 197 NW 261.

Defendant moved for judgment non obstante, but not for a new trial. Upon appeal from the judgment following assignment of error in the admission of evidence could not be considered. Krause v Chicago, Milwaukee, 162 M 102, 202 NW 345.

The application of the heirs was made and heard upon affidavits without objection, and they cannot now complain of the method of submission. Gunderson v Gunderson, 163 M 236, 203 NW 786.

On an appeal from an order denying a new trial, an assignment of error that the verdict is not justified by the evidence, based upon a like assignment in the motion for a new trial, is specific enough to present the question whether the verdict is sufficiently supported by the record. Caldwell v First National, 164 M 401, 205 NW 282.

An assignment of improper remarks by counsel in his argument to the jury fails when the record does not show what was said and the exception thereto. Katzenmeyer v Kuske, 168 M 93, 209 NW 867.

Claim of error in the amount of the judgment must first be submitted to the trial court. Farmers v Mellum, 173 M 325, 217 NW 381.

A general assignment that the court erred in denying a new trial presents no question for review where such motion is made on numerous distinct grounds. Webster v Roedter, 173 M 529, 217 NW 933.

On appeal from a money judgment in the absence of case or bill of exceptions, judgment was affirmed because the court had nothing before it to review. Strand v Thomas, 173 M 611, 216 NW 244.

The assignment of error that the court erred in granting a new trial on the ground of errors occurring at the trial was in the instant case sufficient. Mingo v Extrand, 180 M 395, 230 NW 895.

Where there is no bill of exceptions or settled case, it must be assumed that all issues and facts determined by the findings were litigated by consent. Rosenfeldt's Estate, 185 M 425, 241 NW 573.

Upon an appeal from the judgment without a settled case or bill of exceptions, the sole question for consideration is the sufficiency of the facts found to support the conclusions of law. State v Waddell, 187 M 647, 246 NW 471.

Assignments of error upon rulings excluding or admitting testimony must be sufficiently specific to point out the ruling challenged. It is not sufficient to merely name the witness. Carr v Grant, 188 M 216, 246 NW 743.

Issues not raised by the pleadings or litigated cannot be raised on appeal. National v Moore, 189 M 632, 250 NW 677.

The blanket assignment in the notice, "Errors of law occurring at the trial, and either excepted to at the time or hereinafter assigned in this notice of motion" is not sufficient to present for review errors not excepted to at the trial. First Bank v Overbeke, 190 M 334, 251 NW 669.

Where the trial proceeds without any objections to pleadings and the settled case fails to show any misconduct of counsel, assignments of errors in appellate court that the reply is a departure, and that counsel was guilty of misconduct are not well taken. Hovda v Blekre, 193 M 218, 258 NW 305.

That a complaint fails to state facts sufficient to constitute a cause of action may be raised for the first time on appeal. Tjepkes v State Mutual, 193 M 505, 259 NW 2.

Where defendant relies solely on motion for judgment without asking for new trial, errors at trial cannot be considered on appeal. Mishler v Nelson, 194 M 499, 260 NW 865.

By making a motion for a directed verdict at the close of the testimony, the appellant preserved the right to attack the sufficiency of the evidence. Thorsness v Woltman, 198 M 270, 269 NW 637.

By not objecting to the dismissal of the jury and the trial of the issues by the court, the assignment by the plaintiff that she had been deprived of a jury trial is ineffective. Nordby v Central Life, 201 M 378, 276 NW 278.

In order to secure review on appeal of a ruling of the trial court in admitting or excluding evidence, it is indispensable in all cases that there should be a bill of exceptions or case containing the evidence erroneously admitted or excluded, the objection of counsel, the ruling of the court upon the objection, and so much of the other evidence in the case as may be necessary to enable the supreme court to review intelligently. Timm v Schneider, 203 M 1, 279 NW 754.

On an appeal from an order denying a new trial, the review is limited to errors assigned in the motion for a new trial. Parten v First National, 204 M 200, 283 NW 408.

7. Generally

It is unnecessary, when moving for a new trial of an action, under the provisions of Laws 1901, Chapter 113, to embody in the notice of motion the general

grounds specified in General Statutes 1894, Section 5398 (section 547.01), except, perhaps, where a mere reference to the ruling complained of would not disclose the particular respects in which it is claimed to be erroneous. King v Burnham, 93 M 288, 101 NW 302; Prizer-Painter v Peaslee, 99 M 275, 109 NW 232.

An order denying a motion made upon all the files and records in the action will be affirmed, unless the record contains a settled case or bill of exceptions, or a certificate of the trial judge that the record contains all that was presented or considered on the motion, or a certificate of the clerk that the return contains all the files and records in the case. Radel v Radel, 123 M 299, 143 NW 741; Coppoletti v Citizens Insurance, 123 M 329, 143 NW 787.

Where a party is served with a short notice of an interlocutory motion, his remedy is by timely application to the trial court to vacate the service or to be relieved from default. Noonan v Spear, 125 M 475, 147 NW 654.

Relief from default is within the judicial discretion of the trial court. Johns-Manville v Great Northern, 128 M 311, 150 NW 907.

When aggrieved party is not obliged to take exception to erroneous charge and yet be entitled to review on appeal. Seastrand v Foley, 135 M 5, 159 NW 1072.

Review on appeal. Paul v Pyle, 135 M 13, 159 NW 1070; Harvey v Morse, 135 M 476, 160 NW 79; Kelly v McKeoun, 139 M 285, 166 NW 329.

Not reviewable on appeal. State ex rel v Conshak, 136 M 331, 162 NW 353; Gebhart v Carlson, 136 M 454, 161 NW 167; Dareluis v Lindquist, 136 M 477, 162 NW 464; McCormick v Hoffert, 186 M 380, 243 NW 392.

Question not considered, since the question was not presented in the court below nor argued in the appellate court. Griffin v Minnesota Sugar Co. 162 M 240, 202 NW 445.

A formal offer of proof is not necessary when an objection is sustained to a question calling for an answer which would obviously elicit material and relevant evidence. Linderoth v Kieffer, 162 M 440, 203 NW 415.

Objections to the pleadings cannot be raised after the evidence has been received without objections. McGrath v Pothen, 168 M 206, 209 NW 752.

Misconduct of counsel in argument was neither objected to at the time nor presented by any sufficient assignment of error in the motion for a new trial or in the assignments of error here. Christopherson v Custom Laundry, 179 M 325, 229 NW 136; Seitz v Claybourne, 181 M 4, 231 NW 714; Olson v Purity Baking, 185 M 571, 242 NW 283; Brown v Murphy, 190 M 81, 251 NW 5; Ross v Duluth Missabe, 203 M 312, 281 NW 76.

Errors not argued will not be considered. Lindbloom v Lindbloom, 180 M 33, 230 NW 117.

Dismissal of codefendant and prejudice resulting will not be considered for the first time on appeal. Kutina v Combs, 180 M 467, 231 NW 194.

The theory upon which the case is tried is controlling on appeal. Gunnerson v Metropolitan, 181 M 37, 231 NW 415; Steward v Nutrena, 186 M 606, 244 NW 813; Investment v Home Planners, 187 M 555, 246 NW 364; Livingstone v Havens, 191 M 623, 255 NW 120; Knutson v Fidelity, 202 M 642, 279 NW 714.

A court cannot order judgment notwithstanding the verdict where no motion to direct a verdict was made at the close of the testimony. Stewart v Menzel, 181 M 347, 232 NW 522.

The fact issues having been voluntarily litigated, and there being evidence reasonably supporting the decision, it will not be disturbed on appeal. Meacham v Ballard, 184 M 607, 240 NW 540.

On appeal from a judgment after a jury trial, even if no motion for new trial, the appellate court will consider the question of the sufficiency of the evidence to support the verdict where it has been expressly presented below by motion for a directed verdict. Ciresi v Globe, 187 M 145, 244 NW 688.

The reporter did not take down the final argument, and the parties could not agree on what was said, so there being no record, the appellate court cannot review. Adams v Reliance, 187 M 209, 244 NW 810.

Where one of the defendants was the son of the decedent, and therefore a beneficiary, does not prevent recovery by the representative. On proper application a reduction or apportionment might be made. Anderson v Anderson, 188 M 602, 248 NW 35.

Where no error is assigned in a motion for a new trial, nor assignments of error on appeal, there is nothing before appellate court for review. White v Mazal, 192 M 522, 257 NW 281.

Jury's findings based upon conflicting evidence will not be disturbed on appeal, a new trial not having been granted by the trial court. Farnham v Pepper, 193 M 222, 258 NW 293.

It is the duty of trial courts on their own motion to prevent counsel from arousing passion or prejudice in jurors by stopping such flagrant appeals to prejudice as in the instant case. Ferraro v Taylor, 197 M 5, 265 NW 829; Prescott v Swanson, 197 M 325, 267 NW 251.

Parties who submit a mandamus case on the files, records, and affidavits are not in a position to complain that they were not accorded a trial as in ordinary civil action under the statute. State ex rel v St. Cloud Association, 200 M 1, 273 NW 603.

Plaintiff is not entitled in an action in deceit for damages for fraud in procurement of contract for deed to recover as for money had and received upon, showing rescission of the contract by the parties where the pleadings and evidence did not present a claim for money had and received and that ground of recovery is asserted for the first time on appeal. Houchin v Braham, 202 M 540, 279 NW 370.

Where there is a motion for judgment non obstante but no motion for a new trial, error on appeal can reach only the single question of whether there is any substantial evidence in support of the judgment. Golden v Lerch, 203 M 211, 281 NW 249.

Where the question of waiver by the insurer of its defense of attempted fraud was not presented to the lower court and did not appear in the specifications of error in motion for a new trial, that question will not be considered on appeal. Supornick v National Retailers, 209 M 500, 296 NW 904; Winnig v Timm, 210 M 271, 297 NW 739.

Defendant having consented to submission of cause to jury on a certain theory of law, could not afterwards complain that such theory was erroneous and that cause should have been submitted on a different theory. French v Lindh, 216 M 522, 13 NW(2d) 479.

The inclusion of "instructions" with the rulings, orders, and decisions which need not be excepted to, as set forth in the so-called "lazy lawyer's law" (section 547.03) obstructs rather than furthers, justice. (See the legislature's reply, Laws 1945, Chapter 282). Hubred v Wagner, 217 M 134, 14 NW(2d) 115.

Errors not assigned in the motion for a new trial cannot be assigned for the first time on appeal. Underwood v Town Board, 217 M 386, 14 NW(2d) 459.

On appeal, a specification of error made in a motion for new trial is unavailable unless the point has been preserved both by assignment of error and appropriate argument in the brief of the party depending upon the point. Hanse v St. Paul City Railway, 217 M 432, 14 NW(2d) 473.

A federal appellate court, in order to prevent a manifest miscarriage of justice may notice an apparent error not properly raised on the record. United States v Harrell, 133 F(2d) 504.

547.04 BILL OF EXCEPTIONS AND CASE.

HISTORY. R.S. 1851 c. 71 s. 60; P.S. 1858 c. 61 s. 60; G.S. 1866 c. 66 s. 236; 1875 c. 60 s. 1; G.S. 1878 c. 66 s. 254; G.S. 1894 s. 5399; R.L. 1905 s. 4201; G.S. 1913 s. 7831; G. S. 1923 s. 9328; M. S. 1927 s. 9328.

To make findings of fact and conclusions of law on a trial by the court without a jury part of the record, it is not necessary to incorporate them in a "case"

or bill of exceptions. Where it is claimed that the conclusions of law are not justified by the facts, the proper practice is to move the court to modify them, yet the objections may be made on a motion for a new trial. Farnham v Thompson, 34 M 330, 26 NW 9.

Matters which occur out of court or in another action have no place in a bill of exceptions, but, for the purpose of a motion for a new trial or an appeal, should be presented by affidavit. Perry v Miller, 61 M 412, 63 NW 1040.

Where the trial court orders a verdict in view of and based upon the entire evidence, or the evidence on some particular issue, the whole of such evidence must be incorporated in a settled case or bill of exception, if a review of the order is sought in this court. Board v Brown, 66 M 179, 68 NW 837.

Where actions were by consent tried before a jury together, but as separate cases, rulings of the trial court upon objections made to certain offers to introduce testimony held correct. Gardner v Fidelity Mutual, 67 M 207, 69 NW 895.

There being a deficiency in the regular panel, a special venire for extra jurors was properly issued; and no fraud on collusion is shown on the part of the sheriff in calling four tavern keepers as jurors, the defendant following the same occupation. Jeremy v Matsch, 106 M 543, 118 NW 1008.

In an equitable action for separate support, a judgment was entered in favor of the wife. The husband thereafter apparently acquired a residence in Illinois and began action in that state for divorce. The district court of Minnesota had no power to enjoin the husband from so proceeding. Merriam v Merriam, 127 M 21, 148 NW 478.

Misconduct of counsel not reviewable when not a part of the settled case. Olesen v Noren, 161 M 113, 201 NW 296.

Documents received in evidence but not included in the settled case are not before the court on appeal. If the settled case shows that documents were received, and the certificate of settlement makes no mention of them, the fact as shown in the settled case prevails over the certificate. Sheffield King v Chicago, Great Western, 168 M 402, 210 NW 282.

There being no settled case or motion for a new trial, on an appeal from the judgment, the record presents only the question as to whether the conclusions of law are supported by the findings of fact. Lyon's Estate, 175 M 619, 221 NW 648.

In an appeal from a municipal court in a forcible entry and unlawful detainer case, there being no settled case, the findings of fact of the trial court are controlling. Mercantile Bank v Vogt, 178 M 282, 226 NW 847.

In the instant case, errors in the charge of the trial court are not reviewable, there being no settled case or bill of particulars. Andersen v City of Minneapolis, 182 M 243, 234 NW 289.

Where there is no settled case, it is presumed that sufficient evidence was introduced to justify the findings. Nichols v Village of Morristown, 192 M 510, 257 NW 82.

An appeal from an order denying a new trial is dismissed, there being no settled case or bill of exception; and a certified copy of the judge's charge serves no purpose, absent the evidence. Lund v Thomas, 195 M 352, 263 NW 110.

Entry of judgment, the time for appeal therefrom not having expired, does not in and of itself bar a motion for a new trial; and the trial court may, in its discretion, grant a new trial to a litigant defeated on appeal where the appellate court reversed an order granting his motion for judgment notwithstanding the verdict, there having been no motion for a new trial, and the merits of the case not being determined by the appeal. State ex rel v District Court, 196 M 56, 263 NW 908.

Where the appeal from a judgment brings up for review the prior proceedings which resulted in the judgment, a settled case or bill of exceptions is not necessary. Dahn's Estate, 203 M 19, 279 NW 716.

Where a case has been settled, the findings of the referee in a disbarment proceeding are not conclusive, and the petitioner or prosecutor may challenge

the same as contrary to the preponderance of the evidence. In re McDonald, 204 M 61, 282 NW 677, 284 NW 888.

547.05 BILL OF EXCEPTIONS OR CASE, HOW AND WHEN SETTLED.

HISTORY. R. S. 1851 c. 71 s. 61; P. S. 1858 c. 61 s. 61; G. S. 1866 c. 66 s. 237; 1870 c. 74 s. 1; G.S. 1878 c. 66 s. 255; G.S. 1894 s. 5400, 1901 c. 26; R.L. 1905 s. 4202; G.S. 1913 s. 7832; G.S. 1923 s. 9329; M.S. 1927 s. 9329.

In the case of trials by the court or referee the time begins to run from the service of notice of the filing of the decision or report. See district rules, Minnesota Statutes 1941, Page 3982. Irvine v Meyers, 6 M 558 (394); State v Kelly, 94 M 407, 103 NW 15.

Where a party has failed to have a case or bill settled and allowed within the statutory period, he may, for good cause shown, secure an order of court granting an extension of time. The matter of granting or denying such an application lies almost wholly in the discretion of the trial court, and its action will not be reversed on appeal, except for a palpable abuse of discretion. Irvine v Myers, 6 M 558 (394); Cook v Finch, 19 M 407 (360); Volmer v Stagerman, 25 M 234; Bahnsen v Gilbert, 55 M 334, 56 NW 1117; Seibert v Minneapolis & St. Louis, 58 M 72, 59 NW 828; Loveland v Cooley, 59 M 259, 61 NW 138; State v Powers, 69 M 429, 72 NW 705; Nickerson v Wells, 71 M 230, 73 NW 959, 74 NW 891; State ex rel v Searle, 81 M 467, 84 NW 324; State v Kelly, 94 M 407, 103 NW 15; Johnson v Groth, 102 M 243, 113 NW 452.

The court may allow a case or a bill to be settled even after an appeal has been perfected. Pratt v Pioneer Press, 32 M 217, 18 NW 826; Loveland v Cooley, 59 M 259, 61 NW 138.

By participating without objection in the settlement of a case or bill after the statutory time has expired, a party waives any objection on that ground. Abbott v Nash, 35 M 451, 29 NW 65.

A party is not entitled to have a case or bill settled and allowed as a basis for a motion for a new trial, after the time to appeal from a final judgment has expired. Richardson v Rogers, 37 M 461, 35 NW 270.

It has been held that if a party admits "due service" he will be deemed to have waived the objection that the case or bill was not served in time. State ex rel v Baxter, 38 M 137, 36 NW 108.

By stipulation the parties may extend the time for serving and settling a case or bill. State ex rel v Baxter, 38 M 137, 36 NW 108; State v Powers, 69 M 429, 72 NW 705; State v Kelly, 94 M 407, 103 NW 15.

The primary object of section 547.05 is to secure the settlement and allowance of the case or bill when the details of the trial are fresh in the minds of counsel and the trial judge. Van Brunt v Kinney, 51 M 337, 53 NW 643.

The mere entertaining of a motion to settle and allow a case after the expiration of the statutory period does not in itself constitute an extension of time. Van Brunt v Kinney, 51 M 337, 53 NW 643.

If a case or bill is improperly served after the statutory time, it should be refused or promptly returned with the reason stated thereon. Van Brunt v Kinney, 51 M 337, 53 NW 643; Loveland v Cooley, 59 M 259, 61 NW 138.

The settlement and allowance of a settled case is jurisdictional and discretionary. Loveland v Cooley, 59 M 259, 61 NW 138; Winters v Minneapolis & St. Louis, 127 M 533, 149 NW 550; State ex rel v Stalberg, 128 M 538, 150 NW 924; State ex rel v Johnson, 136 M 465, 161 NW 782.

The limitation of time applies to all cases. Where a party appeals from a judgment he cannot, as a matter of right, propose a case at any time before the expiration of the six months in which an appeal might have been taken. State v Powers, 69 M 429, 72 NW 705.

The neglect of the adverse party to propose amendments within ten days after the service of the proposed bill or case is a waiver of the right to do so; but it does not extend or enlarge the time within which the party proposing the bill

or case is bound, in the absence of an order or stipulation extending the time, to present it to the judge or referee for allowance, that is, within 15 days after service of amendments or failure to do so within the ten days allowed. State ex rel v Searle, 81 M 467, 84 NW 324.

In an action to recover the possession of personal property, where a claimant intervened, and the court ordered judgment for plaintiff, the intervenor was not an adverse party required to be served. State ex rel v Flaherty, 98 M 526, 106 NW 1133.

The original instrument with file marks thereon was received in evidence, plus evidence of filing. The settled case showed no evidence of file marks. The court had a right to correct the settled case before appeal, so plaintiff's offer of amendment was in order. Minneapolis Plumbing v Arcade Investment Co. 124 M 317, 145 NW 37; Skar v McKenney, 135 M 477, 160 NW 247.

Mandamus will not lie to command a district judge to allow and sign a settled case after the expiration of the time fixed therefor by a stay of proceedings. State ex rel v Olsen, 124 M 537, 144 NW 755; State ex rel v Fish, 132 M 146, 155 NW 905.

The time of notice of settlement of a case prescribed by statute may be shortened by an order to show cause. Noonan v Spear, 125 M 475, 147 NW 654.

The discretionary power of a municipal judge to suspend sentence is in effect a stay. State v Fjolander, 125 M 529, 147 NW 273.

Defects in evidence and errors in charge are not reviewable without settled case or bill of exceptions. Wilson v Henningsen, 127 M 520, 148 NW 1081.

The findings of the trial court, in the absence of a settled case, are presumed to be within the issues litigated on the trial, whether presented by pleadings or not. State ex rel v District Court, 129 M 156, 151 NW 910.

Conceding that in a particular case the prevailing party may be entitled to propose and have settled and allowed a record containing the evidence and proceedings on the trial, the showing on this application for an order requiring the trial court to allow and sign the case proposed by the relator is not such as to justify the order prayed for. State ex rel v Jelley, 134 M, 276, 159 NW 566.

On an appeal from a judgment, where there is neither a bill of exceptions nor a settled case, the only matter that will be considered is whether the findings sustain the judgment. Anderson v City of Montevideo, 137 M 179, 162 NW 1073.

The court has power to extend the time limited for proposing and settling a case and to grant leave to propose a case after the time limited has expired. Stevens v Fritzem, 139 M 491, 164 NW 365, 165 NW 1073; Wright v Avenson, 174 97, 218 NW 453; Stebbins v Friend, 191 M 561, 254 NW 818.

Where a party to an action stipulates for a stay of all proceedings, settlement of a case or bill of exceptions is necessarily included. He is not entitled to have the case settled as a matter of right and the supreme court cannot control the discretion of the trial court. State ex rel v District Court, 155 M 497, 192 NW 937.

In an appeal from a judgment where the trial court has made several findings of fact, an assignment "that the findings of fact are not sustained by the evidence and are contrary to the evidence" is insufficient. Murphy v Casey, 157 M 1, 195 NW 627.

An order denying a motion for a new trial must be affirmed in the absence of a properly settled and certified case. Palmer v Palmer, 158 M 531, 197 NW 283.

An assignment of error that the evidence does not sustain the findings, there being several, does not challenge any finding. Crandall v Kroening, 169 M 120, 210 NW 637.

Where an appeal has been promptly taken and a settled case is needed to present and determine the appeal, and where the hearing of the appeal is not shown to be delayed and no prejudice shown, the courts are disposed to aid the presentation and hearing of the appeal on the merits. State ex rel v Enersen, 183 M 341, 236 NW 488.

When an order before the supreme court for review is based upon the records, no certificate of settled case is required. State ex rel v West, 185 M 225, 240 NW 892.

The trial judge did not abuse his discretion for refusing to excuse delay on account of the alleged financial inability of the plaintiff to procure a transcript. Elton v Northwestern National, 191 M 636, 253 NW 529.

In a case where no application for extension had been made, the trial court's discretion was not abused in denying relator's application for a settled case made nearly a year after the statutory period had expired. State ex rel v Guilford, 192 M 345, 256 NW 238.

Where the trial court has settled and allowed a case in obedience to a peremptory writ of mandamus issued by the supreme court, the case so settled cannot be stricken from the record on the ground that it was not properly settled. The remedy was in the mandamus proceeding within the time permitted for petitions for rehearing, for modification of the peremptory writ. Krom v Friend, 192 M 520, 257 NW 812.

Where the trial proceeds without any objection to pleadings, and the settled case fails to show any misconduct of counsel, assignments of error are not well taken. Hovda v Blekre, 193 M 218, 258 NW 305.

The trial judge cannot be ousted by an affidavit of prejudice of his jurisdiction to consider a motion for a new trial. State ex rel v District Court, 196 M 56, 263 NW 908.

Where a party is guilty of unjustified delay in applying to the court for an extension of time within which to have case settled and allowed so that the time allowed for that purpose by statute has expired, and such delay results in prejudice to adverse party, the supreme court will not interfere to control discretion of the district court. State ex rel v Wilson, 199 M 452, 272 NW 163.

An appeal from a judgment, there being no bill of exceptions or settled case, the only question that can be raised is that the findings of fact do not support the judgment. Schaefer v Thoery, 199 M 610, 273 NW 190.

The record containing no record of objections or exceptions to the dismissal of the jury, the error assigned that plaintiff was deprived of a jury trial cannot be considered. Nordby v Central Life, 201 M 375, 276 NW 278.

Where an order for a new trial is granted pursuant to a motion specifying errors of law occurring at the trial exclusively, it is the duty of the trial judge to declare in the order the grounds upon which the new trial is ordered. State ex rel v Moriarty, 203 M 27, 279 NW 835.

The trial court did not abuse its discretion in refusing to extend the time in which to settle and in refusing to settle a proposed case. Hartman v Phoenix, 203 M 388, 281 NW 364.

Where a case has been settled, the findings of the referee in a disbarment proceeding are not conclusive. In re McDonald, 204 M 65, 282 NW 677, 284 NW 888.

After a decision is made and filed in a case tried to the court, and the defeated litigant requests a stay, it is not necessary for the prevailing party to serve the usual written notice of the filing of the decision. Doyle v Swanson, 205 M 42, 284 NW 874.

It is within the discretion of the trial court to settle a case where an appeal from a judgment has been perfected within six months, even though the application to settle a case was not made until after the expiration of the six months. McGovern v Federal Bank, 207 M 262, 290 NW 575.

A stay of proceedings enlarges the time provided by section 547.05, for preparing and proposing a case, and a misapprehension as to the effect of a stay on the part of the court and counsel is sufficient excuse for allowing a case to be subsequently proposed. Schmitt v Village of Cold Spring, 215 M 572, 10 NW(2d) 727.

The appellate court is bound by the settled case as approved and allowed by the trial court, particularly when it accords with the version of both the court and the reporter, and where counsel claims prejudicial comments by the court which did not appear in the settled case, made no exception thereto at the time the comments were alleged to have been made. Merchants v St. P. Mercury, 218 M 386, 16 NW(2d) 463.

547.06 BILL OF EXCEPTIONS; WHEN JUDGE INCAPACITATED.

HISTORY. R.S. 1851 c. 71 s. 61; P.S. 1858 c. 61 s. 61; G.S. 1866 c. 66 s. 237; G.S. 1878 c. 66 s. 255; G.S. 1894 s. 5400; 1901 c. 26; R.L. 1905 s. 4203; G.S. 1913 s. 7833; G.S. 1923 s. 9330; M.S. 1927 s. 9330.

Irregularities in settling a case cannot be reviewed on appeal from the judgment; a district judge may settle a case tried by his predecessor; but a successor judge is not authorized in deciding or in making findings of fact in a case not tried by him; and if material issues remain undisposed of, it is deemed a mistrial. Bahnsen v Gilbert, 55 M 334, 56 NW 1117.

Where a judge who tried the case has quit office, another judge in the same district may hear and determine a motion for a new trial. Noonan v Spear, 125 M 477, 147 NW 654.

On appeal from a judgment, in the absence of a settled case or bill of exceptions, only the sufficiency of the findings to support the conclusions of law and judgment will be reviewed in the appellate court. Hammond v Flour City, 217 M 427, 14 NW(2d) 452.