THE

# GENERAL STATUTES

OF THE

# STATE OF MINNESOTA

As Amended by Subsequent Legislation, with which are Incorporated All General Laws of the State in Force December 31, 1894


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## VOL. 2

CONTAINING

**Sections 4822 to 8054 of the General Statutes, and the General Index**


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# CHAPTER 86.

## APPEALS IN CIVIL ACTIONS.

### § 6132. Appeal from judgment or order of district court.

A judgment or order, in a civil action, in any of the district courts, may be removed to the supreme court, by appeal, as provided in this chapter, and not otherwise.

(G. S. 1866, c. 86, § 1; G. S. 1878, c. 86, § 1.)

No appeal lies to the supreme court from a mere opinion of the district court. Thompson v. Howe, 21 Minn. 1.

An appeal will not lie from the statement filed (on trial by the court without a jury) of the court's findings of fact and law. The appeal should be from the judgment entered upon it. Von Glahn v. Sommer, 11 Minn. 203, (Gil. 132.)

See, also, Johnson v. Northern Pac., F. F. & B. H. Ry. Co., 39 Minn. 30, 38 N. W. Rep. 804.

Except in such special proceedings as the statute has provided for, this court acquires jurisdiction only by writ of error, or appeal. Parties cannot confer it by stipulation. Rathbun v. Moody, 4 Minn. 364, (Gil. 273.)

The supreme court will not review a judgment of the district court, after it has been settled by the parties. Babcock v. Banning, 3 Minn. 191, (Gil. 123.)

McNamara v. Minn. Cent. Ry. Co., 12 Minn. 388, (Gil. 269;) Conter v. St. Paul & S. C. R. Co., 24 Minn. 313.

### § 6133. Title of action on appeal.

The party appealing is known as the appellant, and the adverse party as the respondent; but the title of the action is not to be changed in consequence of the appeal.

(G. S. 1866, c. 86, § 2; G. S. 1878, c. 86, § 2.)

### § 6134. Notice of appeal—Service—Effect.

An appeal shall be made by the service of a notice in writing, on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. When a party gives, in good faith, notice of appeal from a judgment or order, and omits, through mistake, to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just.

(G. S. 1866, c. 86, § 3; G. S. 1878, c. 86, § 3.)

The notice of appeal to this court, filed with the clerk of the district court, is not rendered invalid, because addressed to the attorney for the opposite party instead of to the clerk. Baberick v. Magner, 9 Minn. 232, (Gil. 217.) Followed in State v. Klitzke, 46 Minn. 343, 49 N. W. Rep. 54.

See Hodgins v. Heaney, 15 Minn. 185, (Gil. 142, 146.)

### § 6135. Return to supreme court.

Upon an appeal being perfected, the clerk shall transmit to the supreme court a certified copy of the judgment-roll, or order appealed from, and the papers upon which the order was granted, at the expense of the appellant. When a case is made, or bill of exceptions allowed, it may, for the purpose of the appeal, stand in place of or be attached to the judgment-roll, and certified to the appellate court as aforesaid.

(G. S. 1866, c. 86, § 4; G. S. 1878, c. 86, § 4.)

Upon an appeal to the supreme court, where there is no "statement of the case," or bill of exceptions in the record, the evidence, even though consisting of depositions, will not be considered. Claflin v. Lawler, 1 Minn. 297, (Gil. 231.) Case dismissed for want of a return, the place of which cannot be supplied by a stipulation, as attempted in this instance. American Ins. Co. v. Schroeder, 21 Minn. 331.

This court will strike from the record any matter or paper improperly included in it, and allow proof by affidavit of the facts on which the impropriety depends. Daniels v. Winslow, 2 Minn. 113, (Gil. 93.) An extract from the minutes of a referee attached to the return to this court, there being no case settled or agreement by the parties in

regard to it, is improperly embraced in the return, and will be struck out. Robinson v. Bartlett, 11 Minn. 410, (Gil. 302.)

See Keegan v. Peterson, 24 Minn. 1, 3; Hodgins v. Heaney, 15 Minn. 185, (Gil. 142.)

Until the return is filed, the supreme court has only jurisdiction to dismiss the appeal or compel a return. Briggs v. Shea, 48 Minn. 218, 50 N. W. Rep. 1037.

See Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. Rep. 608, 1119.

## § 6136. Powers of appellate court.

Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all the property and rights lost by the erroneous judgment.

(G. S. 1866, c. 86, § 5; G. S. 1878, c. 86, § 5.)

On appeal from a judgment, this court may review an order refusing a new trial. Mower v. Hanford, 6 Minn. 535, (Gil. 372.) On appeal from a judgment, this court may review an order before judgment, directing a delivery to the sheriff, and a sale of certain property, the subject of the action. Id.

Upon a joint appeal by several parties, this court may reverse, affirm, or modify the judgment or order appealed from as to any or all of the parties. Nelson v. Munch, 28 Minn. 314, 9 N. W. Rep. 863.

See Anderson v. Hanson, 28 Minn. 400, 404, 10 N. W. Rep. 429; Hodgins v. Heaney, 15 Minn. 185 (Gil. 142, 146); L. Kimball Printing Co. v. Southern Land Imp. Co. (Minn.) 58 N. W. Rep. 868.

## § 6137. Dismissal of appeal in vacation.

That any judge of the supreme court shall, during vacation, have the same power as the court at term to dismiss any appeal and remand the cause to the court below, upon the stipulation of the parties to such appeal consenting to such dismissal, to be filed with the clerk of said court.

(1879, c. 70, § 1; G. S. 1878, v. 2, c. 86, § 5a.)

## § 6138. Within what time to be taken.

The appeal from a judgment hereafter rendered may be taken within six months after the entry thereof, and from an order within thirty days after written notice of the same.

(G. S. 1866, c. 86, § 6, as amended 1869, c. 70, § 1; G. S. 1878, c. 86, § 6.)

This section is prospective in its operation, does not apply to judgments entered prior to its passage, nor does it repeal *c.* 83, Laws 1868, as to such judgments. Kerlinger v. Barnes, 14 Minn. 526, (Gil. 398.)

An appeal taken before the filing of the record or entry of the judgment is premature. Exley v. Berryhill, 36 Minn. 117, 30 N. W. Rep. 436.

The time for bringing an appeal or writ of error begins to run with the entry of the judgment or order. Humphrey v. Havens, 9 Minn. 318, (Gil. 301.)

The judgment is not perfected, for the purpose of limiting the time for taking an appeal, until costs have been duly taxed and inserted therein. Richardson v. Rogers, 37 Minn. 461, 35 N. W. Rep. 270.

An appeal taken within six months after the *entry* of the judgment appealed from is in time. Hostetter v. Alexander, 22 Minn. 559.

See Papke v. Papke, 30 Minn. 260, 262, 15 N.W. Rep. 117; Keegan v. Peterson, 24 Minn. 1, 3; Hodgins v. Heaney, 15 Minn. 185, (Gil. 142, 146;) Beaupre v. Hoerr, 13 Minn. 366, (Gil. 339, 340.)

## § 6139. Papers to be furnished by appellant.

The appellant shall furnish the court with copies of the notice of appeal, and of the order or judgment-roll. If he fails to do so, the appeal may be dismissed.

(G. S. 1866, c. 86, § 7; G. S. 1878, c. 86, § 7.)

See American Ins. Co. v. Schroeder, 21 Minn. 331; Briggs v. Shea, cited in note to § 6135; L. Kimball Printing Co. v. Southern Land Imp. Co. (Minn.) 58 N. W. Rep. 868.

## § 6140. Appeal to supreme court in what cases.

An appeal may be taken to the supreme court, by the aggrieved party, in the following cases:

First. From a judgment in an action commenced in the district court, or brought there from another court from any judgment rendered in such court,

and, upon the appeal from such judgment, the court may review any intermediate order involving the merits, or necessarily affecting the judgment.

Second. From an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve an injunction, or an order vacating or sustaining an attachment.

Third. From an order involving the merits of the action, or some part thereof.

Fourth. From an order granting or refusing a new trial, or from an order sustaining or overruling a demurrer. (As amended 1867, c. 63, § 1.)

Fifth. From an order, which, in effect, determines the action, and prevents a judgment from which an appeal might be taken.

Sixth. From a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment.

(G. S. 1866, c. 86, § 8, amended as supra; G. S. 1878, c. 86, § 8.)

See, generally, Shepard v. Pettit, 30 Minn. 119, 14 N. W. Rep. 511; Conter v. St. Paul & S. C. R. Co., 24 Minn. 313; Thompson v. Howe, 21 Minn. 1; Schurmeier v. First Div. St. P. & P. R. Co., 12 Minn. 351, (Gil. 228.)

SUBD. 1. The supreme court will not review the acts of a court commissioner till they have been passed on by the court below. Gere v. Weed, 3 Minn. 352, (Gil. 249.) Followed, Pulver v. Grooves, 3 Minn. 359, (Gil. 252.)

An appeal cannot be taken from an order denying a motion on a case made for judgment, notwithstanding the report of a referee. The appeal should be from the judgment after it is entered on the report. Ames v. The Mississippi Boom Co., 8 Minn. 467, (Gil. 417.)

The order of a probate court admitting a will to probate is a judgment within the meaning of this subdivision, and an appeal lies to the supreme court from a judgment of a district court affirming such order. In re Penniman, 30 Minn. 245, (Gil. 220.)

In an action for a penalty imposed by statute for neglect of official duty, though it be brought by an informer, no appeal lies from a judgment of acquittal. Kennedy v. Raught, 6 Minn. 235, (Gil. 155.)

See State v. District Court, 26 Minn. 235, 2 N. W. Rep. 698.

In partition on appeal from the final judgment, confirming the partition or sale, the interlocutory judgment, declining the interests of the parties, may be reviewed. Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. Rep. 171.

An order changing the place of trial is reviewable on appeal from the judgment. Hinds v. Backus, 45 Minn. 170, 47 N. W. Rep. 655; Schoch v. Winona & St. P. R. Co., (Minn.) 57 N. W. Rep. 208.

An order affirming the clerk's refusal to tax and insert costs in a judgment already entered may be reviewed on appeal from the judgment. Fall v. Moore, 45 Minn. 517, 48 N. W. Rep. 404.

SUBD. 2. An appeal does not lie to this court from an *ex parte* order of the judge of the district court at chambers. Hoffman v. Mann, 11 Minn. 364, (Gil. 262;) Schurmeier v. First Div. St. P. & Pac. R. Co., 12 Minn. 351, (Gil. 228.)

An order vacating an attachment is not appealable. Humphrey v. Hezlep, 1 Minn. 239, (Gil. 190.)

An order modifying an injunction, and suspending its operation in part, is in effect one dissolving an injunction *pro tanto*, and is appealable under this subdivision. Weaver v. Mississippi, etc., Boom Co., 30 Minn. 478, 16 N. W. Rep. 269.

An order refusing to appoint a receiver, in accordance with the report of a referee, is appealable as an order refusing a provisional remedy, notwithstanding such order was made without prejudice to a new motion for the appointment of a receiver with less authority. Grant v. Webb, 21 Minn. 39.

An order or decision which constitutes part of the record, and is appealable, need not be excepted to. Ely v. Titus, 14 Minn. 125, (Gil. 93.)

An order discharging an attachment upon a bond given is appealable. Gale v. Seifert, 39 Minn. 171, 39 N. W. Rep. 69.

An ex parte order granting an injunction is not appealable. State v. District Court First Jud. Dist., 52 Minn. 283, 53 N. W. Rep. 1157.

SUBD. 3. There is no appeal given upon the refusal of the court below to entertain a motion. Mayall v. Burke, 10 Minn. 285, (Gil. 225.)

Where the summons contains the proper notice prescribed in the case of an "action arising on contract for the payment of money only," but the complaint on file indicates an "action for the recovery of money" other than one arising on contract, etc., held, that an order denying a motion made to set aside the complaint on the ground of such non-conformity is not an appealable order. Sibley Co. v. Young, 21 Minn. 335.

An order denying a motion to change the place of trial is not appealable. Carpenter v. Comfort, 22 Minn. 539.

An order refusing to strike out portions of a pleading for duplicity is not appealable. Exley v. Berryhill, 36 Minn. 117, 30 N. W. Rep. 436. An order striking out portions of an

answer is appealable. Starbuck v. Dunklee, 10 Minn. 168, (Gil. 136;) Kingsley v. Gilman, 12 Minn. 515, (Gil. 425.)

An order referring a cause not referable is appealable. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

An order setting aside a stipulation in an action between the parties agreeing to the existence of facts in the case is appealable. Bingham v. Supervisors Winona Co., 6 Minn. 136, (Gil. 82.)

An appeal will not lie from an order made on a trial denying a motion for judgment on the pleadings. McMahon v. Davidson, 12 Minn. 357, (Gil. 232.) Nor from an order made at the trial granting such a motion. Lamb v. McCanna, 14 Minn. 513, (Gil. 385.) See, also, Lockwood v. Bock, 46 Minn. 73, 48 N. W. Rep. 458; United States Sav., Loan & Bldg. Co. v. Ahrens, 50 Minn. 332, 52 N. W. Rep. 898.

An appeal will not lie from the rulings of a court during a trial admitting or excluding evidence. Hulett v. Matteson, 12 Minn. 349, (Gil. 227.)

When the case is one of failure of proof, and not of variance, a denial of an application, on trial, for leave to amend the complaint, will not be reviewed if there be no abuse of discretion. White v. Culver, 10 Minn. 192, (Gil. 155.)

An order setting aside a stipulation for dismissal of an action deprives a party of a legal right, and is appealable, as an order "involving the merits of the action, or some part thereof." Rogers v. Greenwood, 14 Minn. 333, (Gil. 256.)

An appeal will not lie from an order dismissing an action. Searles v. Thompson, 18 Minn. 316, (Gil. 285.)

An order for judgment is not appealable. Hodgins v. Heaney, 15 Minn. 185, (Gil. 142;) State v. Bechdel, 38 Minn. 278, 37 N. W. Rep. 338.

An order refusing to vacate an unauthorized judgment is appealable. Piper v. Johnston, 12 Minn. 60, (Gil. 27.)

An order setting aside a judgment upon a question of practice as to the service of the answer is not appealable. Westervelt v. King, 4 Minn. 320, (Gil. 236.)

An order setting aside a judgment in proceedings to enforce payment of taxes under Gen. St. 1878, c. 11, if it determine only the strict legal rights of the parties, and not merely questions of practice or discretion, is reviewable under this subdivision. County of Chisago v. St. Paul & D. R. Co., 27 Minn. 109, 6 N. W. Rep. 454.

An order permitting defendants to answer, made under § 105, c. 66, G. S., (§ 5267,) more than one year after the entry of judgment, involves the merits of the action, or some part thereof, under this subdivision. Holmes v. Campbell, 13 Minn. 66, (Gil. 58.)

An order dismissing an application for the settlement of a bill of exceptions is not appealable. Richardson v. Rogers, 37 Minn. 461, 35 N. W. Rep. 270. An order denying leave to make and serve a statement of the case, after the time given by statute has expired, is not, in the absence of abuse of discretion, appealable. Irvine v. Myers, 6 Minn. 558, (Gil. 394.)

An order refusing to set aside garnishee proceedings for insufficiency of the affidavit, and granting plaintiff leave to file a supplemental complaint under § 12 of the act of 1860 relating to garnishment, is not appealable. Prince v. Heenan, 5 Minn. 347, (Gil. 279.)

An order made by a court commissioner, in a case where he has no power to act, is a nullity, and cannot be appealed from. To purge the record of the void order, the proper course is by motion in the court below. Black v. Brisbin, 3 Minn. 360, (Gil. 253.)

See Wagner v. Wagner, 34 Minn. 441, 443, 26 N. W. Rep. 450; Rabitte v. Nathan, 22 Minn. 266.

An order refusing a motion to strike out an answer as a sham is not appealable. National Albany Exch. Bank v. Cargill, 39 Minn. 477, 40 N. W. Rep. 570.

In an action against an insolvent corporation under c. 76, a creditor who has proved his claim may appeal from an order directing or confirming a sale of the property of the insolvent. Hospes v. Northwestern Manuf'g & Car Co., 41 Minn. 256, 43 N. W. Rep. 180.

An appeal will not lie from an order vacating or refusing to vacate a nonappealable order, nor from an interlocutory administrative order in an action to wind up a corporation. Brown v. Minnesota Thresher Manuf'g Co., 44 Minn. 322, 46 N. W. Rep. 560; Lockwood v. Bock, 46 Minn. 73, 48 N. W. Rep. 458.

An order vacating a judgment on default, and granting leave to answer, is appealable. People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. Rep. 219.

An order requiring a bill of particulars to be made more specific is not appealable. Van Zandt v. Wood Produce Co., 54 Minn. 202, 55 N. W. Rep. 863.

SUBD. 4. Formerly the decision of the district court upon a demurrer could not be appealed from until judgment thereon was perfected. Cummings v. Heard, 2 Minn. 34, (Gil. 25.)

The state cannot take an appeal or writ of error in a criminal case. State v. McGrorty, 2 Minn. 224, (Gil. 187.)

An order deciding a demurrer is appealable. Sons of Temperance v. Brown, 9 Minn. 151, (Gil. 141.)

The failure of a party demurring to appear at the hearing upon it in the court below, does not prevent him being heard on it here on an appeal from an order overruling it. Hall v. Williams, 13 Minn. 260, (Gil. 242.)

An order denying a motion to vacate an order sustaining a demurrer, and for a new trial on the demurrer, is not an order refusing a new trial, so as to be appealable under this section. Dodge v. Bell, 37 Minn. 382, 34 N. W. Rep. 739.

The granting of a new trial is a matter in the discretion of the court, and not reviewable. Dufolt v. Gorman, 1 Minn. 302, (Gil. 234.)

After an order had been made granting a new trial, a subsequent order was made, modifying it by providing that on the retrial, certain depositions read on the first might be read. Held, that this subsequent order is not appealable. Chouteau v. Parker, 2 Minn. 119, (Gil. 95.)

When an action is tried by a district court without the intervention of a jury, a party may, if he chooses, move for a new trial, and from the order made upon the motion an appeal lies to this court. Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. Rep. 773.

An appeal cannot be taken from an order granting a new trial in proceedings to ascertain the compensation to be paid for taking private property for public use. McNamara v. Minnesota Cent. Ry. Co., 12 Minn. 388, (Gil. 269.)

An order refusing to vacate an order denying a new trial is not appealable. Little v. Leighton, 46 Minn. 201, 48 N. W. Rep. 778.

An appeal from an order striking out a demurrer, in addition to one from the judgment, is improper. Hatch & Essendrup Co. v. Schusler, 46 Minn. 207, 48 N. W. Rep. 782.

SUBD. 5. An appeal will not lie from an order dismissing an action before trial. Jones v. Rahilly, 16 Minn. 177, (Gil. 155.)

An order of the district court, dismissing an appeal from a justice's judgment for want of jurisdiction apparent on the face of the record, is a final order, putting an end to all proceedings upon the appeal, and is appealable under this subdivision. Ross v. Evans, 30 Minn. 206, 14 N. W. Rep. 897.

An order dismissing an appeal from an order of the town supervisors laying out a highway, and from their award of damages, is appealable. Town of Haven v. Orton, 37 Minn. 445, 35 N. W. Rep. 264.

An order denying a new trial, made by the district court on appeal from a judgment of a justice court on questions of law, is not appealable. Common Council of City of St. Cloud v. Karels (Minn.) 56 N. W. Rep. 592.

SUBD. 6. An order committing for contempt is appealable. Register v. State, 8 Minn. 214, (Gil. 185.) An appeal does not lie from an order which adjudges a defendant in contempt for disobeying a previous order of the court requiring him to pay to plaintiff a specified sum as temporary alimony, and which directs a warrant to issue for his arrest and commitment in case he refuses to pay the amount of such alimony, with interest and costs of motion, within ten days after the personal service upon him of such order. Semrow v. Semrow, 26 Minn. 9, 46 N. W. Rep. 446.

In what case an appeal lies from an order imposing a penalty for contempt; in what case the remedy is by certiorari. State v. Leftwich, 41 Minn. 42, 42 N. W. Rep. 598.

An order setting aside a judgment, and the report of the referee, and directing a new trial, is not appealable under § 11, p. 414, Rev. St. Chouteau v. Rice, 1 Minn. 121, (Gil. 97.)

An order dismissing a motion under § 255, c. 66, G. S., (§ 5435,) to compel entry of satisfaction of a judgment, is an order of the court, and is appealable. Ives v. Phelps, 16 Minn. 451, (Gil. 407.)

An order granting leave to issue execution after five years from the entry of judgment is appealable. Entrop v. Williams, 11 Minn. 381, (Gil. 276.)

An order vacating an execution sale of real estate, the certificate, and sheriff's return, is appealable. Hutchins v. County Commissioners Carver Co., 16 Minn. 13, (Gil. 1.) The defendant, in an execution, may appeal from an order made on application of the plaintiff in it, setting aside a sale under the execution, and ordering an *alias* to issue. Tillman v. Jackson, 1 Minn. 183, (Gil. 157.)

An order made pursuant to § 788, upon the hearing of an order to a sheriff to show cause why he should not pay over money collected or received by him on execution, is appealable as "a final order affecting a substantial right made * * * upon a summary application in an action after judgment." Coykendall v. Way, 29 Minn. 162, 12 N. W. Rep. 452.

An order to appear and answer, and of reference in proceedings supplementary to execution, are not final orders, and not appealable. Rondeau v. Beaumette, 4 Minn. 224, (Gil. 163.)

An order made upon a disclosure in proceedings supplementary to execution, directing the assignment of certain claims belonging to the judgment debtor, and appointing a receiver to collect the same, is an appealable order. Knight v. Nash, 22 Minn. 452.

The execution creditor may appeal from an order appointing the receiver, and directing the sheriff to deliver to him the property levied upon. In re Jones, 33 Minn. 405, 23 N. W. Rep. 835.

An order appointing a receiver under Laws 1881, c. 148, § 2, is a final order, affecting a substantial right, made in a special proceeding, within the meaning of this subdivision. In re Graeff, 30 Minn. 359, 16 N. W. Rep. 395.

A final order directing a receiver to distribute the proceeds of the estate of the in-

solvent equally among all his creditors, and setting aside the liens of attaching and execution creditors, is appealable under this subdivision. State v. Severance, 29 Minn. 269, 13 N. W. Rep. 48.

An order vacating the order discharging the relator in *habeas corpus* is appealable. State v. Hill, 10 Minn. 63, (Gil. 45.) An order discharging a person brought up on a writ of *habeas corpus* may be brought to this court for review by appeal, but not by *certiorari*. State v. Buckham, 29 Minn. 462, 13 N. W. Rep. 902.

This chapter, with the exception contained in this subdivision, only authorizes an appeal from a judgment or order in a civil action, and does not extend to special proceedings, as for the condemnation of lands. McNamara v. Minnesota Cent. R. Co., 12 Minn. 388, (Gil. 269.) An order in the district court in a special proceeding, as for the condemnation of lands, granting a new trial therein, is not a final order, affecting a substantial right, and not an appealable order, under this subdivision. Id. An order denying a motion for new trial, on appeal from award of commissioners in condemnation proceedings, under charter of Minnesota Valley Railroad Company, is a final order in a special proceeding, and appealable, under this subdivision. Minnesota Valley R. Co. v. Doran, 15 Minn. 230, (Gil. 179.)

In condemnation proceedings, an order dismissing the appeal from the award of the commissioners to the district court is appealable. Warren v. First Div. St. P. & Pac. R. Co., 18 Minn. 384, (Gil. 345.)

See State v. Webber, cited in note to § 5987; Gurney v. City of St. Paul, 36 Minn. 163, 30 N. W. Rep. 661.

In proceedings on certiorari, an appeal lies from a final order of the district court affecting a substantial right. Moede v. County of Stearns, 43 Minn. 312, 45 N. W. Rep. 435.

An order dismissing a petition by a creditor, under § 10 of the insolvent law as amended by Laws 1889, c. 30, § 7 (§ 4249), if made for informality or irregularity, is not appealable; if on the merits, is appealable. In re Harrison, 46 Minn. 331, 48 N. W. Rep. 1132.

An order denying a motion to correct a judgment entered by the clerk, and not conforming to the findings, is appealable. Nell v. Dayton, 47 Minn. 257, 49 N. W. Rep. 981.

An order upon disclosure in proceedings supplementary to execution, directing the payment of money by the judgment debtor, is appealable. Christensen v. Tostevin, 51 Minn. 230, 53 N. W. Rep. 461.

See Hospes v. Northwestern Manuf'g & Car Co., 41 Minn. 256, 43 N. W. Rep. 180; Brown v. Minnesota Thresher Manuf'g Co., 44 Minn. 322, 46 N. W. Rep. 560.

## § 6141. Bond for costs—Deposit.

To render an appeal effectual for any purpose, a bond shall be executed by the appellant, with at least two sureties, conditioned that the appellant will pay all costs and charges which may be awarded against him on the appeal, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the judgment of the court of appeal; but such bond or deposit may be waived by a written consent on the part of the respondent.

(G. S. 1866, c. 86, § 9; G. S. 1878, c. 86, § 9.)

See County of Hennepin v. Robinson, 16 Minn. 381, (Gil. 340, 341.) Bennett v. Whitcomb, 25 Minn. 148, 150; County of Aitkin v. Morrison, Id. 295.

## § 6142. Appeal from order—Supersedeas bond.

Such appeal, when taken from an order, shall stay all proceedings thereon, and save all rights affected thereby, if the appellant, or some one in his behalf, as principal, executes a bond, in such sum, and with such sureties, as the judge making the order, or in case he cannot act, the court commissioner or clerk of the court where the order is filed, directs and approves, conditioned to pay the costs of said appeal, and the damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein; which bond shall be filed in the office of said clerk.

(G. S. 1866, c. 86, § 10; G. S. 1878, c. 86, § 10.)

A clause granting defendant ten days to answer in an order denying his motion to set aside the summons is not affected by his appeal from the order and giving the undertaking provided in c. 22, Laws 1861, and it is improper for the plaintiff to enter judgment before the end of the ten days. Yale v. Edgerton, 11 Minn. 271, (Gil. 185.)

Where there is an appeal to this court from an order striking out portions of the answer, and an undertaking to stay proceedings executed, the cause cannot, while the ap-

peal is pending, be noticed for trial in the court below. Starbuck v. Dunklee, 12 Minn. 161, (Gil. 97.)

The condition of the bond does not require appellant to pay the judgment that may be afterwards entered on the verdict or decision. Reitan v. Goebel, 35 Minn. 384, 29 N. W. Rep. 6. Followed in Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. Rep. 1024.

Where an order of the district court requiring the payment of money is appealed to this court, and a stay-bond executed, conditioned "to abide and satisfy the judgment or order which the appellate court may give therein," and the order appealed from is affirmed, an action may be maintained upon the bond for the sum of money required to be paid by the order appealed from, with interest thereon. Erickson v. Elder, 34 Minn. 370, 25 N. W. Rep. 804.

See State v. Webber, 31 Minn. 211, 17 N. W. Rep. 339; State v. District Court, 35 Minn. 461, 29 N. W. Rep. 60.

Effect of appeal with stay bond from an order dissolving an attachment. Ryan Drug Co. v. Peacock, 40 Minn. 470, 42 N. W. Rep. 298.

An appeal from an order refusing to allow the defendant to answer except upon terms does not stay the entry of judgment on the default. Exley v. Berryhill, 37 Minn. 182, 33 N. W. Rep. 567. Cf. St. Paul & D. R. Co. v. Village of Hinckley, infra.

The supersedeas bond stays proceedings only from the date of its filing. Woolfolk v. Bruns, 45 Minn. 96, 47 N. W. Rep. 460.

An appeal, with the stay provided in this section, from an order dissolving an injunction, suspends the operation of the order, and the injunction remains in force. State v. Duluth St. Ry. Co., 47 Minn. 369, 50 N. W. Rep. 332.

But an ex parte order granting an injunction is not appealable, and an appeal from such an order, with supersedeas bond, does not suspend its operation. State v. District Court First Jud. Dist., 52 Minn. 283, 53 N. W. Rep. 1157.

An appeal with a stay does not oust the jurisdiction of the lower court. State v. Young, 44 Minn. 76, 46 N. W. Rep. 204; Briggs v. Shea, 48 Minn. 218, 50 N. W. Rep. 1037.

An appeal from an order refusing a new trial, the stay bond prescribed by this section being filed, is effectual as a stay, and suspends the right to enter judgment. St. Paul & D. R. Co. v. Village of Hinckley, 53 Minn. 102, 54 N. W. Rep. 940.

Where an appeal was dismissed, on motion of the respondents, for failure to file paper book, etc., a bond to pay the judgment below, "after decision of said supreme court," will not cover a judgment entered subsequent to dismissal. L. Kimball Printing Co. v. Southern Land Imp. Co. (Minn.) 58 N. W. Rep. 868.

## § 6143. Appeal from money judgment—Supersedeas bond.

If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment, unless a bond is executed by the appellant, with at least two sureties, conditioned that if the judgment appealed from, or any part thereof, is affirmed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and all damages which are awarded against the appellant upon the appeal.

(G. S. 1866, c. 86, § 11; G. S. 1878, c. 86, § 11.)

A levy made previous to an appeal from the judgment is not discharged by the giving of a bond for a stay on the appeal. First Nat. Bank of Hastings v. Rogers, 13 Minn. 407, (Gil. 376.)

The sureties in a bond for a stay on an appeal may, in an action against them on the bond, set up any defense which the principal may set up. If, as to him, the judgment is satisfied *sub modo*, it is a good defense for them. Id. Such a bond does not estop the parties from setting up a previous levy of execution on sufficient personal property to satisfy the judgment. Id.

## § 6144. From judgments for delivery of chattels, etc.—Stay.

If the judgment appealed from, directs the assignment or delivery of documents, or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court may appoint; or unless a bond is executed by the appellant, with at least two sureties, and in such amount as the court or judge thereof may direct, conditioned that the appellant will obey the order of the appellate court upon the appeal.

(G. S. 1866, c. 86, § 12; G. S. 1878, c. 86, § 12.)

## § 6145. From judgment directing conveyance—Stay.

If the judgment appealed from directs the execution of a conveyance, or other instrument, the execution of the judgment is not stayed by the appeal,

until the instrument is executed, and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

(G. S. 1866, c. 86, § 13; G. S. 1878, c. 86, § 13.)

## § 6146. From judgment directing sale, etc., of real estate —Supersedeas bond.

If the judgment appealed from directs the sale or delivery of possession of real property, the execution of the same is not stayed, unless a bond is executed on the part of the appellant, with two sureties, conditioned that, during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon; and that, if the judgment is affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment.

(G. S. 1866, c. 86, § 14; G. S. 1878, c. 86, § 14.)

## § 6147. Stay of proceedings—Extent thereof.

Whenever an appeal is perfected, as provided by sections eleven, twelve and fourteen, it stays all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by said sections, when the appellant is an executor, administrator, trustee, or other person acting in another's right.

(G. S. 1866, c. 86, § 15; G. S. 1878, c. 86, § 15.)

An appeal does not supersede prior proceedings, but simply stays them. Robertson v. Davidson, 14 Minn. 554, (Gil. 422.)

The district court ought not to hear a motion for a new trial while an appeal from the judgment is pending in the supreme court. McArdle v. McArdle, 12 Minn. 122, (Gil. 70.)

See First Nat. Bank v. Rogers, 13 Minn. 407, (Gil. 376, 379;) State v. Young and Briggs v. Shea, cited in note to § 6142.

## § 6148. Bond to vacate stay on money judgment on contract.

In an action arising on contract, for the recovery of money only, notwithstanding an appeal and security given for a stay of proceedings therein, if the respondent gives adequate security to make restitution in case the judgment is reversed or modified, he may, upon leave obtained in the manner hereinafter provided, from the court below, proceed to enforce the judgment. Such security shall be a bond executed by the respondent, or some one in his behalf, to the appellant, with at least two sufficient sureties, to the effect that if the judgment is reversed or modified, the respondent will make such restitution as the appellate court directs. Such leave shall only be granted upon motion and notice to the adverse party, and in case when it satisfactorily appears to the court that the appeal has been taken for the purpose of delay.

(G. S. 1866, c. 86, § 16; G. S. 1878, c. 86, § 16.)

## § 6149. Bonds may be in one instrument, how served.

The bonds prescribed by sections nine, eleven, twelve and fourteen may be in one instrument, or several, at the option of the appellant; and a copy, including the names and residence of the sureties, shall be served on the adverse party, with the notice of appeal, unless a deposit is made as provided in section nine, and notice thereof given.

(G. S. 1866, c. 86, § 17; G. S. 1878, c. 86, § 17.)

## § 6150. Justification of sureties.

A bond upon an appeal is of no effect, unless it is accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein; the adverse party may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal; and unless they or other sureties justify before a judge of the court below, as prescribed by law in other cases, within ten days thereafter, the appeal shall be regarded as if no such bond had been given; the justification shall be upon a notice of not less than five days.

(G. S. 1866, c. 86, § 18; G. S. 1878, c. 86, § 18.)

## § 6151. Stay in other cases—Sale of perishable property.

In the cases not specified in sections eleven, twelve, thirteen and fourteen, the perfecting of an appeal, by giving the bond mentioned in section nine, stays proceedings in the court below, upon the judgment appealed from, except that when it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

(G. S. 1866, c. 86, § 19; G. S. 1878, c. 86, § 19.)

## § 6152. Dismissal not to preclude another appeal.

No discontinuance or dismissal of an appeal in the supreme court shall preclude the party from taking another appeal in the same cause, within the time limited by law.

(G. S. 1866, c. 86, § 20; G. S. 1878, c. 86, § 20.)

## § 6153. Death of respondent—Appellant to cause substitution to be made.

In all cases where an appeal has been taken to the supreme court, and before such appeal has been perfected, or argued and submitted, the respondent to such appeal dies, it shall be and is the duty of the appellant to apply to the supreme court, if in session, to any judge thereof when not in session, to have the legal representative or successor in interest of such deceased respondent substituted as the party respondent in such appeal. In case such appellant fails or neglects to cause such substitution to be made within sixty days from the death of such respondent, or in case any such appeal has heretofore been taken, and remains unperfected, and no substitution made, as herein provided, within sixty days from the passage of this act, upon the filing of an affidavit, by the legal representative or successor in interest of such deceased respondent, with the clerk of the supreme court, showing that such appeal has been taken, and the death of the respondent therein, and that the appellant has failed to make, or cause to be made, such substitution, such appeal shall be deemed abandoned, and it shall be the duty of the clerk of the supreme court to enter an order dismissing said appeal; and upon the filing of a certified copy of such order in the office of clerk of the court from which such appeal was taken, [it] will be restored to and have full jurisdiction over the action in which such appeal was taken, in the same manner, and to all intents and purposes, and shall proceed thereon, as if no appeal had been taken.

(1876, c. 47, § 1; G. S. 1878, c. 86, § 21.)

This court has power to relieve an appellant, and reinstate an appeal where it has been dismissed, under this section. Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79.

## § 6154. Death of party after submission of case to appellate court.

In all cases where an appeal has been taken to the supreme court, and, after the case [has] been submitted to the supreme court, but before the entry of judgment thereon in such court, either party to such appeal dies, and the surviving parties to such action, or the legal representative or successor in interest of said deceased party or either of them, shows by affidavit filed therein that such death has occurred, it shall be the duty of the clerk of the supreme court to substitute the name of the person so shown to be the legal representative or successor in interest of such deceased party; and the action shall thereupon proceed, and all subsequent proceedings had, and judgment be entered therein, for or against such legal representative or successor in interest, or such jointly or alone, as the case may be.

(1876, c. 47, § 2; G. S. 1878, c. 86, § 22.)