CHAPTER 544

PLEADINGS

544.01 PLEADINGS, HOW REGULATED.

When the suit is brought against the principal it is not necessary to plead the fact of agency or the authority of the agent. Rausch v Aronson, 211 M 272, 1 NW(2d) 371.

A claim of the defendant stated in the answer to a complaint in an action begun in the conciliation court of Duluth and on appeal tried de novo in the municipal court need not be formulated to comply with the ordinary rules of pleading a counterclaim unless the other party so requests by proper motion; and certiorari is the proper method to review the judgment of the municipal court. Warner v Anderson, 213 M 376, 7 NW(2d) 7.

In an action by surety on an executor's probate bond against the principals on the bond, it is error to order judgment for plaintiff on the pleadings as amended without giving the defendant an opportunity to answer the amended portions of the complaint. It is fundamental, as it is a matter of orderly procedure, that a party should be entitled to formulate and present by appropriate pleading what he claims the facts to be and to meet his opponent's assertions by his own proof. When a complaint is amended after answer, the defendant is not required to answer de novo; and if he does not choose to do so, his original answer stands as his answer to the amended complaint. But if he makes timely election to answer the pleading as amended, judgment may not be entered against him until he has had the opportunity to exercise that right. U.S.F. & G. v Falk, 214 M 142, 7 NW(2d) 398.

Prior to the enactment of L. 1947, c. 498, the forms and proceedings in civil actions and the rules by which the sufficiency of the pleadings is to be determined are governed by statute under Minnesota Constitution, art. 6, s. 14. Nostdal v Watonwan County, 221 M 376, 22 NW(2d) 461.

A pleading should state facts and not conclusions of law; and where an answer, attempting to set forth that a stockholder seeking inspection did so not in good faith for a proper purpose but for the improper one of doing harm to the corporation, consists of allegations which either do not constitute defensive matter or which are mere conclusions of law, it is demurrable. State ex rel v Crookston Trust, 222 M 17, 22 NW(2d) 911.

Anomolies and uncertainties in Minnesota pleading. 11 MLR 430.

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

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

Right to legal relief on equitable issues in a suit under the code. 27 MLR 319.

544.02 CONTENTS OF COMPLAINT.

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

1. Title

The test of the sufficiency of a complaint on general demurrer is not whether it states the precise cause of action intended, or whether the pleader appreciated the nature of his remedy, or asked for appropriate relief, but whether the facts stated, expressly or inferentially, giving to the language the benefit of all reasonable in-

tendments, show the plaintiff to be entitled to some judicial relief. Hartford v Dahl, 202 M 410, 278 NW 591.

2. Statement

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

A demurrer raises an issue of law, the determination of which constitutes a trial by the court. It does not raise any question of fact, or a mixed question of law and fact. A demurrer admits all material facts well pleaded, including all necessary inferences or conclusions of law which follow from such facts. The test of a complaint on general demurrer is not whether it states the precise cause of action intended, or whether the pleader appreciated the nature of his remedy, or asked for appropriate relief, but whether the facts stated, expressly or inferentially, giving to the language the benefit of all reasonable intendments, show the plaintiff entitled to some judicial relief. Smith v Smith, 204 M 255, 283 NW 239.

In determining whether the complaint states a cause of action the test is whether the facts alleged, liberally construed, entitle the plaintiff to any relief either legal or equitable. In the instant case where respondent is in possession of funds as trustee for the plaintiff and others it was error to sustain a general demurrer to the complaint. The plaintiff may have misconceived the nature of his cause of action and demanded inappropriate relief, but the facts alleged, if proven, are sufficient to warrant relief. Lucas v Medical Arts Bldg. 207 M 380, 291 NW 892.

A complaint alleging in the alternative that one or the other of two defendants is liable but that plaintiff is unable to determine which one, states no cause of action since a complaint must state with ordinary directness facts which constitute a cause of action against each of them. Pilney v Funk, 212 M 398, 3 NW(2d) 792.

In an action by an insurer for subrogation to the rights of its named assured, and for recovery against the defendant, the complaint does not allege sufficient facts to state a cause of action. Every fact which a plaintiff must prove in order to maintain his action must be alleged. American Farmers Co. v Riise, 214 M 6, 8 NW(2d) 18.

The test of a complaint on general demurrer is not necessarily whether it states the precise cause intended or whether the pleader appreciated the nature of his remedy or asked for appropriate relief, but whether the facts alleged, giving to the language used the benefit of all reasonable intendments, show plaintiff to be entitled to some judicial relief. Nostdal v Co. of Watonwan, 221 M 376, 22 NW(2d) 461.

See State ex rel v Crookston Trust Co. 222 M 17, 22 NW(2d) 911, noted under section 544.01.

In an action under the emergency price control act of 1942 the government's complaint was sufficiently definite and certain to permit the defendant to meet the issues raised, when the complaint alleged: (1) defendant's failure to post selling prices prior to Nov. 20, 1945; (2) sales in excess of maximum prices; (3) sales made more than 30 days prior to bringing this suit, and no customer had instituted process; and (4) the government had no knowledge of the number of breaches by the defendant of the law relating to sales and prices. Bowles v Sigel, 5 FRD 108.

The complaint was insufficient in that it alleged damages to plaintiff's dock by reason of timber washed from defendant's dock, and did not allege or prove that navigation was impeded or obstructed, and as the allegations did not present a cause of action under the federal statute, the case was dismissed for lack of jurisdiction. Christianson v City of Duluth, 154 F(2d) 205.

3. Demand for relief

A motion to dismiss a complaint for failure to state a claim on which relief can be granted is a substitute for the former demurrer in actions at law and for

motions to dismiss for want of equity in suits in equity. A motion to dismiss a complaint for failure to state a claim on which relief can be granted admits existence and validity of claim as stated but challenges the plaintiff's right to relief. (Rule 12b). Dennis v Village of Tonka Bay, 151 F(2d) 411.

4. Generally

Where the complaint alleged an action for unpaid room rent and the answer alleged payment by transfer of property to plaintiff, together with a defense relating to a lease, a decision that plaintiff was entitled to recover was within the issues raised by the pleadings. Doyle v Swanson, 206 M 56, 288 NW 152.

Where facts pleaded fail to show any excuse for a delay of more than 62 years in bringing suit to enforce a known right, laches appears as a matter of law for equity aids the vigilant and not the negligent. Synell v Town of Sharon, 206 M 437, 289 NW 44.

Where contract exhibits which are alleged to be the foundation of a cause of action are made a part of the pleading, the sufficiency of such pleading to establish a cause of action may be determined by the terms of the exhibits where their provisions are plain and unambiguous, and their provisions prevail over conflicting allegations in the pleadings. Markwood v Olson, 207 M 70, 289 NW 830.

In pleading fraud the material facts constituting fraud must be specifically alleged; a general charge of fraud is insufficient to state a cause of action. Fraud is not to be presumed but must be affirmatively proved and an allegation of fraud must be based upon material facts and carries the burden of proof throughout the trial. Parrish v Peoples, 214 M 589, 9 NW(2d) 225.

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

Splitting causes of action; suit by insurer not bar by judgment for personal injuries obtained by the insured. 15 MLR 356.

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

Causes of action blended. 22 MLR 498.

544.03 DEMURRER TO COMPLAINT.

SUBD. 1. GROUNDS
SUBD. 2. REQUISITES
SUBD. 3. WAIVER
SUBD. 4. HEARING AND DETERMINATION GENERALLY

SUBD. 1. GROUNDS

Plaintiff bank acquired a promissory note admittedly executed by defendant. It had been properly indorsed by the payee to another and by the latter indorsed in blank when plaintiff came into possession of it. Plaintiff in the first instance acquired the note as collateral security for obligations held by it and another bank against last indorser. Plaintiff later acquired full title in its own behalf and such other bank, retaining possession of the instrument. Defendant having failed to meet the obligation, suit was brought by plaintiff-holder in its own name without joining such other bank, which concededly had a beneficial interest in the instrument. Defendant secured dismissal on the ground that there was misjoinder of parties plaintiff. The order refusing new trial is reversed as the law is well settled that an action on a bill or note payable to bearer, or indorsed in blank, may be maintained in the name of the nominal holder; that possession by such nominal holder is prima facie sufficient evidence of his right to sue, and cannot be rebutted by proof that he has no beneficial interest, or by anything else but proof of mala fides. Northwestern National Bank v Hawkins, 205 M 490, 286 NW 717.

A demurrer for misjoinder was properly sustained to a complaint by husband and wife, joint owners of a home, to recover for depreciation of the value of the

use thereof by defendant's wrongful maintenance of a nuisance upon adjacent property and by the husband alone to recover damages sustained by his family from the noxious odors the members thereof were subjected thereto by the same nuisance. King v Socony-Vacuum Co. 207 M 573, 292 NW 198.

Where there is a defect of parties, either plaintiff or defendant, and the defect appears on the face of the complaint, the objection must be taken by demurrer; if the defect does not so appear, objection must be taken by answer; if neither objection is made, the defect is deemed waived. Flowers v Germann, 211 M 412, 1 NW(2d) 424; Whipple v Mahler, 215 M 578, 10 NW(2d) 771.

Where a demurrer is interposed to the whole pleading and such pleading contains at least one good defense, the demurrer is bad. First & Lumbermen's Bank v Buchholz, 220 M 97, 18 NW(2d) 771.

Plaintiff was injured while exercising defendant's pet dog. Since there was no allegation in the complaint that defendant was in any way responsible for the icy conditions of the street or was possessed of any other knowledge regarding such conditions than was the plaintiff, the trial court properly sustained defendant's general demurrer. Woodring v Pastoret, 221 M 50, 21 NW(2d) 97.

For the purpose of testing the sufficiency of the pleading, a demurrer admits all well-pleaded allegations of fact, and further admits the legal and factual inferences fairly and reasonably drawn therefrom as distinguished from bare conclusions or assertions of law; and although mandamus lies to set discretion in motion on the part of a quasi-judicial body, it is neither available for the purpose of controlling or guiding such discretion nor for the purpose of reviewing the exercise thereof. Zion Church v City of Detroit Lakes, 221 M 55, 21 NW(2d) 204.

If the plaintiff seeks to recover on the theory that the contract was one for a third party beneficiary, allegations must be sufficient to show that the contract was intended to benefit him directly and that he was not merely an incidental beneficiary. Gjovik v Bemidji Local Bus Line, 223 M 522, 27 NW(2d) 273.

See, Dennis v Village of Tonka Bay, 151 F(2d) 411, under section 544.02.

Waiver distributed among election, estoppel, contract and release. 11 MLR 415.

SUBD. 2. REQUISITES

When a complaint contains causes of action which cannot properly be united, and they are mingled and combined, the defendant is not required to move, in the first instance, for the separation of the several causes of action in order that he may demur when such separation has been accomplished. He may demur for misjoinder, though the pleading in form sets forth by one cause of action, if in reality it embraces two or more that cannot be joined in any form. Jewell v Jewell, 215 M 190, 9 NW(2d) 513.

Where a demurrer is interposed to the whole answer and such answer contains at least one good defense the demurrer is bad. First & Lumbermen's Bank v Buchholz, 220 M 97, 18 NW(2d) 771.

The test of a complaint on general demurrer is not necessarily whether the complaint states the precise cause intended or whether the pleader appreciated the nature of his remedy or asked for appropriate relief, but whether the facts alleged, giving to the language used the benefit of all reasonable intendments show plaintiff to be entitled to some judicial relief. Nostdal v County of Watonwan, 221 M 376, 22 NW(2d) 461.

SUBD. 3. WAIVER

Where the parties while before the railroad and warehouse commission fully participated by consent and without objection to the proceedings and who likewise appeared in the district court and entered formal appearances waived defects in the pleading. State v Rock Island Motor Transit Co. 209 M 105, 295 NW 519.

The question whether there is a misjoinder of parties must be raised by answer or demurrer. Misjoinder of causes must be demurred to or it is waived.

Such questions cannot be raised for the first time on appeal from the judgment. Whipple v Mahler, 215 M 578, 10 NW(2d) 771.

SUBD. 4. HEARING AND DETERMINATION

Simply because the demurrer is overruled it does not follow that the defendant is out of court. The demurrer merely admits the facts for the purpose of testing its validity. It is not an admission of them for all purposes. Failure to apply for leave to plead over likewise is not a concession of them. Plaintiff must show proof to the satisfaction of the court. Defendant still has the opportunity to cross-examine plaintiff's witnesses. Kemerer v State Farm Mutual, 206 M 328, 288 NW 719.

The overruling of demurrer to the complaint does not bar the defendant from questioning the sufficiency of the complaint to state a cause of action by motion for judgment on the pleadings after the answer and reply are filed. Parsons v Town of New Canada, 209 M 132, 295 NW 909.

A demurrer raises only a question of law, not one of fact or of mixed issues of law and fact, and is for the court's determination. Smith v Smith, 204 M 255, 283 NW 239; Nostdal v County of Watonwan, 221 M 376, 22 NW(2d) 461.

GENERALLY

When at the trial no motion was made to make the complaint more specific and certain with regard to attorneys fees and no demurrer was interposed, the supreme court on appeal will not reserve the judgment because of inadequacy of pleading. Becker County Bank v Davis, 204 M 603, 284 NW 789.

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

A demurrer for the purpose of determining the sufficiency of the facts alleged in the pleading admits all facts well pleaded but not those not well pleaded or which are conclusions of law. State ex rel v Crookston Trust Co. 222 M 17, 22 NW(2d) 911.

A demurrer admits all well-pleaded allegations of material fact and all legal and factual inferences fairly and reasonably to be drawn therefrom as distinguished from bare conclusions or assertions of law, and on general demurrer a pleading is to be liberally construed in support of its sufficiency. Matheson v Gullickson, 222 M 369, 24 NW(2d) 704.

Doctrine of aider of pleading. 12 MLR 97, 120.

544.04 CONTENTS OF ANSWER.

Where defect of parties is claimed in a cause, objection must be raised either by demurrer or answer. If neither is done, defendant cannot later raise the objection by motion for dismissal, for judgment on the pleadings, for direction of verdict, or by objection to the evidence. Serr v Biwabik Co. 202 M 166, 278 NW 355.

Where facts pleaded in the complaint show the cause to be barred by the statute of limitations, and no facts are shown to forestall its operation, demurrer to the complaint should be sustained. The defense of the statute of limitations is an affirmative defense and should be specially pleaded. Parsons v Town of New Canada, 209 M 129, 295 NW 907.

A defendant need not plead laches in his answer in order to avail himself of that defense. Cantianey v Bose, 209 M 407, 296 NW 491.

On demurrer as in other cases, general allegations are controlled by specific ones. Inferences or conclusions from specific allegations which follow as a matter of law prevail over general allegations to the contrary. Wiseman v Northern Pacific, 214 M 106, 7 NW(2d) 762.

It is a matter of orderly procedure that a party should be entitled to formulate and present by appropriate pleading what he claims the facts to be and to meet his opponents assertions by his own proof. Before judgment is entered against him, this opportunity should be accorded him. It is true that when a complaint is amend-

ed after answer the defendant is not bound to answer de novo; but if he makes timely election to answer the pleading as amended, judgment may not be entered against him until he has had the opportunity to exercise that right. Ermantrout v American Ins. Co. 63 M 194, 65 NW 270; Kelly v Anderson, 156 M 71, 194 NW 102; U. S. F. & G. v Falk, 214 M 142, 7 NW(2d) 398.

In this action to recover on a conditional sale note the purchase price of baby chicks the evidence supports the verdict of the jury as to special damages to the defendant resulting from loss of production of eggs by the chicks purchased. Lanesboro Hatchery v Forthum, 218 M 377, 16 NW(2d) 326.

In master and servant cases assumption of risk and contributory negligence are affirmative defenses and must be so pleaded. Skow v Dahl Tire, 129 M 324, 152 NW 755; Crotty v Gt. Northern, 120 M 535, 139 NW 948; Kummerstad v Gt. Northern, 120 M 376, 139 NW 713; Foley v Bennett, 219 M 249, 17 NW(2d) 509.

Denials, either specific or general when properly pleaded, place in issue the material allegations to which they are directed in a complaint, and an answer consisting thereof is not subject to demurrer. Under a general denial, any fact tending to controvert directly the material allegations of a complaint may be submitted in evidence. Alansky v Northwest Airlines, 224 M 138, 28 NW(2d) 183.

Defenses provable under a general denial in replevin cases. 5 MLR 563.

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

Evidence of contributory negligence disclosed during the trial of the case but not pleaded in the answer. 16 MLR 719.

Illegality as an affirmative defense; proof admissible under general denial. 16 MLR 720.

Violation of the anti-trust laws as a defense in civil actions. 31 MLR 507.

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

Failure to give the defendant notice of the application for an order for judgment is an irregularity which renders the judgment vulnerable on direct attack; and since, in the instant case, the judgment was unauthorized rather than merely erroneous, it may be vacated. It is immaterial that the six months' time for appeal from the judgment expired before any application for relief was made. Kemmerer v State Farm Mutual, 206 M 325, 288 NW 719.

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

The statutory remedy which permits a defendant not personally served to set aside a default judgment and defend on the merits within one year from judgment should be allowed as a matter of right; but in the instant case the application of the non-resident defendant to set aside a judgment taken by default, and for leave to defend, was properly denied where the statutory right thereto had been lost by unexcused lack of diligence. Kane v Slattman, 209 M 138, 296 NW 1.

The phrase found in section 508.01 provided that "as against a defendant who does not answer, the relief granted to plaintiff shall not exceed that demanded in the complaint," has by decision law been so construed as to hold that on default the relief which may be awarded to the plaintiff is limited in nature and degree to the relief demanded in the complaint, whether the proof justifies this or greater relief. Pilney v Funk, 212 M 398, 3 NW(2d) 792.

Irregularity of procedure in the assessment of recovery in the entry of judgment upon default cannot be raised upon appeal to the supreme court unless the appellant has applied to the trial court for relief against such irregularity. If the supreme court were to entertain such a question upon appeal, it could upon reversal only send the case back to the trial court for a proper assessment of the recovery.

The defaulting defendant has a prompt and efficacious remedy by application to the trial court. The defendants in the instant case not having sought relief in the trial court for the clerk's alleged irregular action in entering the judgment will not be heard upon that question in the supreme court. Whipple v Mahler, 215 M 578, 10 NW(2d) 771.

Under district court rule No. 22, an affidavit of merit is unnecessary if the proposed answer shows merit and is verified on personal knowledge. Peterson v Davis, 216 M 60, 11 NW(2d) 800.

The exclusion of divorce cases from the provisions of sections 543.13 and 544.32 does not affect the inherent power of the court to grant relief to a party who has been denied an opportunity to defend in a divorce action under such circumstances as amount to a fraud on the court and the administration of justice. Kahaley v Kahaley, 216 M 175, 12 NW(2d) 182.

See, Lanesboro Hatchery v Forthum, 218 M 377, 16 NW(2d) 326, noted under section 544.04.

Counter-claim for wrongful attachment. 5 MLR 306.

Right of shipper to counter-claim when sued for freight. 5 MLR 550.

Claims barred by limitations as a defense. 13 MLR 395.

Right of surety to set-off the principal's claim against the creditor; effect of principal's insolvency. 16 MLR 217.

544.06 DEFENSES, HOW PLEADED; ANSWER AND DEMURRER.

Pleading inconsistent defenses. 23 MLR 840.

544.07 JUDGMENT ON DEFENDANT'S DEFAULT.

The statutory remedy which permits a defendant not personally served to set aside a default judgment and defend on the merits within one year from judgment should be allowed as a matter of right, which, though qualified in certain respects, is not discretionary with the trial court; but in the instant case the application of a non-resident to set aside a judgment taken by default and for leave to defend was properly denied where the statutory right thereto had been lost by unexcused lack of diligence. Kane v Stallman, 209 M 138, 296 NW 1.

See, Whipple v Mahler, 215 M 578, 10 NW(2d) 771, noted under section 544.05.

See, rules of the district court. M.S.A., p. 4195.

Issue of payment of note not raised by a general denial. 1 MLR 462.

Sufficiency of answer to warrant evidence of contributory negligence. 1 MLR 462.

Error in refusal to set aside a default judgment for negligence of attorney. 8 MLR 622.

544.08 DEMURRER OR REPLY TO ANSWER.

Pursuant to the rule that where there is a material averment, which is traversable, but which is not traversed by the other party, it is admitted, if a fact is admitted in the pleading on which the case is tried, it is in general assumed without other evidence to be conclusively established for the purposes of the trial, because a party is estopped by the allegations in his own pleading. So in the instant case the settlor, by admitting in his reply execution and delivery of the instrument upon which the defense was based, admitted the validity of such instrument. Fortune v First Trust Co. 200 M 367, 274 NW 524.

Whatever tends to controvert directly the allegations in a complaint may be shown defensively under a general denial. It therefore logically follows, where plaintiff's complaint in suit for trespass alleged only fact of title generally and without disclosing means by which acquired, and defendant's answer pleaded generally that its alleged acts of trespass were consented to by plaintiff but without

pleading anything more, that plaintiff, under his reply denying all new matter, could assail a written grant of easement, introduced by defendant defensively against the charged trespass, upon the ground that grant was the result of a mutual mistake between the parties thereto, defendant being in privity wih the grantee therein named. Lawrenz v Langford Electric Co. 206 M 316, 288 NW 727.

As against a general demurrer, a complaint must not leave to remote and difficult inference any essential of the cause of action relied upon; nor may the court in passing upon the issues presented by the demurrer act upon mere suspicion or jump at what may be wholly unwarranted conclusions. Twin Ports v Whiteside, 218 M 78, 15 NW(2d) 125.

A paragraph in an answer even if it does not set up an independent defense is not demurrable if it is material on a constitutional question raised in another portion of the answer. A demurrer will lie only to a whole pleading or to the whole of a single cause of action or defense. State v Chgo. Great Western Ry. Co. 222 M 504, 25 NW(2d) 294.

Where a demurrer is interposed to a whole pleading and such pleading contained at least one good defense the demurrer is bad. First & Lumbermen's Bank v Buchholz, 220 M 97, 18 NW(2d) 771.

The only ground for a demurrer to an answer is that it does not state facts sufficient to constitute a defense or counterclaim. The demurrer does not bring up for consideration the materiality or relevancy of the allegations in the answer, nor does it constitute a challenge thereto because of redundancy. The demurrer must be to the whole of any defense pleaded rather than to a portion. Alansky v Northwest Airlines, 224 M 138, 28 NW(2d) 183.

Widow was advised by her attorneys to permit a $7,000 mortgage to be foreclosed and to acquire the property through the mortgagor rather than to probate the estate. The day before the period of redemption expired an assignee of a mechanic's lien being foreclosed redeemed from the foreclosure and claims title. The widow's attorney had died, and she was absent from the state at the time of redemption. The party making the redemption knew of the widow's mistake. She had not been negligent or careless, and had relied on her attorneys to protect. The demurrer to the complaint of the plaintiff is rightfully overruled. The court will not permit unjust enrichment of defendants. Lee v Construction Service, 224 M 149, 28 NW(2d) 69.

Right to plead set-off and counterclaim in a reply. 5 MLR 487.

544.10 SHAM AND FRIVOLOUS PLEADINGS.

The court erred in striking out the answer as sham and frivolous and granting judgment for the full amount demanded in the complaint, for in this action for money had and received the general denial in the answer was not so qualified by admissions or defensive matters pleaded that it could be struck as frivolous. Nor could it be struck as sham, for in no event can it be said that the denial of unjust enrichment as to a substantial amount of the sum demanded was false. The defense stated in the answer does not appear frivolous from a mere inspection, and whether true and adequate should be determined upon a trial and not upon conflicting affidavits. Zinsmaster Baking Co. v Commander Milling Co. 200 M 128, 273 NW 673.

Whether the owner is sued in tort for the result of negligently constructing a concealed trap on the premises, evidence that some wrong of the lessee rather than that of the owner is the cause of plaintiff's injury is admissible under a general denial. Hence an allegation that the lessee had in the lease assumed liability to indemnify the lessor for any damage either to person or property due to the demised premises, regardless of cause, was properly stricken. Murphy v Barlow, 206 M 537, 289 NW 567.

An answer shown to be false in fact may be stricken as sham and judgment ordered notwithstanding, the same as for want of an answer. Kirk v Welch, 212 M 300, 3 NW(2d) 426.

Allegations of an answer shown to be false in fact may be stricken as sham on motion. Independent School v City of White Bear Lake, 208 M 29, 292 NW 777;

Minnesota Casket Co. v Swanson, 215 M 150, 9 NW(2d) 324; Meuwissen v Westerman, 218 M 477, 16 NW(2d) 546.

A frivolous pleading is one which does not in any view of the facts pleaded present a defense to the action. Essential fact issues being raised, the reply should not have been stricken. Hasse v Virginia Assn. 208 M 457, 294 NW 475.

An answer shown to be false in fact may be stricken as sham and judgment ordered notwithstanding the same as for want of an answer. Kirk v Welch, 212 M 300, 3 NW(2d) 426; Minnesota Casket Co. v Swanson, 215 M 150, 9 NW(2d) 324.

Where complaint alleged in detail the full performance of the terms of a contract for deed, portions of the answer constituting a general denial and making general allegations of default were properly stricken upon plaintiff's motion, supported by plaintiff's detailed sworn statement of payments made, uncontradicted and undisputed by defendants. McReavy v Zeimes, 215 M 239, 9 NW(2d) 924.

A motion to vacate a previous order striking an answer as sham or for leave to amend the answer is addressed to the discretion of the trial court. Nelson v Auman, 216 M 407, 13 NW(2d) 38; Simons v Cowan, 217 M 317, 14 NW(2d) 356.

The plaintiff's answer to the complaint of the intervenor having been stricken, and there having been a full trial upon a motion affecting substantial rights or involving the merits, the order made upon such motion is as conclusive upon the issues necessarily decided as is a final judgment, and as to such issues the entire matter is res judicata. Nelson v Auman, 221 M 46, 20 NW(2d) 703.

Where the amended answer substituted sham and insufficient allegations as to the right of one of the defendants to counter-claim for services, and alleged that plaintiff was indebted to him for such services, for the sham allegations of the original answer that there was an estoppel, the amended answer was properly stricken. Kafka v O'Malley, 221 M 490, 22 NW(2d) 845.

An order denying a motion to strike pleadings as sham, frivolous, or irrelevant is not appealable. The relevancy or materiality of such allegations may be treated on trial by the objection to the admission of evidence thereunder, notwithstanding the motion to strike has been denied. Alansky v Northwest Airlines, 224 M 138, 28 NW(2d) 183.

On motion to strike out an answer as sham, the duty of the court is to determine whether there is an issue to try, and not to try the issue. An answer is sham when it is clearly and indisputably false and tenders no real issue. Jasperson v Jacobson, 224 M 76, 27 NW(2d) 780.

544.12 INTERPLEADER.

Requirement of privity. 11 MLR 172; 18 MLR 812.

Requirement of identity of claim. 23 MLR 232.

544.13 INTERVENTION.

Where in a garnishment the garnishee summons is served on the garnishee before the summons in the main action is issued and delivered to the officer for service, and a subsequent garnishment is regularly and lawfully made by a third party before the defect in the first garnishment has been waived, the plaintiff in the second garnishment is entitled to intervene in the first and claim the right of precedence in the fund or property in the hands of the garnishee. Nash v Braman Co. 210 M 196, 297 NW 755.

Appellant's application to intervene in the registration proceeding made more than a year after judgment therein was rendered was correctly denied. Dean v Rees, 211 M 103, 300 NW 396.

An order granting the motion of an omitted property owner to intervene in eminent domain proceedings by the state is not appealable. Antl v State, 220 M 129, 19 NW(2d) 78.

An order denying the state permission to interpose and file answers alleging that there was no taking of or damage to lands of persons permitted to intervene

in condemnation proceeding instituted by the state is appealable. State ex rel v Anderson, 220 M 139, 19 NW(2d) 70.

The intervenors ask to intervene in order to obtain an order from the court enjoining plaintiffs from litigating their claims or in any way representing them in the class action commenced by plaintiffs. Rule 24 (a)(2) does not authorize employees who were similarly situated to intervene in an action by other employees under the fair labor standards act in behalf of themselves and others similarly situated, for unpaid compensation, where intervenors sought to deprive plaintiffs of the right to represent intervenors, since intervenors would not be bound by the judgment. Fink v Oliver Iron Mining Co. 65 F. Supp. 316.

Complaint by employee to recover for himself and named plaintiffs, "and other employees too numerous to mention whose names will be disclosed at the trial," liquidated damages under the fair labor standards act, was of such nature that the court on defendant's motion properly ordered a dismissal as to all unnamed employees who did not qualify as intervening plaintiffs by entering an appearance within 20 days of the date of the order. Schempf v Armour, 5 FRD 294; Smith v Cudahy, 5 FRD 298, 299.

Respective rights of owner and possesser when the property is converted by a third party. 22 MLR 863.

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

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

Procedure for compensation. 29 MLR 214.

544.14 DEPOSIT WHEN NO ACTION IS BROUGHT.

Involuntary bailee; absolute liability in conversion for misdelivery. 6 MLR 579.

544.15 SUBSCRIPTION AND VERIFICATION.

The remedy for a defective verification of pleading or want of verification, when required, is a prompt return of the pleading. Hahn v Foley Bros. 221 M 279, 22 NW(2d) 3.

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

544.16 PLEADINGS LIBERALLY CONSTRUED.

In determining whether a complaint states a cause of action the test is whether the facts alleged, liberally construed, entitle plaintiff to any relief, either legal or equitable. In the instant case, it is clear that respondent is in possession of funds as trustee for plaintiff and others, and it was error in the trial court to sustain a general demurrer to the complaint. Lucas v Medical Arts Bldg. 207 M 380, 291 NW 892.

The complaint stated a cause of action for negligence where it alleged that defendants "wrongfully, unlawfully, wilfully, and maliciously" set fire to a wooden structure and that they "wrongfully, unlawfully, carelessly, and negligently" left a can of inflammable oil near the burning building, and therefore was governed by the six-year statute of limitations, section 541.05. Allegation of the facts constituting the crime of arson was mere setting out of the circumstances which created the opportunity for committing the tort. Villaume v Wilkinson, 209 M 330, 296 NW 176.

A railroad is not negligent for failure to warn a spectator, standing on a highway witnessing a fire caused by a wreck, of the danger that a tank car full of gasoline engulfed in the flames is likely to explode, since the risk is obvious and a warning under such circumstances would not communicate to the party knowledge which he did not already possess or apprise him of danger of which he was not aware. Wiseman v Northern Pacific Ry. Co. 214 M 101, 7 NW(2d) 672.

Under our system, forms of proceedings in civil actions and the rules by which the sufficiency of pleadings is to be determined are governed by statute. The test of a complaint on general demurrer is not necessarily whether it states the precise cause intended or whether the pleader appreciated the nature of his remedy or asked for appropriate relief, but whether the facts alleged, giving to the language used the benefit of all reasonable intendments, show plaintiff to be entitled to some judicial relief. A demurrer raises only an issue of law, not one of fact or of mixed issues of law and fact, and is for the court's determination. Nostdal v County of Watonwan, 221 M 376, 22 NW(2d) 461.

544.17 IRRELEVANT, REDUNDANT, AND INDEFINITE PLEADINGS.

A party is not only bound 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, and where, as in the instant case, and with respect to attorney's fees, no demurrer was interposed and no motion was made to make the complaint more specific, the appellate court will not reverse the judgment of the trial court with respect to attorney's fees on the ground of inadequacy of pleading. Becker County Bank v Davis, 204 M 603, 284 NW 789.

544.20 ORDINANCES AND LOCAL STATUTES.

Since the Declaration of Independence the law of Great Britain and its dependencies is the law of a foreign country, and like any other foreign law is a matter of fact with which courts of this country cannot be presumed to be acquainted or take judicial notice of but which must be pleaded and proved. In the case at bar, the defendant was not chargeable with constructive notice of a title deed recorded or registered in the province of Saskatchewan. Greear v Paust, 202 M 633, 279 NW 568.

In an action to enjoin and recover damages because of a nuisance caused by a public utility whose plant permitted cinders, smoke and ashes, obnoxious substances and odors to permeate the air and neighborhood surrounding the plant, it was not error of the trial court in permitting the jury to view the premises or in limiting the number of witnesses to testify to the condition or to exclude a criminal ordinance of the city. The evidence was sufficient to prove the facts alleged without the introduction of the additional testimony offered. Jedneak v Mpls. General Electric Co. 212 M 226, 4 NW(2d) 326.

An ordinance prescribing standards of conduct, being an evidentiary fact in a negligence case, although not pleaded may be proved like any other fact tending to prove or disprove negligence as an ultimate fact. Christensen v Hennepin Transportation Co. 215 M 395, 10 NW(2d) 406.

Violation of statute or ordinance as negligence or evidence of negligence. 19 MLR 676.

544.21 INCORPORATION, PLEADING AND PROOF.

General denial of corporate existence. 1 MLR 181.

Proof of corporate existence; best evidence rule. 5 MLR 475.

544.23 CONDITIONS PRECEDENT.

Alleging performance of conditions precedent. 5 MLR 147.

544.24 ITEMS OF ACCOUNT, HOW PLEADED.

Bill of discovery and bill of particulars. 18 MLR 889.

Proof of payment under a general denial. 27 MLR 318.

544.25 PLEADINGS IN SLANDER AND LIBEL.

Notwithstanding the fact that benevolent and beneficial associations, corporate and non-corporate, have charitable features, they are liable in tort the same as other groups of individuals; and criticism and comment concerning services rendered by an attorney at law and imputing to him gross neglect and unskillfulness, if untrue, are slanderous and actionable per se. High v Supreme Lodge, 214 M 164, 7 NW(2d) 675.

When words charged as defamatory are not so upon their face, it is for the court to determine whether the construction of the language put forward by innuendo is permissible. In the case at bar the innuendo of insolvency or of financial embarrassment here pleaded is not warranted by the language used. Marudas v Odegard, 215 M 357, 10 NW(2d) 233.

Extrinsic facts necessary to render words libelous. 13 MLR 21, 26.

Communications between an attorney and client; absolute or qualified proof. 13 MLR 384.

Insanity as a defense to civil liability. 18 MLR 356.

Basis for liability for defamation by radio. 19 MLR 611.

544.27 JOINDER OF CAUSES OF ACTION.

If one sues on a contract, he must litigate all claims he then has thereunder. Such claims constitute but one cause of action. Doyle v City of St. Paul, 206 M 543, 289 NW 785.

A class suit cannot be maintained under section 540.02 where the sole relief sought is the recovery of money or damages arising out of distinct and separate transactions of each of several plaintiffs with the defendant because each plaintiff has a speedy and adequate remedy at law. Thorn v Hormel, 206 M 589, 289 NW 516.

A stockholder bringing a representative action on a cause of action belonging to the corporation is not entitled in the same action to recover a judgment against the corporation on a debt or other liability which he claims it owes to him. Briggs v Kennedy, 209 M 312, 297 NW 342.

Where as the result of an automobile collision the owner has but one indivisible cause of action against the wrongdoer for injuries to his person and damage to his car, the wrongdoer may not be subjected to more than one recovery. Recovery on part of the cause bars recovery on the remainder. Hayward v State Farm Mutual, 212 M 500, 4 NW(2d) 316.

In an action against a tort-feasor based on negligence the plaintiff has no right to join the tort-feasor's indemnitor as a party defendant. Fjellman v Weller, 213 M 458, 7 NW(2d) 521.

It is firmly established that in order that two or more causes of action may be united in the same pleading the result must be one that affects all parties to the action. Jewell v Jewell, 215 M 195, 9 NW(2d) 513.

Under the rules of conflict of laws that substantive rights acquired under the laws of foreign state are enforceable in this state, and procedural matters are governed by our own laws, the fact that section 260.11 (1) of the Wisconsin statutes permit joinder of defendant and his insurer, does not authorize a joinder in Minnesota, there being no statute permitting it. Anderson v State Farm Mutual, 222 M 428, 24 NW(2d) 837.

Joinder of parties defendant in tort actions. 1 MLR 428.

Recovery upon either general statute or railway statute under one complaint. 10 MLR 417, 422.

Meaning of possession. 16 MLR 611.

Prevention of multiplicity of suits. 16 MLR 679.

Causes of action blended. 22 MLR 498, 510.

Joinder and several suits against master and servant for tort servant. 26 MLR 730.

544.29 AMENDMENTS OF COURSE, AND AFTER DEMURRER.

In a malpractice case there was no error in permitting an amendment alleging that both defendants were employed to render medical services and that they were copartners; nor is the date of such amendment taken as the date of the commencement of the action in determining the bar of the statute of limitations. Schanil v Branton, 181 M 381, 232 NW 708.

After amendment of the complaint, the defendant is not bound to answer de novo but may let his original answer stand as an answer to the amended complaint; but if he makes a timely election to answer the pleading as amended, judgment may not be entered against him until he has had an opportunity to exercise that right. U.S. F. & G. v Falk, 214 M 138, 7 NW(2d) 398.

Where a motion to strike an answer as sham and frivolous is made before the time to amend has expired and the defendant, before the expiration of such time, interposes an amended answer as of course, the motion to strike must be dismissed; but if the defendant instead of taking a dismissal of the motion to strike procures continuances of the hearing on the motion, he waives the right to a dismissal thereof and consents that thereafter the motion to strike shall be in force and effect as to the amended answer. Kafka v O'Malley, 221 M 490, 22 NW(2d) 845.

Effect of amendment stating new cause of action, the statute of limitations having run. 1 MLR 261.

Amendment of pleading under the federal employers liability act. 3 MLR 132.

Amendment; departure from law to law. 3 MLR 132.

Amendment an aider of pleadings. 12 MLR 97.

544.30 AMENDMENT BY ORDER.

Where inadvertently the name of a defendant is omitted from the title of the action in the summons, but appears in the title of the action in the complaint attached to and personally served on such defendant with the summons, said complaint stating a cause of action against him by name, the court properly amended the summons so as to conform to the complaint on plaintiff's motion made and heard simultaneously with defendant's special appearance to vacate the service of summons on the ground that he was not named as a defendant therein. Griffin v Faribault Fair & Agric. Assn. 203 M 97, 280 NW 7.

Where the purchaser both in the conditional sales contract and in the license used his son's name, and the insurance policy covering theft, robbery, and pilferage, was made out in the father's name, in an action to recover from the insurance company the trial court did not err in permitting the complaint to be amended so that the son became the plaintiff. Mullany v Firemans Insurance Co. 206 M 29, 287 NW 118.

Defendant in a personal injury action, after the evidence was in, asked permission to amend the answer to plead contributory negligence. There was no abuse of discretion in denying the request; nor did the evidence warrant submission of an issue of contributory negligence. Guin v Mastrud, 206 M 382, 288 NW 716.

Where suit for services rendered was brought against a corporation and it developed during the trial that at the time the services were rendered the defendants conducted their business as a partnership, it was error on the part of the trial court to permit an amendment allowing the case to proceed against the partners. Parties cannot be brought into court by a mere amendment of pleadings. Guy v Dictating Machine Co. 208 M 534, 294 NW 877.

Where by creditor's action it was sought to set aside a conveyance by the defendants to their daughters as fraudulent to creditors, the trial court properly denied the plaintiff's motion made at the time the plaintiff moved for a new trial

to amend his complaint so as to allege that the conveyance in question was a mortgage to the daughters. Blodgett v Hollo, 210 M 298, 298 NW 249.

See U. S. F & G v Falk, 214 M 138, 7 NW(2d) 398, under section 544.29.

Where during trial defendant moved to amend his answer by asking for a reformation of a contract on which the action was brought, the motion was properly denied. Bass v Ring, 215 M 11, 9 NW(2d) 234.

Pleadings are but means to an end, the end being the proper administration of the substantive law; and, since the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. Where all the testimony came into the case without objection, all issues therein were tried by consent, and it was therefore permissible for the court to allow an amendment of the pleadings to conform to the proof. Jasinski v Keller, 216 M 15, 11 NW(2d) 438.

Where a claim has been tried in the probate and district courts on the theory of reasonable value of services and, at the close of the district court trial, a motion is made to amend the claim to one for damages based on an oral contract to convey real estate, and where, subsequent to trial and before findings of fact are filed, a motion is made by the claimant to withdraw the amendment, findings of fact allowing the claim on the theory of reasonable value of services constitute granting of the motion to withdraw the amendment even though no formal order is filed permitting such withdrawal. Hallock's Estate, 221 M 25, 20 NW(2d) 881.

The federal rules do not permit a new cause of action to be pleaded by amendment after the statute of limitations has run thereon; but the general wrong suffered and the general conduct causing such wrong are the controlling considerations in determining whether amendment sets up a new and different cause of action barred by limitations. Bowles v Tankar Gas, 5 FRD 230.

Amendment under wrongful death statute. 10 MLR 424.

Amendment an aider of pleadings. 12 MLR 97, 103.

Amendments in cases relating to the obtaining of goods under false pretenses. 25 MLR 791.

Mistake and the contractual interests. 28 MLR 460.

544.31 AVERMENTS.

Whatever tends to controvert directly the allegations in a complaint may be shown defensively under a general denial. It therefore logically follows, where plaintiff's complaint in suit for trespass alleged only fact of title generally and without disclosing means by which acquired, and defendant's answer pleaded generally that its alleged acts of trespass were consented to by plaintiff but without pleading anything more, that plaintiff, under his reply denying all new matter, could assail a written grant of easement, introduced by defendant defensively against the charged trespass, upon the ground that grant was the result of a mutual mistake between the parties thereto, defendant being in privity with the grantee therein named. Evidence sustains verdict that defendant's trespass was not casual, the result of inadvertence, mistake, or unintentional. Lawrenz v Langford Electric Co. 206 M 315, 288 NW 727.

When a writing is introduced in support of an allegation and a pleading which does not in any way indicate the existence thereof, it cannot be required that the opposite party shall anticipate its production and allege in his pleading fraud in its procurement, nor to introduce evidence of such fraud. Turner v Edwards, 207 M 455, 292 NW 257.

Under a general denial a defendant may submit evidence to show that the contract sued upon was executed and delivered conditionally and that the conditions were not fulfilled so as to make it effective. Benson v Wheaton, 216 M 56, 11 NW(2d) 769.

The money of a partnership of two brothers was taken out of their checking account in a bank and certificates of deposit issued, bearing interest and payable to the brothers or either of them, or to the surviver of either. The finding that the sur-

viver became the owner of the certificate to the exclusion of the heirs of the first deceased partner is not supported by the evidence, and a defense not pleaded is not available. Shanahan v Olmsted Co. Bank, 217 M 454, 14 NW(2d) 433.

Where it is sought to charge the master under the doctrine of respondeat superior with liability for an assault committed by his servant, it is error to exclude evidence to charge the master with personal fault with retaining the employee in his employment. Porter v Grennan Bakeries, 219 M 14, 16 NW(2d) 906.

Variance. 12 MLR 121.

Review of the second edition of Phillips on "Code Pleading." 17 MLR 832.

544.32 EXTENSIONS OF TIME; RELIEF AGAINST MISTAKES.

While divorce jurisdiction is purely statutory and as such the court has only the powers thus delegated, adequate authority and power to grant relief such as is considered and determined in the instant case is found in section 518.23. Wilhelm v Wilhelm, 201 M 463, 276 NW 804.

Self or double dealing by a fiduciary renders the transaction voidable by the beneficiary, but where as in the instant case the facts were fully disclosed to the court and the action of the guardian was on the advice of independent counsel whose only duty was to and whose interest was that of the ward, and the transaction was approved by the court, it cannot thereafter be disaffirmed by the ward. Fiske v First National, 207 M 44, 291 NW 289.

Although there was a delay of seven months in moving to vacate, on the facts disclosed by the record the trial court acted within its discretionary power when it vacated a judgment entered by the clerk in favor of plaintiff, and under section 544.32 permitted the defendant to answer. High v Supreme Lodge, 207 M 228, 290 NW 425.

In vacating a judgment for "good cause shown" pursuant to section 544.32, and granting a new trial, the trial court in view of the evidence and circumstances disclosed by the record did not abuse its discretion. Holmes v Conter, 209 M 144, 295 NW 649.

In response to an application seasonably made, the probate court vacated a previous appealable order after time for appeal had expired upon the ground that its failure to notify the party of the order constituted excusable neglect within the statute. On appeal from such order to the district court, that court should decide the merits of the application, and it was error to vacate the probate court's vacating order upon the ground that the probate court acted without jurisdicion in entertaining the application. In re Estate of Showell v Saucier, 209 M 539, 297 NW 111.

A judgment recovered against a bankrupt after the commencement of a proceeding in bankruptcy and before his discharge is anulled thereby, but a judgment recovered after discharge has been granted is valid and enforcible. Bearman Fruit Co. v Parker, 212 M 327, 3 NW(2d) 501.

Since the opening of a default judgment entered upon personal service of summons upon the defendant is by section 544.32 left largely to the discretion of the trial court, in an action against a mother and son on a note where the mother knew nothing of the judgment for a considerable length of time but thereafter with reasonable diligence filed a motion to set aside the judgment and supported her motion by an affidavit that she did not sign the note and was not interested in any way or sum to the payee of the note, the trial court did not abuse its discretion in setting aside the default judgment and permitting the mother-defendant to answer. Pilney v Funk, 212 M 398, 3 NW(2d) 792.

The trial court erred in vacating a default judgment when the evidence failed to show that the moving party initiated his action within one year after notice to him that the judgment had been entered, and also failed to show that the judgment had been procured by fraud. The fact that throughout the proceedings the wrong middle initial of his name was used was not sufficient to give the relief asked for. Cacka v Gaulke, 212 M 404, 3 NW(2d) 791.

The matter of opening a default lies wholly in the discretion of the trial court and its action will not be reversed on appeal except for clear abuse of discretion. Bonley v Rickmire, 213 M 214, 6 NW(2d) 245.

Where neither defendant claims to have been misled by the improper arrangement of the papers, the fact that the summons did not appear as "the first paper seen upon opening and inspecting the papers served," as required by District Court Rule 13(d), does not require the opening of the judgment. Whipple v Mahler, 215 M 578, 10 NW(2d) 771.

In the interests of justice it is proper that section 544.32 should be liberally construed so that causes could be tried on the merits; but it is the duty of a defendant to make his application for the relief afforded by the statute within a reasonable time after notice of the judgment and, at all events, within one year after such notice. Lentz v Lutz, 215 M 231, 9 NW(2d) 505.

The trial court abused its discretion in permitting defendants after entry of default judgment, to file an answer which was devoid of merit. Peterson v Davis, 216 M 60, 11 NW(2d) 800.

So long as no effort is made to improperly influence the testimony of an expert, the counsel for the accused may interview the expert and offer him more than usual fees for his testimony; and the court will take judicial notice that $50 is not an unusual fee to be paid to a medical expert. State v Gorman, 219 M 162, 17 NW(2d) 42.

A motion for a directed verdict on the ground of contributory negligence as a matter of law raises a question of law only and admits, for the purpose of the motion, the credibility of the evidence for the adverse party and every inference which may fairly be drawn from such evidence, and the view of the evidence most favorable to the adversary must be accepted. Mix v City of Minneapolis, 219 M 389, 18 NW(2d) 130.

It is the duty of counsel on the trial of an action to call attention to obviously unintentional misstatements and verbal errors in the charge of the court to the jury; and, failing so to do, a mere technical verbal error which could have been corrected at the trial if counsel had called timely attention thereto will not afford cause for reversal. (See, L. 1945, c. 282; Minnesota Statutes 1945, section 547.03). Slindee v City of St. Paul, 219 M 428, 18 NW(2d) 128.

Section 544.32 does not apply to an order vacating a stipulated settlement and dismissal of a minor's suit for personal injuries, and the court may vacate its approval of such settlement, and the ensuing judgment of dismissal for mutual material mistake, although the application to vacate be made more than a year after dismissal. Section 544.32 lifts the stringent common law rule limiting the control of the court upon its orders or judgments to the term at which such orders or judgments were entered. Elsen v State Farmers Mut. Ins. Co. 219 M 315, 17 NW(2d) 652.

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 Midway Chevrolet, 219 M 461, 18 NW(2d) 233.

Where the evidence offered by the employer is sufficient to overcome a presumption that a disease claimed to have caused death was due to the nature of the employee's employment and there is evidence of the employee that it was, giving the employee's dependent the benefit of such a presumption is harmless error, because the presumption disappeared from the case when the evidence sufficient to overcome it was received. Ogren v City of Duluth, 219 M 555, 18 NW(2d) 535.

Error in admitting evidence of a fact which is undisputed is not ground for a new trial or reversal on appeal. Krueger v City of Faribault, 220 M 89, 18 NW(2d) 777.

That a judgment is erroneous because of judicial error is ground for appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside

the judgment on motion after time for review has expired. State ex rel v Probate Court, 221 M 333, 22 NW(2d) 448.

Where an application is made to the court within the time for appeal, the court has the power, for the correction of judicial error, to modify, vacate, or set aside its orders and its judgments after the time for such appeal has expired. Gelin v Hollister, 222 M 339, 24 NW(2d) 497.

Defendant was entitled to have a default judgment opened and set aside, where he was unable to serve an answer on plaintiff's attorney because of the failure of the attorney to maintain an office at the address specified in the summons or provide for delivery of mail to him at residence specified in the summons. The district court has jurisdiction in the premises. Waiver of time to answer by the attorney for the plaintiff takes from such attorney the right to enter a default judgment without prior notice. Bentley v Kral, 223 M 248, 26 NW(2d) 532.

Proceedings in the municipal court of St. Paul for relief from judgments upon the grounds of mistake, inadvertence, surprise, or excusable neglect are governed by the general statute and not by the special act. Industrial Loan v Swanson, 223 M 346, 26 NW(2d) 625.

"Notice" as used in section 544.32, under which the court in its discretion may relieve a party from judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, means actual, and not constructive, notice. Industrial Loan v Swanson, 223 M 348, 26 NW(2d) 625.

The elapse of almost ten years between the time of entry of judgment and commencement of action thereon by which defendants obtained actual notice thereof did not bar defendants' application for relief. Laches was not established as a matter of law. Industrial Loan v Swanson, 223 M 348, 26 NW(2d) 625.

The appellate court should not reverse a trial court in a non-injury case for having admitted incompetent evidence, whether objected to or not, unless all of the competent evidence is insufficient to support the judgment appealed from or unless it affirmatively appears from the record that the incompetent evidence complained of was relied upon by the trial court and induced the court to make an essential finding which would not otherwise have been made. Doering v Buechler, 146 F(2d) 786.

544.33 UNIMPORTANT DEFECTS DISREGARDED.

In the absence of exceptional circumstances it is not negligence as a matter of law for a motorist to proceed into a cloud of smoke without first stopping. Admission of a statement as part of the res gestae, even though it was error was error, was not prejudicial when the fact in question was already in evidence and remained uncontradicted. Young v Great Northern Ry. 204 M 122, 282 NW 691.

Where the defense of breach of warranty is fully litigated and by verdict resolved against defendant on his attempt to recoup his damages, the error, if any, in ruling out his counterclaim for breach of warranty, is harmless. McConn v Lyell, 204 M 198, 283 NW 112.

Where upon the record the verdict was right as a matter of law disparaging remarks by the trial judge concerning counsel for the losing party were not ground for new trial or reversal. Wentz v Guaranteed Sand and Gravel Co. 205 M 611, 287 NW 113.

In an action on an insurance policy, it is not error to receive in evidence a writing the contents of which have been shown by testimony previously given. Rice v New York Life, 207 M 268, 290 NW 798.

Where inadequate damages are awarded, the plaintiff cannot complain or appeal if the record shows no right of recovery. Contributory negligence or assumption of risk appeared from the record as a matter of law. Blume v Ballis, 207 M 393, 291 NW 906.

In actions to recover for battery inflicted by an employee of defendant where plaintiff asked the defendant as to the presence of slot machines in the defendant's place of business and the trial court sustained objections and where there was

considerable evidence dealing primarily with the battery, the gratuitous statements made by plaintiff's counsel and improper question propounded in cross-examination did not constitute prejudice or reversable error. Ness v Fischer, 207 M 558, 292 NW 196.

Where a decisive finding is supported by sufficient evidence and is adequate to sustain the conclusion of law it is immaterial that some other findings are not so sustained. Locksted v Locksted, 208 M 551, 295 NW 402.

The parties of record in a proceeding before the railroad and warehouse commission in which they fully participated by consent and without objection, who upon appeal from the commission and to the district court were notified to appear and appeared in the district court in regard to such notice and in formal appearance there and by consent limited the issues raised by the appeals to the appellate court to the district court, will be heard in the appellate court with other parties whose appeals are not included in the motion to dismiss. State & R.R. Com. v Rock Island Motor Transit Co. 209 M 105, 295 NW 519.

In a portion of the charge certain terms were submitted without being defined making that portion of the charge erroneous in case plaintiff was found to be a licensee, but the jury by special verdict found the plaintiff to be an invitee and consequently the error in the judge's charge was without prejudice. Radle v Hennepin Avenue Theater, 209 M 415, 296 NW 510.

A large measure of discretion in respect to admission or exclusion of evidence is left with the trial court; and in the instant case the trial court's exercise of discretion permitting the defendant, based upon a claim of surprise, the privilege of cross-examining his own witnesses did not result in harmful error to plaintiff. Klingman v Loew's Inc. 209 M 450, 296 NW 528.

Where plaintiff's counsel on cross-examination questioned defendant's witness as to certain statements made a few days before the trial which conflicted with his testimony on direct examination, and incidentally the subject of insurance against automobile accidents was mentioned, the cross-examination was not improper since the version of the witness on cross-examination was substantially as complained by plaintiff's counsel. Jaenisch v Vigen, 209 M 543, 297 NW 29.

Erroneous admission of testimony over plaintiff's objection was not reversible error where the same witness later upon examination by both parties testified without objection to the same facts as those erroneously admitted. Hill v Northern Pacific, 210 M 500, 243 NW 711.

The jury having found that defendant acted with justification and in good faith in ousting the plaintiff, he was not prejudiced by the instructions of the trial court in reference to the measure of damages. Wolfson v Northern States, 210 M 504, 299 NW 676.

After it appeared that the witness's testimony differed from a written statement he had previously made, plaintiff's counsel asked the witness if he had talked with a representative of the insurance company. The court would not permit the question, and the matter was then dropped. The mere asking of the question was not reversible error. Schultz v Swift, 210 M 533, 299 NW 7.

Error in excluding evidence does not require a reversal where the fact is otherwise satisfactorily proved. Schmitt v Emery, 211 M 547, 2 NW(2d) 413.

Defendant was not entitled to a directed verdict on the ground that plaintiff's sole remedy was under the workmens compensation act, because he failed to show that he was insured or self-insured. Anderson v Hegna, 212 M 147, 2 NW(2d) 820.

Where A performed services for B under an express contract, he may upon B's repudiation or breach thereof stop performance, treat the contract as at an end, and recover the reasonable value of the services rendered, and where, as in the instant case, the instructions were erroneous but were more favorable to the defendant than under the law they should have been, defendant cannot complain on appeal. Stark v Magnuson, 212 M 167, 2 NW(2d) 814.

In the light of the evidence the trial court properly concluded that the jury could not reasonably find that any negligence of the lessor of the premises proxi-

mately caused injury to the plaintiff. Therefore, the dismissal of the cause of action as to the lessor on the ground that it was not the owner of the premises was immaterial and without prejudice to the plaintiffs. Johnson v Hamm Brewing Co. 213 M 12, 4 NW(2d) 778.

In the instant case, while certain testimony of the plaintiff was improperly received, there was no prejudice, the evidence being merely cumulative. Fjellman v Weller, 213 M 457, 7 NW(2d) 521.

In an action against a landlord by one injured from collapse of a part of a building, evidence that after a previous fire the landlord in making repairs left in the building certain timbers that did not conform to present building code requirements, and evidence as to the requirements of present code, was properly admitted. Murphy v Barlow, 214 M 64, 7 NW(2d) 684.

Error in excluding opinion testimony of a qualified expert based on his own observations is not cured by permitting him to testify as to his opinion based in part upon a hypothetical presentation of the testimony of others as to facts they observed. Independent School v Hedenburg, 214 M 82, 7 NW(2d) 511.

The often stated rule that the appellate court will view the evidence in aspects most favorable to the verdict does not apply in cases where the court has directed the verdict since such a verdict expresses only the opinion of the court as to a question of law, not of fact. Hence, where there is a question of fact, the case should go to the jury, and it is reversible error to direct a verdict. Abraham v Byman, 214 M 355, 8 NW(2d) 231.

Where the contents of certain exhibits to show purchases of merchandise are fully disclosed by the testimony and where there is no serious dispute as to the facts of such purchases, loss of the exhibits by the clerk of the court is not ground for a new trial as the loss of the exhibits resulted in no prejudice to the plaintiff. Hlubeck v Beeler, 214 M 485, 9 NW(2d) 252.

Failure to include the words "through no fault of his own" in the court's charge submitting the emergency doctrine to the jury was harmless error in view of the language used by the court, and defendant's failure to take an exception to the court's charge as given precludes consideration thereof on review. Merritt v Stuve, 215 M 44, 9 NW(2d) 329.

Where prejudice is not shown to have resulted to the appellant from an erroneous ruling requiring him to proceed with his evidence prior to the presentation of that of his adversary, the error is harmless and not ground for a new trial. In re Dittrich, 215 M 234, 9 NW(2d) 510.

Where, as in the instant case, actual damages are uncertain and difficult to ascertain or prove and are speculative in character, where the contract furnishes no data for the ascertainment thereof, and when there has been a sum named, fixed by the party themselves for the breach, their stipulation with respect to damages for breach of contract is valid as an agreement for liquidated damages and is not a penalty. Schutt Realty v Mullowney, 215 M 341, 10 NW(2d) 273.

The opinion of an expert witness based on conflicting evidence which he is called upon to waive is inadmissible, and the expert witness may not include the opinion of another expert witness as basis for his own opinion. Hohenstein v Dodds, 215 M 348, 10 NW(2d) 236.

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 a clear abuse of discretion. In the instant case, during the trial of a salesman's suit to recover commissions as on an account stated, the allowance of an amendment permitting the allegation of reasonable value of services was not prejudicial to defendant. Raspler v Seng, 215 M 596, 11 NW(2d) 440.

The doctrine of "harmless error" should be applied whenever it is safe and reasonable to do so, but courts should not strain the doctrine beyond its legitimate function. Waters v Fiebelkorn, 216 M 489, 13 NW(2d) 461.

Alleged errors in the admission of evidence will be disregarded on appeal where the admission of such evidence could not have affected the result. Martin v Tucker, 217 M 104, 14 NW(2d) 105.

In the instant case, the misconduct of plaintiff's counsel in his final address to the jury on the subject of damages together with improper statements on the same subject in the court's charge was reversible error. Hubred v Wagner, 217 M 129, 14 NW(2d) 115.

Where upon return of verdict it was found upon reading to be erroneous and the verdict was reformed and resubmitted and the jury polled, any irregularity in correction of the verdict was not prejudicial. Hanse v St. Paul City Ry. 217 M 432, 14 NW(2d) 473; Walley v Sweet, 220 M 545, 20 NW(2d) 528.

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 Chgo. St. Paul & Omaha, 218 M 333, 16 NW(2d) 188.

Under the provisions of section 597.12 a party is entitled to read a deposition taken on behalf of his adversary, but the exclusion of the deposition in the instant case was not prejudicial, because admission could not have affected the result. Porter v Grennan Bakeries, 219 M 14, 16 NW(2d) 906.

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

Where on appeal from a judgment the only errors complained of are of the kind which do not affect the substantial rights of the appellant, it is the duty of the court to disregard the errors and affirm the judgment. Skog v Pomush, 219 M 322, 17 NW(2d) 641; 221 M 11, 20 NW(2d) 530.

When a statement forming part of a conversation is given in evidence by one party, whatever was said in the same conversation tending to explain or qualify that statement may be given in evidence by the other, but the latter cannot give in evidence distinct independent statements in the same conversation in no way connected with the statement proved by his adversary on the ground that he had opened the subject by his examination. Jeddeloh v Hockenhull, 219 M 541, 18 NW(2d) 582.

Where trial court in its charge correctly states the rule with respect to the facts giving rise to a presumption of death, which it states is not conclusive, and then several times tells the jury that it should base its finding as to existence or nonexistence of the fact of death upon the evidence, but does not tell it whether the presumption may be considered in determining the facts, and it is doubtful whether the jury understood that its finding was to be based exclusively upon the evidence unaided by the presumption, if any, the defendant cannot challenge the charge for failure explicitly to tell the jury not to consider the presumption, unless the matter was called to the attention of the trial judge at the time with a request for a corrective instruction. Donea v Mass. Mutual Life Ins. Co. 220 M 204, 19 NW(2d) 377.

It is proper for plaintiff's counsel in his argument to the jury to express his ideas for the amount of damages suffered by his client, and it is proper for defendant's counsel to exercise the same privilege in expressing contrary ideas on the same subject. In the last analysis the trial court properly instructed the jury that it was their function to determine this question in the light of evidence rather than the argument of counsel for either party. Shockman v Union Transfer Co. 220 M 334, 19 NW(2d) 812.

An error in the admission of evidence may be waived and cured by the opponent's subsequent use of evidence similar in character and purpose to the evidence to the admission of which opponent has objected. Clabots v Badeaux, 221 M 303, 22 NW(2d) 19.

Where fact issues are tried by the court without a jury and incompetent evidence is admitted, but there is competent evidence sufficient to support court's finding, and where there is no reasonable ground for inferring that the incompetent evidence was a material factor in the court's determination, admission of such incompetent evidence is not reversible error. Fleetham v Lindgren, 221 M 545, 22 NW(2d) 637.

Where the verdict is the only one warranted under the law and by the evidence error in the charge and misconduct on the part of counsel for the prevailing party

are harmless and not grounds for a new trial. A judgment for the defendant should not be disturbed where the plaintiff is not entitled to recover in any event. DeVere v Parton, 222 M 211, 23 NW(2d) 584.

Informing jury of insurance coverage. 23 MLR 85.

544.34 DEFECTS RELIEVED AGAINST.

Sections 544.32 and 544.34 apply to ordinary procedure in judicial ditch proceedings but do not extend to administrative boards such as county boards. A county board has no authority under the above quoted sections to reopen a final order in ditch proceedings. OAG Sept. 27, 1946 (602-E).

544.35 PLEADINGS, TO BE FILED; PENALTY.

The delivery of a complaint to be filed, to a clerk of the district court not in his office, and the making of an endorsement of filing by the clerk in the proper form, the paper not, however, being deposited in his office, nor any entry of the filing being made in his office, does not constitute the filing of a complaint under the provisions of section 544.35. Schulte v First National Bank, 34 M 48, 24 NW 320.