CHAPTER 546

TRIALS

546.01 ISSUES AND TRIALS.

Suggested limitations of the public policy doctrine. 19 MLR 196.

Respective function of parties and court. 20 MLR 191.

Medico-legal aspects of compromise settlements. 30 MLR 505.

546.02 ISSUES, HOW JOINED.

Estoppel by verdict as distinguished from estoppel by judgment is limited in its application to the issues of fact actually adjudicated in the prior action, and such adjudication of questions of fact so placed in issue and determined by the trier of fact is res judicata and is final and conclusive on the parties and their privies in all subsequent litigation although different causes and forms of action are involved; and in determining whether an issue is res judicata by reason of litigation in a prior action the entire record in such prior action may be examined. Bernstein v Levitz, 223 M 46, 25 NW(2d) 289.

546.03 ISSUES, HOW TRIED; RIGHT TO JURY TRIAL.

The trial court was not justified in directing a verdict in favor of defendant in a case where the evidence was sufficient to enable the jury reasonably to conclude that the defendant was negligent in parking his truck on the highway, and that such negligence was the proximate cause of injury to plaintiff who was riding as a guest in a car which ran into the truck. Barclay v Fritz, 205 M 192, 285 NW 484.

A verdict upon a special question is administrative and remains so unless vacated. The verdict of a jury on a special question in an equity case is not merely advisory but is final. Dose v Insurance Co. 206 M 114, 287 NW 866.

In the instant case a fact question existed which should have been submitted to the jury to determine. It was error to direct a verdict for defendant. A motion for a directed verdict raises a question of law only and does not involve the weighing of evidence. Reiton v St. Paul City Ry. 206 M 216, 288 NW 155.

Although the evidence on the part of plaintiff standing alone might justify submitting a case to the jury yet a court should direct a verdict for defendant if, upon all the evidence, it would be its manifest duty to set aside a verdict against it. Brulla v Cassady, 206 M 398, 289 NW 404.

When plaintiff and defendant each move for directed verdicts there is no waiver to the right to a jury trial. In the instant case the evidence created fact questions for the jury to determine. Lee v Osmundson, 206 M 487, 289 NW 63.

Because of the prayer for a declaratory judgment the action was considered in the trial court as one of mixed legal and equitable content, and so a jury trial was denied defendant. If the real nature of the action is such as to give a litigant the right to a jury trial any mere label put upon the cause of action should not result in a denial of a litigant's constitutional right. Gilbertson v Independent School District, 208 M 51, 293 NW 129.

Where the evidence of a fact is conflicting the issue is always for the jury. Symons v Gt. Northern, 208 M 240, 293 NW 303; Ristow v Von Berg, 211 M 150, 300 NW 444.

The test to be applied upon a motion for a directed verdict is not whether the court might in the exercise of its discretion grant a new trial, but whether from the

whole evidence it clearly appears that it would be its manifest duty to set aside a contrary verdict. Applequist v Oliver Iron Co. 209 M 230, 296 NW 13.

Contributory negligence, like negligence, becomes a question of law only when reasonable minds functioning judicially could not arrive at a different conclusion. Packar v Brooks, 211 M 99, 300 NW 400.

In the absence of opposing evidence, a prima facie case prevails as a matter of law and a verdict may be directed. Wojtowicz v Belden, 211 M 461, 1 NW(2d) 409.

The purpose of a view by the jury is not to obtain evidence but to enable them better to understand and apply the evidence submitted in open court. Huynk v Hart, 212 M 87, 2 NW(2d) 552.

Where plaintiff brought and tried his cause as one founded in tort and not upon contract, but failed to establish his case upon that theory, the court properly directed a verdict against him. Tapper v Pliam, 212 M 295, 3 NW(2d) 500.

The contract being entire the contractor's performance of the contract according to its terms is a condition precedent to any right to compensation, and the evidence being in conflict both as to the terms of the conflict and all substantial performance thereof, the fact questions must be left to the jury. Ylijarvi v Brockphaler, 213 M 385, 7 NW(2d) 314.

A substantial performance of a building contract is properly a question for the jury. Independent School v Hedenberg, 214 M 83, 7 NW(2d) 511.

Where the respective claims of the contending parties are at variance with evidence to support the claims of each, the court should submit the issues to the jury as questions of fact. Abraham v Byman, 214 M 355, 8 NW(2d) 231.

The court properly granted judgment non obstante to defendant who made a motion for a directed verdict at the close of the trial, since the record shows that the evidence overwhelmingly preponderates in his favor on the issue of negligence in this auto collision case. Reiter v Porter, 216 M 479, 13 NW(2d) 372.

Where the terms of a writing are clear and unambiguous, the construction thereof is a question of law for the court; and if the trial court determines the language is ambiguous and permits the introduction of extrinsic evidence to aid in construction and such extrinsic evidence is disputed, construction then becomes a question of fact. Leslie v Mpls. Teachers, 218 M 369, 16 NW(2d) 313.

Though facts are undisputed, negligence and contributory negligence are jury questions if different minds in applying legal critera of due care to conduct of parties might reasonably disagree from the inferences to be drawn from facts. The existence of an emergency excusing an act otherwise negligent is ordinarily a question of fact. Nees v Mpls. Street Ry. 218 M 532, 16 NW(2d) 758; Travis v Collett, 218 M 592, 17 NW(2d) 68.

Where plaintiff is not entitled as a matter of law to recover, the trial court should direct a verdict for defendant. Porter v Grennan Bakeries, 219 M 14, 16 NW(2d) 906.

"Where there is factual basis for a medical expert's opinion that an employe sustained injury to his heart muscles as the result of attacks of angina pectoris and the expert states that his opinion is 'speculative,' the opinion affords evidentiary basis for a finding of such injury, where it appears from the expert's testimony as a whole that he based his opinion upon the factual basis and regarded it as speculative only in the sense that it was incapable of demonstration." Hiber v City of St. Paul, 219 M 87, 16 NW(2d) 878.

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 Mpls. 219 M 389, 18 NW(2d) 130.

A motion for a directed verdict presents 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 be fairly drawn from such evidence. Windorski v Doyle, 219 M 402, 18 NW(2d) 142.

Where there is a conflict in the evidence as to whether or not a warranty was made it is a question for the jury, whose verdict will not be disturbed by the appellate court. Walley v Sweet, 220 M 545, 20 NW(2d) 528.

Causation, like negligence, is a fact issue for the determination of the jury when the facts are in dispute and are susceptible of more than one influence. Johnson v Ivansky, 221 M 323, 22 NW(2d) 213.

Whether defendant made a misrepresentation to induce plaintiff to enter into a contract and whether plaintiff in so doing relied upon the alleged misrepresentation, are questions of fact before the trier of fact and not of law for the court where, as here, the evidence with respect to those questions is in conflict. Marshfield Brewing Co. v Schmidler, 221 M 486, 22 NW(2d) 553.

Where fact issues are tried without a jury and incompetent evidence is admitted but there is competent evidence sufficient to support the 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.

The irregular and undesirable practice of granting a dismissal on the merits in a jury trial is equivalent in effect to the granting of a motion for a directed verdict; and this practice, as also the practice of directing a verdict in a jury trial, does not impair the constitutional right to a trial by jury. Anderson v Sears-Roebuck Co. 223 M 1, 26 NW(2d) 355.

Estoppel by verdict as distinguished from estoppel by judgment is limited in its application to the issues of fact actually adjudicated in the prior action, and such adjudication of questions of fact so placed in issue and determined by the jury or other trial of fact is res judicata and is final and conclusive on the parties and their privies in all subsequent litigation, although different causes and forms of action are involved. Bernstein v Levitz, 223 M 46, 25 NW(2d) 289.

Constitutional protection of equitable rights as they existed prior to the adoption by the code. 11 MLR 449; 15 MLR 478, 810.

Trial by jury as a matter of right under the code. 11 MLR 450.

Right to a jury trial; pleadings. 13 MLR 601.

Verdict of jury on special issues of fact. 15 MLR 261, 479.

Jury trial on question of validity of release. 15 MLR 741.

Jury trial in will cases. 22 MLR 513.

Dismissal and directed verdict. 23 MLR 363.

546.04 CONSOLIDATION; SEPARATE TRIALS; ACTIONS TRIABLE TOGETHER.

In the instant case the sole ground for enjoining defendants from suing being to avoid a multiplicity of suits the court may consider the number of suits which may be avoided, the statutory provisions for reducing this number, the efficiency of such provisions for giving plaintiffs adequate relief, the convenience and pecuniary loss of the parties, the apparent as well as the anticipated issues between the different parties, and the importance of preserving to each their right to a jury trial in determining whether jurisdiction should be entertained or refused; keeping in mind that if separate actions are commenced where one action would be proper the court may order them consolidated for trial. Davis v Forestal, 124 M 10, 144 NW 423.

In an action by vendor on a fire policy obtained by vendee providing that in case of loss by fire proceeds should be paid to the vendee and vendor as their interest should appear, where the insurer made no objection that there was a defect of parties plaintiff and did not raise the question of splitting the cause of action, the insurer elected to defend two actions instead of one on the policy. The rule against splitting a cause of action is a rule for the benefit of the defendant and is waived unless the issue is promptly raised. Capital Fire Ins. v Langhorne, 146 F(2d) 237.

Power of equity to compel consolidation of actions at law arising out of the same state of facts. 4 MLR 62.

Causes of action blended. 22 MLR 498, 511.

546.05 NOTICE OF TRIAL; NOTE OF ISSUE.

Since quo warranto is an extraordinary legal remedy, procedure is not governed by the requirements of service of notice of trial applicable in civil actions as defined by section 546.02, 546.05, for the reason that upon respondent in such cases rests the burden of showing before a court of competent jurisdiction, at a stated time and place designated in the writ "by what warrant" they exercised the powers claimed by them. State ex rel v Village of North Pole, 213 M 297, 6 NW(2d) 458.

Changes in procedure affected by the laws of 1917. 1 MLR 542.

Necessity of notice of trial after granting a new trial. 5 MLR 564.

546.08 CONTINUANCE.

Uncontradicted evidence tending to show that a doctor's habitual method of diagnosis has no scientific basis and is a species of quackery is sufficient to justify the board of medical examiners in suspending his license. Minnesota State Board v Schmidt, 207 M 526, 292 NW 255.

546.09 JURY, HOW IMPANELED; BALLOTS; RULES OF COURT; EXAMINATION; CHALLENGES.

In an action for damages for wrongful death the fact that plaintiff's counsel indicated that defendant's insurer would pay the verdict, and also influence argument admitted to compute the cash value of the deceased's life, based upon his capacity, earnings and life expectancy, would not be ground for reversal or new trial. McKeown v Argetsinger, 202 M 596, 279 NW 402.

Improper statement of plaintiff's counsel during voir dire examination. 10 MLR 632.

Examination of prospective jurors on voir dire. 17 MLR 299.

Failure to disclose information on voir dire examination as contempt. 17 MLR 340, 654.

Effect of L. 1943, c. 228. 31 MLR 45.

546.10 CHALLENGES.

Where it affirmatively appeared that the interests of defendants were not adverse to each other, the court properly allowed the defendants only three peremptory challenges and did not grant three challenges each. Eilola v Oliver Iron Mining Co. 201 M 77, 275 NW 408.

Right to challenge taxpayer called as a juror in case in which the county is interested. 11 MLR 669.

546.11 ORDER OF TRIAL.

The court did not unduly restrict plaintiff in his cross examination of the defendant under the statute, the scope of such cross examination being largely within judicial discretion. Bylund v Carroll, 203 M 484, 281 NW 873.

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

Improper argument by plaintiff's counsel, invited and provoked by the improper argument of defendant's counsel, is not reversible error. Hinman v Gould, 205 M 377, 286 NW 364.

There was no misconduct in plaintiff's attorney eliciting that at defendant's request plaintiff was, on three different occastions, examined by a doctor selected

by defendant, but that only one of the three doctors was called in as a witness. Guyen v Mastrud, 206 M 382, 288 NW 716.

Evidence that plaintiff had liability insurance but did not have collision insurance is clearly inadmissible in an action to recover for property damage to plaintiff's vehicle. Lee v Osmundson, 206 M 487, 289 NW 63.

Admission of expert testimony is largely a matter of discretion for the trial judge; and he may upon motion for a new trial decide that he abused that discretion and order a new trial upon the ground of error of law occurring at the trial. Simon v Larson, 207 M 605, 292 NW 270.

Objections to alleged misconduct of counsel are not reviewable unless taken before the jury retires. Where such objection is taken, and the trial court gives an adequate instruction to cure the claimed misconduct, the error if any is cured and is not ground for new trial. Symons v Gt. Northern, 208 M 240, 293 NW 303.

There was no reversible error in refusing to permit two witnesses to testify as to temperament and disposition of the defendant; nor was there error in refusing to reopen the case for additional testimony. Locksted v Locksted, 208 M 551, 295 NW 402.

The counsel for the prevailing party was guilty of misconduct, requiring a new trial in the instant case where, in his closing argument to the jury, he made prejudicial remarks concerning the opposing counsel. Ryan v Hegnauer, 210 M 607, 299 NW 673.

A party's unexplained failure to produce a witness justifies unfavorable jury inference, and counsel for opposing party in argument may properly comment on such failure. Both plaintiff's and defendant's counsel may comment on the amount of damages, if any. Shockman v Union Transfer, 220 M 334, 19 NW(2d) 814.

Where a motion to reopen a case is within the discretion of the trial court, in the instant case the city ordinance was immaterial, and following Fletcher v Byers, 55 M 419, 57 NW 139, there was no abuse of discretion on the part of the trial court in refusing to reopen so the offered evidence could be introduced. Hahn v Diamond Iron Works, 221 M 33, 20 NW(2d) 704.

Right of the trial judge in civil and criminal cases to comment on evidence in his charge to the jury. 18 MLR 441.

Use of judicial admissions in argument to the jury. 19 MLR 708.

Hearsay evidence; res gestae; spontaneous exclamations. 22 MLR 391.

Informing the jury of insurance coverage. 23 MLR 85.

Admissibility of conversations obtained by federal agents by wire tapping. 25 MLR 382.

546.12 VIEW OF PREMISES; PROCEDURE.

Where, upon stipulation of counsel in open court, the jury is permitted to view the stairway and premises where plaintiff fell and sustained injuries which occasioned this action, and to consider whatever they saw there as evidence, the appellate court will not say there was insufficient evidence to sustain the jury's verdict. Smith v Ostrov, 208 M 77, 292 NW 745.

The purpose of a view by the jury is not to obtain evidence but to enable them to better understand and apply the evidence submitted in open court. Huynk v Hart, 212 M 87, 2 NW(2d) 552; Waters v Fiebelkorn, 216 M 489, 13 NW(2d) 461.

In an action to enjoin as a nuisance the escape of cinders, smoke and ashes from the smokestack of an electric power company, the action of the trial court judge in permitting the jury to view the premises and in executing an exhibit having no probative force, was not erroneous. Jedneak v Mpls. G.E. Co. 212 M 226, 4 NW(2d) 326.

Where a view of premises is taken with the consent of both parties, it is proper to admit evidence of repairs subsequent to the incident to show that the premises as viewed were not in the same condition as when the incident occurred. Without a

request, failure to instruct the jury that it should confine the use of such evidence to its proper function, was not error. Lunde v Nat'l City Bank, 213 M 278, 6 NW(2d) 809.

546.14 REQUESTED INSTRUCTIONS.

The act of the trial judge authorizing the jurors to separate upon the finding of the verdict but informing them that there must be a 12-hours deliberation before they could reach and five-sixths verdict, was not under the circumstances, coercion. Osbon v Henry Johnson, 205 M 419, 286 NW 306.

A trial court is justified in disregarding a request that it instruct the jury under a certain doctrine where such request is made orally after the arguments to the jury and where no request was formulated in language suitable for the charge. Pettit v Nelson, 206 M 265. 288 NW 223.

No reversible error is present where counsel fails to request an instruction that the evidence must be clear and convincing and express satisfaction with a charge that burden of proving forgery may be satisfied with a fair preponderance of the evidence. Amland v Gross, 208 M 596, 296 NW 170.

Negligence and contributory negligence of the respective parties both as to plaintiff's cause of action and defendant's counter-claim, were for the jury. Judgment notwithstanding the verdict was properly denied. Corridan v Agranoff, 210 M 237, 297 NW 759.

Plaintiff laid the proper foundation for admission of a statement by defendant after the accident containing assertions contradictory to those made at the trial. Though the statement was admitted only for the purpose of impeachment, the defendant did not take the necessary precautions to prevent its misuse by the jury. Johnson v Farrell, 210 M 351, 298 NW 256.

After dark two trucks, one disabled and the other a service car called to its assistance, blocked one lane of a trunk highway. In the hazard thus created, the decedent, who had come to the assistance of the truck drivers, was killed while standing in front of the service truck in a collision between it and another car. Failure of driver of the service truck to set out flares which he had available and the use of which under such circumstances is required by statute held to show both negligence and also, under the circumstances, its agency of proximate causation. Duff v Bemidji Motor Service Co. 210 M 456, 299 NW 196.

The contract was one of employment and not a partnership. The court's instructions outlined the proper measure of damages. There was no error in such instructions. Wolfson v Northern States Co. 210 M 504, 299 NW 676.

In this action to recover damages for deceit inducing plaintiffs to purchase a farm by representations that the well thereon had never caused trouble and that they need not worry about water, the evidence justified the jury in finding that the representations were untrue; that there had been trouble in obtaining sufficient water therefrom prior to the sale; that plaintiffs did not, by completing the payments after discovering the falsity of the representations, waive their cause of action for deceit; and that the verdict is sustained by the evidence. Forsberg v Baker, 211 M 59, 300 NW 371.

Under the rule that where services rendered are such as one friend might perform for another, the circumstances show that compensation was expected or contemplated by the parties before recovery for the reasonable value of the services may be had. In the instant case the evidence was sufficient. Sattinger v First Trust, 211 M 108, 300 NW 393.

Requests properly refused as singling out and giving undue prominence to certain testimony. Freeman v Morris, 179 M 94, 228 NW 442; Johnson v Kutches, 205 M 383, 285 NW 881; St. George v Lollis, 209 M 322, 296 NW 523; Anderson v High, 211 M 227, 300 NW 597.

The contract being a lease under which the plaintiff occupied the premises for a time before rescission, the measure of his recovery is the difference between the reasonable value of the use of the premises and what he paid for such use during

his occupancy; and as the court's instructions contemplated a different measure of damages, there must be a reversal. Hatch v Kulick, 211 M 309, 1 NW(2d) 309.

It was not error to submit to the jury the emergency rule upon evidence that defendant, traveling on a trunk highway, had the right of way over another car which, evidence indicated, entered the highway not only without stopping, as required by signs, but also at an increasing rate of speed, defendant's view of the other car being obstructed. An added circumstance is that three cars were approaching the intersection from the direction opposite to that of defendant when the car with which he collided suddenly thrust itself onto the highway between the first and second of such cars. Zickrick v Strathern, 211 M 329, 1 NW(2d) 134.

Generally it is not advisable to read to the jury statements of law found in decisions of the court, or in textbooks, since such statements frequently couched in legal verbiage which laymen are not likely to understand may be confusing or misleading. Thomsen v Reibel, 212 M 83, 2 NW(2d) 567.

The charge of the trial court was in error through unfortunate wording as to a possible assumption of risk by the plaintiff, but it followed a long discussion replete with examples of assumption of risk making the proper law on the subject reasonably clear, and considering the charge in its entirety there was no prejudicial error. Anderson v Hegna, 212 M 147, 2 NW(2d) 820.

Instructions cautioning the jury not to consider duties of a county defendant as to whom the action had been dismissed but to limit its inquiry to the duties of the remaining defendant, was proper. Fjellman v Weller, 213 M 458, 7 NW(2d) 521.

The statute being applicable, it is generally, if accompanied by proper caution as to its applicability, proper to read it to the jury. O'Neill v Mpls. St. Ry Co. 213 M 514, 7 NW(2d) 665; Weber v McCarthy, 214 M 76, 7 NW(2d) 681.

Plaintiff's plane in storage with defendant was destroyed by wind. The court properly charged the jury that the burden of proof was on the defendant as bailee to show that the destruction of the plane was without negligence on his part. Zanker v Cedar Flying Service, 214 M 242, 7 NW(2d) 775.

Since the standards of prudent conduct especially in negligence cases are generally for jury determination, courts should exercise great caution in framing standards of behavior that amount to rules of law. Abraham v Byman, 214 M 355, 8 NW (2d) 231.

An instruction that "if a person recklessly exposes himself to known or imminent danger, unnecessarily, in a manner that a person of ordinary care would not do under the circumstances, he assumes the risk of such danger and is guilty of contributory negligence and cannot recover for any injuries sustained by him under such circumstances" is not open to the objection that it fails to submit the defense of assumption of risk as a separate and distinct defense. Schroepfer v City of Sleepy Eye, 215 M 525, 10 NW(2d) 398.

A charge to the jury must be examined as a unit and not from the standpoint of passages isolated from their context or from subsequent qualifying provisions. The court's statement of the claim of plaintiff as to the condition of the curb was stated only as a claim and could not have resulted in prejudice, especially in view of the subsequent instruction that defendant had no control thereof and was not responsible for its condition. Gillson v Osborne, 220 M 122, 19 NW(2d) 5.

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. Mut. Life Ins. Co. 220 M 204, 19 NW(2d) 377.

In order to entitle a party to raise objections to errors, inaccuracies or incomplete statements in the court's charge, the court must be specifically apprised of the

same before the jury retires. The instructions requested by defendant were argumentative in form and contained in substance the fellow-servant rule not applicable to this case and the court properly denied defendant's request. Jenkins v Jenkins, 220 M 216, 19 NW(2d) 389.

It was not error for the court to reinstruct the jury, at its request, on a question of law applicable to the case, since interests of justice require that jury have a full understanding of rules of law applicable to the case; and in last analysis, the trial court properly instructed the jury that it was their function to determine the question of the amount of damages in the light of the evidence rather than the argument of counsel for either party. Shockman v Union Transfer, 220 M 334, 19 NW(2d) 814.

The assertion by the defendant that the court erroneously assumed as a fact that the patch of cement causing the injury was there for the convenience of the building, the charge must be considered as a whole, and on the whole the trial court fairly submitted the issue to the jury. Shepstedt v Hayes, 221 M 74, 21 NW(2d) 203.

Defendant requested the court to charge the jury that the burden of proof was upon plaintiff to show the presence of water, oil, peanut shells, or other debris on its floor and that the same had been on the floor for such a period of time that the defendant had notice. The court denied the request and did not cover the subject in its general charge. This was error and a new trial must be granted. Hubbard v Montgomery, 221 M 133, 21 NW(2d) 231.

Where the defendant made timely request for instructions applicable to question of its "wilful and wanton negligence," and where subsequently trial court submitted this issue to the jury but failed to give requested instructions or otherwise to cover the subject, and where the jury's verdict may have been based on the applicable issue, failure to give the requested instruction constituted reversible error. Bryant v Northern Pacific, 221 M 577, 23 NW(2d) 175.

Where, because of the construction of a streetcar and its location upon a crosswalk so as to project into the intersection, the motorman, while operating the car in a sitting position, could not see a person of plaintiff's height within ten feet of the left side of the streetcar, but could have seen him when he was going around the front of the streetcar, and could have seen him if the motorman either had changed his position so as to enable him to make a proper observation or if he had stopped the streetcar so as to leave the crosswalk clear for pedestrians, it is error to charge the jury that the motorman was not negligent if, by the exercise of ordinary care, he could not have seen him "due to the height of the boy [plaintiff]." Wright v Mpls. St. Ry. Co. 222 M 105, 23 NW(2d) 347.

The court's charge that the act of the truckdriver in parking his truck where he did was as a matter of law a proximate cause of the injury was erroneous, as was also the charge that "less care" was required of the operator of the streetcar in the middle of the block than at intersections, or new trial may be ordered. Seward v Mpls. St. Ry. 222 M 454, 25 NW(2d) 221.

Where the trial court inadvertently gave an erroneous instruction in relation to the duty of a municipality as to care of its streets, but subsequently corrected the misstatement by stating the correct rule, the circumstances did not constitute reversible error. Squillance v Village of Mountain Iron, 223 M 10, 26 NW(2d) 197.

It was error to charge the jury that it might consider the question of loss of profits from production where there was no competent evidence on which to base such loss. Poynter v Co. of Otter Tail, 223 M 122, 25 NW(2d) 708; Lanesboro v Forthum, 218 M 377, 16 NW(2d) 326.

The substance of the request was given in the general charge, so no error in denying to charge as requested. Dally v Ward, 223 M 265, 26 NW(2d) 217; Blanton v Northern Pacific, 215 M 442, 10 NW(2d) 382; O'Neill v Mpls. St. Ry. 213 M 514, 7 NW(2d) 665; Boese v Langley, 213 M 440, 7 NW(2d) 355.

546.15 WHAT PAPERS JURORS MAY TAKE.

One who is negligent is liable for any injury naturally and proximately resulting from his act or omission if he ought reasonably to have anticipated that some form of injury was likely to result. This is to be determined by the jury "in the

exercise of practical common sense, rather than by the application of abstract definitions." Saturnini v Rosenblum, 217 M 154, 14 NW(2d) 108.

To supplement or interpret the testimony or evidence adduced at the trial, a jury may bring to its aid matters of common knowledge as well as matters known to them through their own individual observations. Chicago, Milwaukee v Moore, 166 F. 663.

546.16 VERDICT, WHEN RECEIVED; CORRECTING SAME; POLLING JURY.

The trial court had the power to amend the verdict by adding to the general damages awarded the amount of special damages written into the verdict, it appearing that the jury intended to award said items of special damage in addition to the sum fixed as general damages. Jaenisch v Vigen, 209 M 543, 297 NW 29.

Where, after retiring, a jury returns into court for instructions upon an issue not presented by pleadings or evidence, there is no error in the refusal to instruct concerning it. Grove v Lyon, 211 M 68, 300 NW 373.

There must be a reversal where the verdict is perverse as a compromise and not in response to the evidence. Dege v Produce Exchange Bank, 212 M 44, 2 NW(2d) 423.

Where an employee with employer's consent retains money belonging to the employer which came into employee's hands during the period of service covered by the contract of employment, he is not guilty of unfaithful and dishonest service forfeiting his right to compensation. Hlubeck v Beeler, 214 M 484, 9 NW(2d) 252.

Marriage does not of itself create the relation of principal and agent between husband and wife. A finding of no negligence on the part of the husband was not implicit in a verdict for defendants where the jury was instructed to find such a verdict in the event it found that the husband was driving pursuant to a prearrangement between defendants and plaintiff and her husband, on the theory that such arrangement made the husband plaintiff's agent, the jury having so found in response to a special question. Darian v McGrath, 215 M 389, 10 NW(2d) 403.

546.19 VERDICT, GENERAL AND SPECIAL.

The court properly required the jury to return special verdicts upon the several issues or items involved in the action. Jaeger v Mirau, 206 M 469, 289 NW 51.

Estoppel by verdict, as distinguished from estoppel by judgment, is limited in its application to the issues of fact actually adjudicated in the prior action, and such adjudication of questions of fact, so placed in issue, and determined by the jury or other trier of fact, is res judicata and is final and conclusive on the parties and their privies in all subsequent litigation, although different causes and forms of action are involved. Bernstein v Levitz, 223 M 46, 25 NW(2d) 289.

546.20 INTERROGATORIES; SPECIAL FINDINGS.

The failure of a jury to agree on an answer to a special interrogatory submitted to it is equivalent to a finding against the party having the burden of proof. Boese v Langley, 213 M 440, 7 NW(2d) 355.

Direction of verdict or entry of judgment on the pleadings. 15 MLR 602.

Dismissal and directed verdict. 23 MLR 363.

546.22 JURY TO ASSESS RECOVERY.

Trial court had power to amend the verdict by adding to the general damages written into the verdict as found by the jury. Jaenisch v Vigen, 209 M 543, 297 NW 29.

The remedial right for personal injuries caused by negligence is the recovery of compensatory damages. The right to damages is the effect or consequences of the cause of action. Damages are an award made to a person "because of a legal wrong

done him by another." An action to recover loss of earnings and medical, hospital, and nursing expenses resulting from personal injuries caused by the negligence of a wrongdoer who was instantly killed by the act of negligence is based on a cause of action for "injury to the person" which under section 573.01 dies with the person of the tortfeasor. Eklund v Evans, 211 M 164, 300 NW 617.

Where the defendant county acquired a right of way by deed, which by its terms released defendant from all damages by reason of the location, grading, construction, maintenance, and use of the public highway over the premises, the provisions of the deed released the defendant only from all damages arising from non-negligent construction and maintenance. Poynter v County of Otter Tail, 223 M 121, 25 NW(2d) 709.

Assessment of damages in personal injury actions. 14 MLR 216.

What law governs the measure of damages. 14 MLR 665.

Counsel fees and other expenses of litigation as an element of damages. 15 MLR 619.

Duty of injured party to accept new offer from defaulter on contract, avoidable consequences. 20 MLR 300.

Verdict apportioning damages among defendants jointly liable for tort. 22 MLR 569.

Measure of damages where negligence of defendant operates upon an active or latent condition of the plaintiff. 25 MLR 380.

546.24 RECEIVING VERDICT.

The irregularity of completing the verdict upon its return to the court was not prejudicial to the losing party and the verdict may stand. Hause v St. Paul Ry. 217 M 432, 14 NW(2d) 473; Walley v Sweet, 220 M 545, 20 NW(2d) 528.

Where a jury in a personal action returned a general verdict for $30,000 against three defendants, but accompanied the verdict with an attempted specification as to what each defendant must pay, such division of liability was surplusage. The jury has no jurisdiction to apportion the damages. Bakken v Lewis, 223 M 329, 26 NW(2d) 478.

546.26 TRIAL BY JURY, HOW WAIVED.

Plaintiff who makes no objection to oral order for reference at call of calendar nor to subsequent formal order of reference waives his right to a jury trial, notwithstanding objection at commencement of proceedings before a referee. Gondreau v Beliveau, 210 M 35, 297 NW 352.

Accused's waiver of jury trial. 15 MLR 109.

Power of defendant in criminal prosecution to waive right to jury trial without advice of counsel. 27 MLR 533.

546.27 TRIAL BY THE COURT; DECISION, HOW AND WHEN MADE.

Whenever an issue of fact or of law and fact is tried and determined by the judge, section 546.27 requires separately stated findings of fact. Midland Loan v Temple Garage, 206 M 434, 288 NW 853; State ex rel v Anderson, 207 M 357, 291 NW 605.

On an application for a writ of prohibition against the district court of the 19th judicial district, the writ was denied, the record not containing sufficient facts. The appellate court ought not to determine legal questions that may be involved in advance of a proper finding of facts by the trial court. State ex rel v District Court, 206 M 645, 287 NW 491.

There is nothing in the statements found in the memorandum of the trial court from which a conclusion can be drawn that the statement of the amount due in the published notice was overstated. The memorandum of the court may be resorted to in order to sustain findings but may not be used to overturn them. McGovern v Federal Land Bank, 209 M 403, 296 NW 473.

The denial of a motion to make a finding of fact is equivalent to a finding to the contrary. Blodgett v Hollo, 210 M 298, 298 NW 249.

In a suit to compel specific performance of a written contract to make a will the trial court's denial of appellant's motion for a finding that the services rendered by plaintiff under the contract were compensable in money amounted to a finding that the services were not compensable and the evidence justified such a finding; and consequently, plaintiff's remedy at law was inadequate and she was entitled to specific performance. Herman v Kelehan, 212 M 349, 3 NW(2d) 587.

Where in an action to reform deeds on the ground of mutual mistake in omitting certain land, there is evidence which would have justified the trial court in finding that the mistake was established by clear and convincing proof and that a third party purchaser from the vendor took title to the omitted property with full knowledge of the grantees' claim of title. It was error to dismiss the action. Czanstknowski v Matter, 213 M 257, 6 NW(2d) 629.

An order denying a motion for amended or additional findings is not appealable; and where such a motion is coupled with an alternative motion for a new trial, only that part of the order denying a new trial is appealable; and where the court refuses to make proposed amendments or changes in the findings, the order is equivalent to findings negativing the facts asked to be found. Droege v Brockmeyer, 214 M 182, 7 NW(2d) 538; Motzko v Motzko, 222 M 36, 22 NW(2d) 920.

In this suit to set aside a deed on the ground that defendant obtained it from plaintiff by fraud and deceit and without consideration, defendant's own testimony and the agreements and receipts drawn or dictated by him conclusively prove that the trial court could do no other than make findings for the plaintiff, and accordingly the trial court rightly denied defendant's motion for amended findings or a new trial. Yess v Ferch, 218 M 32, 15 NW(2d) 134.

Clear and explicit findings are not subject to construction and cannot be explained by other parts of the record (Kleidon v Glarcock, 215 M 417, 10 NW(2d) 394); but where the findings are of ambiguous or doubtful meaning, they should be construed in the light of the entire record, including the evidence, to ascertain the intention of the trial court. Stevens v Mpls. Fire Dept. 219 M 282, 17 NW(2d) 642.

A memorandum of a trial judge attached to his findings or order, even though expressly made a part of such findings or order, may not be used to impeach, contradict, overturn, or modify the positive and unambiguous terms of such findings or order. Bicanic v J.C. Campbell Co. 220 M 107, 115, 19 NW(2d) 7.

Held that where court, without consent of defendants, made an order appointing a general receiver for a partnership business in connection with an action for an accounting, which order contained an alternative provision that the receivership would be limited to the books and records and the taking of an inventory if defendants would furnish a bond conditioned to pay plaintiff such sums as might be found due him on the accounting, and defendants furnished such bond for the purpose of thus limiting the receivership, defendants did not thereby waive the right of appeal. Such a choice does not fall within the contemplation of the general rule that one who accepts the benefits of an order or judgment waives the right to appeal therefrom. Bliss v Griswold, 222 M 494, 25 NW(2d) 302.

While the relationship between partners is essentially one of mutual trust and confidence and, as such, the law imposes upon them the highest standard of integrity and good faith in their dealings with each other, nevertheless, in weighing the evidence and finding the facts, it is for the trier thereof to determine them; and where, as here, such trier, upon conflicting evidence, found for defendants, such findings will not be disturbed on appeal. Venier v Forbes, 223 M 69, 25 NW(2d) 704.

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

Dismissal and directed verdict in Minnesota. 23 MLR 363.

546.29 PROCEEDINGS ON DECISION OF ISSUE OF LAW.

A party who interposes a demurrer is entitled under section 543.16 to notice of all subsequent proceedings even though the demurrer is overruled and no leave to plead over is obtained. Section 546.29 does not dispense with the duty to give notice after demurrer is overruled. Kemerer v State Farm Mutual, 206 M 325, 288 NW 719.

546.30 COURT ALWAYS OPEN; DECISIONS OUT OF TERM.

Nunc pro tunc entries of judicial action are permitted to correct the record in furtherance of justice where error or delay is caused by the action of the court. It is the office of such entries to record and not supply judicial action. Nunc pro tunc order directing that the record indicate that a motion for directed verdict was made at the close of testimony and denied, when in fact no such motion was then made, is a nullity. Wilcox v Schloner, 222 M 45, 23 NW(2d) 19.

546.33 TRIAL BY REFEREES; REFERENCE BY CONSENT; FEES WHEN PAID BY THE COUNTY.

Plaintiff who makes no objection to an oral order for reference at the call of the calendar nor to a subsequent formal order of reference waives his right to a jury trial notwithstanding his objection made at the commencement of the proceedings before the referee. Gondreau v Beliveau, 210 M 35, 297 NW 352.

The court lacks power to appoint a referee in actions purely at law where there was an absolute right of trial by jury as the law stood when the constitution was adopted, but otherwise there is no limitation on the court's power of appointment. Rockwell v State Board of Education, 213 M 184, 6 NW(2d) 251.

A referee appointed by an administrative board has a limited power of hearing and reporting testimony in any proceeding for the removal of a public officer. He acts strictly in subordination to the board, and his appointment and powers do not constitute a delegation of legislative authority. Rockwell v State Board of Education, 213 M 184, 6 NW(2d) 251.

Modernizing court procedure. 8 MLR 84.

546.34 COMPULSORY REFERENCE, WHEN.

Generally when a referee is appointed, his findings of fact have the effect of a special verdict as provided in section 546.36, but 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 evidence. In re McDonald, 204 M 61, 282 NW 677, 284 NW 888; 208 M 330, 294 NW 461.

See, Rockwell v State Board of Education, 213 M 184, 6 NW(2d) 251, noted under section 546.33.

546.35 SELECTION OF REFEREES; MAJORITY MAY ACT.

Where appellant asked in the alternative for a jury trial or a reference on the question of value of attorney's services, he is not in a position to claim prejudice because the case was referred to a judge for trial. Coughlin v City of St. Paul, 219 M 372, 18 NW(2d) 87.

546.36 TRIAL AND REPORT; POWERS; EFFECT OF REPORT.

The court speaks and operates through the referee, its subordinate officer. The referee exerts no power proprio vigore. Without the court he could have no existence, without the court he could not act after his creation, and without confirmation and adoption by the court, his acts have no force or validity. Nothing can originate before a referee, and nothing can terminate with or by the decision of a referee. The court acquires the jurisdiction, and the court renders the judgment. The whole exercise of judicial power is by the court, the referee acting only in an intermediate capacity as auxiliary to the court. In supplying the courts with convenient and

necessary agents, there is no violation of the constitution. Carson v Smith, 5 M 78 (58); Thayer v Barney, 12 M 507 (406).

The district courts have power to set aside the reports of referees and grant new trials on account of errors appearing therein. Thayer v Barney, 12 M 507 (406).

The district court may vacate the findings and decision of a referee and grant a new trial on the ground that the verdict is not justified by the evidence, as in other cases. The supreme court will not interfere to disturb the action of the trial court in granting a new trial for such cause, unless the evidence manifestly predominates in favor of the decision vacated. Koktan v Knight, 44 M 304, 46 NW 354.

A motion to vacate the report of a referee, and for a new trial, for errors of law committed during the trial and for insufficiency of evidence, may be made on a case settled after the entry of judgment, when the report has been made and filed, and judgment has been entered without notice, and when the party making the motion has been guilty of no laches or unreasonable delay in settling the case, and making the motion. When in such a case a report is vacated, and a new trial granted, the court may also set aside the judgment to give effectiveness to its decision. Cochrane v Halsey, 25 M 52.

Where in the appointment of a referee it is his duty to report the facts, his report is in effect a special verdict. Ferch v Hiller, 209 M 124, 295 NW 504.

546.38 DISMISSAL FOR DELAY.

Great caution and deliberation should be exercised by the trial court in the granting of an interlocutory injunction since the injunctive process is the strong arm of equity. The right to and the necessity for the granting or refusal of such an injunction lies largely within the discretion of the trial court whose action will not be disturbed on appeal unless from the whole record it appears that there has been an abuse of such discretion. It was plaintiff's plain duty, in the instant case, to exercise "reasonable diligence to call into action" the powers of the court; and failing so to do, the "court may dismiss a suit where the plaintiffs' 'lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence.'" General Minnesota Utilities v Carleton County Assn. 221 M 510, 22 NW(2d) 673.

546.39 DISMISSAL OF ACTION.

Dismissals are governed by statute. An action may be dismissed without final determination on its merits where, upon trial and before submission of the case, plaintiff abandons it or fails to substantiate or establish his cause of action or right to recovery. While generally a court may direct a verdict for defendant when plaintiff rests and a cause of action is not proved, such practice is not authorized by statute and is objectionable; the obvious intent of the statute being that when there is a failure of proof on plaintiff's part to establish a cause of action, a dismissal should be ordered rather than a verdict directed. Where plaintiff requests a dismissal the matter is entirely discretionary with the court. Willard v Kohen, 202 M 626, 279 NW 553.

Under clause (3) of section 546.39 the court is authorized to dismiss a case if plaintiff fails to substantiate or establish his cause of action or right to recovery, but in exercising this authority the court must give the plaintiff the benefit of every reasonable inference that might be drawn from the evidence. Docken v Ryan, 213 M 209, 6 NW(2d) 98.

It appearing from the record that the issue here presented was before the court in a former action between the same parties, the judgment entered therein pursuant to a written stipulation of settlement dismissing the action on the merits is binding on the parties and a bar to the present action. Melady v Drovers State Bank, 213 M 304, 6 NW(2d) 454.

An order for dismissal on the ground that the complaint does not state a cause of action requires that every reasonable intendment be indulged in to favor the sufficiency of the complaint and that all allegations thereof, including those denied

by the defendant, be accepted as true for the purposes of the motion. Cranak v Link, 219 M 112, 17 NW(2d) 359.

The irregular and undesirable practice of granting a dismissal on the merits in a jury trial is equivalent in effect to the granting of a motion for a directed verdict. Anderson v Sears, Roebuck & Co. 223 M 1, 26 NW(2d) 355.

Discretion to dismiss actions between non-residents on causes of action arising outside the state. 15 MLR 83, 115.

Right of plaintiff to a dismissal without prejudice after trial begins. 17 MLR 674.

Effect of second voluntary dismissal before trial. 20 MLR 228.

Dismissal and directed verdict. 23 MLR 363, 391.

Appealable orders. 24 MLR 860.

Discontinuance of stockholders' derivative suit without notice to the other stockholders. 25 MLR 945.

546.41 TENDER OF MONEY IN LIEU OF JUDGMENT.

Where a cause of action has been settled and the parties interested in the award have stipulated to submit the matter to the district court for the purpose of having it determine what division should be made of the proceeds of the compromise between the parties claiming an interest therein, the evidence is considered in the light most favorable to the prevailing party, and the decision of the trial court will be sustained if reasonably supported by the evidence. Fyfe v Great Northern, 223 M 339, 27 NW(2d) 147.