

Nineteen Hundred Thirty-One
Supplement

to

Mason's Minnesota Statutes

(1927 thru 1931)

Containing the text of the acts of the 1929 and 1931 Sessions of the
Legislature, both new and amendatory, and notes showing repeals,
together with annotations from the various courts, state
and federal, construing the constitution, statutes,
charters and court rules of Minnesota



Edited by
WILLIAM H. MASON, Editor-in-Chief
W. H. MASON, JR., Assistant Editor

CITER-DIGEST CO.
ST. PAUL, MINNESOTA
1931

§9483. Relator entitled to, and liable for.

Prevailing defendant was entitled to costs and disbursements without specific directions by the

court, and court did not err in denying motion to amend conclusions of law. 178M164, 226NW 709.

CHAPTER 80.

Appeals in Civil Actions

§9490. Appeal from district court.

An order permitting defendant to pay the amount into court and directing another claimant to be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. 176M11, 222NW295.

The order must finally determine the action or some positive legal right of the appellant relating thereto. 176M11, 222NW295.

§9492. Requisites of appeal.

Jurisdiction on appeal cannot be conferred by consent of counsel or litigants. The duty is on appellant to make jurisdiction appear plainly and affirmatively from the printed record. Elliott v. R., 233NW316. See Dun. Dig. 286.

§9493. Return to Supreme Court.

1. In general.

In reviewing orders pursuant to motions, and orders to show cause, and other orders based upon the record, the rule of Radel v. Radel, 123 M299, 143NW741, and prior cases, requiring a settled case, bill of exceptions, or a certificate of the trial court as to the papers considered, or a certificate of the clerk of the trial court that the return contains all the files and records in the case, is no longer the rule when all the original files are returned to this court. 181M 392, 232NW740. See Dun. Dig. 344a.

4. Settled case or bill of exceptions.

Upon an appeal from an order overruling a demurrer there is no place for a bill of exceptions. 174M66, 218NW234.

Findings of court presumed to be correct in absence of settled case. 176M588, 224NW245.

Affidavits not presented by settled case or bill of exceptions cannot be considered. 180M 580, 230NW472.

The certification of the pleadings, findings, motion for new trial, and order denying it does not make a settled case. Upon such a record we can review the sufficiency of the findings but not the sufficiency of the evidence to sustain them. Rea v. K., 235NW910. See Dun. Dig. 344 (87), 344a(88).

6. Assignments of error.

Supreme Court cannot consider assignments of error involving questions not included in the motion for new trial. 174M402, 219NW546.

On appeal theory of case may not be shifted from that at trial. 174M434, 219NW552.

Conclusion of law, not expressly assigned as error, was so closely related to other conclusions assigned as error that it should not be permitted to stand. 177M189, 224NW852.

A ground of negligence not pleaded, not raised in the trial by request to charge or otherwise, and not raised on the motion for a new trial, cannot be presented for the first time on appeal. Arvidson v. S., 237NW12. See Dun. Dig. 384.

§9494. Powers of appellate court.

1. In general.

The fixing and allowance of fees of an attorney for a receiver are largely in the discretion of the trial court and will not be disturbed except for an abuse of such discretion. 173M619, 216NW784.

Supreme court cannot conclude that judge below failed to exercise the judicial power and discretion reposed in him in regard to matter presented by motion for new trial. 175M346, 221NW424.

On appeal from a judgment after trial by the court, no motion for a new trial having been

made, and no errors in rulings or proceedings at the trial being involved, the questions for review are limited to a consideration of sufficiency of evidence to sustain the decision. 177M53, 224 NW461.

An order striking portions of answer is not reviewable on appeal from an order denying motion for new trial. 177M103, 224NW700.

Fact that, in motion to amend findings and conclusions, plaintiff asked for less relief than she was entitled to does not limit the relief that may be granted on an appeal. 177M189, 224NW 852.

An order overruling a demurrer to the complaint and an order denying a motion to strike out certain portions of the complaint are not reviewable on an appeal from an order denying an alternative motion for judgment notwithstanding the verdict or for new trial. 177M240, 225 NW84.

Scope of review in absence of bill of exceptions or settled case. Wright v. A., 227NW357.

On appeal from judgment any order or part of order subsequent to verdict and effecting the judgment may be reviewed. 180M540, 231NW222.

Case was remanded where all of the issues had not been tried. 181M606, 233NW870. See Dun. Dig. 440.

Affidavits on motion for amended findings and conclusions of law or for a new trial on the ground of newly discovered evidence are considered on appeal only on the motion for a new trial. Wheaton v. W., 234NW14. See Dun. Dig. 300(76), 395.

Supreme Court yields somewhat to trial court's judgment that it erred in its instructions, on review of granting of new trial. Hector v. R., 234NW643. See Dun. Dig. 394.

Errors assigned upon parts of the charge not excepted to when given nor challenged in the motion for new trial are not reviewable on appeal. Harrington v. A., 235M535. See Dun. Dig. 388a(27).

In action on fire policy by lessee to recover for betterments and loss of use of premises, a verdict finding loss nearly twice amount of cost of restoration and repairs held contrary to evidence and law. Harrington v. A., 235NW535. See Dun. Dig. 415(47).

Where it is clear that the court has considered and definitely decided an issue of fact, the case will not be reversed or remanded for more definite findings thereon. Buro v. M., 237 NW186. See Dun. Dig. 435.

A defect in the complaint, not challenged in the lower court, cannot be urged here after an interposed defense has been litigated on the merits as if no such defect existed—the question of liability having been so voluntarily litigated. Gleason v. D., 237NW196. See Dun. Dig. 384.

2. Dismissal of appeal.

It appearing that appeal could serve no purposes other than those of delay, it was dismissed. 174M401, 219NW457.

3. Affirmance.

After affirmance on ground that alleged error was not presented to the court below the trial court is without power to amend the judgment to cure such error. 179M589, 229NW882.

4. Reversal.

Inadvertent failure of court to include small item in computing the amount due was not ground for reversal. 171M461, 214NW288.

Order consented to cannot be reversed. 173M 621, 217NW114.

Matter of opening default lies almost wholly in discretion of trial court. Johnson v. H., 225 NW283.

Court may grant new trial on single issue. 230NW473.

Where judgment has been entered notwithstanding verdict, the court's denial of a new trial may be regarded as prematurely entered, and is to be entertained and determined on reversal. 180M540, 231NW222.

Judgment was reversed and remanded where court failed to make findings on important disputed questions. *National Cab Co. v. K.*, 233NW 838. See Dun. Dig. 435, 411(28).

6. Law of case.

Questions involved and directly decided on an appeal from a judgment rendered non obstante verdicto are res adjudicata on a subsequent appeal from an order denying a new trial. 171M384, 214NW276.

Decision on former appeal is the law of the case. 173M436, 217NW483.

Where a case has been tried and submitted upon a certain construction of the pleadings, such construction is conclusive on the parties. 174M216, 218NW891.

No question which might have been raised on appeal from an order granting plaintiff a new trial can be raised on plaintiff's appeal from judgment entered in virtue of the reversal of the order granting a new trial. 175M346, 221NW424.

While litigant may not depart from theory upon which case was tried, yet where an issue of law is presented by the pleadings and there is nothing to show that it has been waived, it may be urged by an appellant who on the record was entitled to a verdict and against whom judgment has been ordered notwithstanding the verdict. 177M503, 225NW445.

Where charge is unexpected to or sufficiently assigned at error in the motion for new trial, it becomes the law of the case. 178M411, 227NW 358.

Where the sufficiency or insufficiency of a complaint is determined on one appeal, the decision is the law of the case on a subsequent appeal even if the grounds urged on the second appeal were not presented on the former appeal. *Kozisek v. B.*, 237NW25. See Dun. Dig. 398.

The court has the power, on a second appeal, to overrule its own decision on a former appeal in the same case. *Kozisek v. B.*, 237NW25. See Dun. Dig. 398.

All questions involved and which might have been raised on a former appeal are concluded by the decision on such appeal. *Kozisek v. B.*, 237NW25. See Dun. Dig. 398.

8. Findings of fact.

174M442, 219NW457.

Findings as to questions of fact are binding on appeal. 172M436, 217NW483.

Determination of trial court on motion to dissolve an attachment will not be disturbed where it is supported by evidence. 173M584, 218NW99.

Findings of fact having substantial support in the evidence will not be disturbed simply because there is a substantial amount of evidence in opposition. 174M507, 219NW758.

The evidence presenting only a fact issue, the verdict will not be disturbed. 175M617, 221NW 240.

Findings of fact in a judicial road proceeding have the same force and effect as findings of fact in an ordinary civil action. 176M94, 222NW 578.

The sole issue being of fact and there being substantial evidence in support of a decision below, affirmance must follow. *Brodsky v. B.*, 222NW931.

Findings of trial court will not be disturbed unless the evidence does not reasonably sustain them. 223NW770.

Findings of court presumed to be correct in absence of settled case. 176M588, 224NW245.

Findings of trial court should not be reversed, if supported by substantial evidence. *Alexander v. W.*, 224NW849.

A claim that a finding is not sustained by the evidence nor within the issues formed by the pleadings cannot be raised on appeal, where the record fails to show that it contains all the evidence bearing thereon. 177M602, 225NW924.

A finding that there was an agreement to pay interest on partnership contributions cannot be contradicted by a memorandum of the trial judge not made a part of the findings. 177M602, 225NW924.

Where there is no settled case and the findings of the trial court are not questioned, findings of fact are controlling on appeal. 178M282, 226NW847.

In order to affirm, it is not necessary to demonstrate the correctness of the trial court's findings, it being enough that they are fairly supported by the evidence. 178M275, 226NW933.

Verdict based on question of fact cannot be disturbed. *Wright v. A.*, 227NW356.

Verdict based in conflicting evidence not disturbed. 178M621, 227NW853.

Whether representation was of fact or opinion is question of fact findings on which will not be disturbed on appeal. *Gunnerson v. M.*, 231NW415(2).

Rule that court will not disturb findings not manifestly contrary to evidence applies to fact that must be proved by clear and convincing evidence. 181M217, 232NW1. See Dun. Dig. 411(15).

There being evidence to support the findings and order for judgment, and no question of error, the decision below must be affirmed. 181M 436, 232NW789. See Dun. Dig. 411.

There can be no reversal in a strictly fact case where findings were supported by evidence. *Lepak v. M.*, 233NW851. See Dun. Dig. 411(12).

There being evidence in reasonable support of the decision below, it cannot be disturbed. *Nelson Bros. Road Bldg. Co. v. E.*, 235NW902. See Dun. Dig. 411.

In a negligence case, where there is no prejudicial or available error in the trial or submission of the issue of defendant's negligence, the verdict of the jury on that issue in defendant's favor, when sustained by the evidence, generally ends the case. *Arvidson v. S.*, 237NW12. See Dun. Dig. 415.

Findings of trial court will be sustained if they have reasonable support in the evidence and this also applies even though the construction of written or documentary evidence is involved. *Somers v. C.*, 237NW427. See Dun. Dig. 411(13).

§9495. Judgment notwithstanding verdict.

1. Prior to amendment—When judgment should be ordered.

180M578, 230NW585. Certiorari denied. 51 SCR31.

1½. Applicability.

Applies to action under federal Employers' Liability Act. 133M460, 157NW638; 180M578, 230NW585.

2. Motion on trial for directed verdict necessary.

180M1, 230NW260.

Defendant was not entitled to judgment non obstante, not having moved for a directed verdict at the close of the testimony. 175M592, 222NW272.

3. Motion for judgment.

180M305, 230NW793.

Moquin v. M., 231NW920.

In action for damages for injuries inflicted by automobile, defendants were not entitled to judgment non obstante. 171M321, 214NW52.

Questions involved and directly decided on an appeal from a judgment rendered non obstante verdicto are res adjudicata on a subsequent appeal from an order denying a new trial. 171M 384, 214NW276.

Conditions under which order granting judgment notwithstanding verdict should be granted. 173M378, 217NW379.

Where evidence was practically conclusive against the verdict judgment was properly ordered notwithstanding the verdict. 173M522, 217NW939.

Where defendant moved in the alternative for judgment notwithstanding verdict or a new trial, and a new trial was granted and the motion for judgment denied, an appeal from the

denial of a judgment is ineffectual. 174M237, 219NW149.

In action against an estate for services rendered the decedent, evidence held to justify verdict in plaintiff's favor and defendant was not entitled to judgment non obstante. 174M272, 219 NW151.

Where the evidence presented did not establish any defense, judgment in favor of plaintiffs, notwithstanding the verdict, was properly ordered. *Powell v. T.*, 221NW241.

An order denying a motion for judgment notwithstanding disagreement of the jury, is not appealable. 176302, 223NW146.

An order overruling a demurrer to the complaint and an order denying a motion to strike out certain portions of the complaint are not reviewable on an appeal from an order denying an alternative motion for judgment notwithstanding the verdict or for a new trial. 177M240, 225 NW84.

Party is not entitled to judgment notwithstanding verdict, if it appears reasonably probable that upon a new trial defects in proof may be supplied. 177M494, 225NW432.

Judgment should have been entered notwithstanding verdict for plaintiff in an action under the Federal Safety Appliance Act. *Meisenhelder v. B.*, 227NW426.

Defendant, not being entitled to judgment upon the pleadings was not under common law rule entitled to judgment non obstante. 180M1, 230NW260.

On alternative motion, held error to deny new trial and order judgment for amount less than verdict, where evidence authorizes recovery in amount greater than that ordered, the proper order being award of new trial unless successful party consents to reduction. 180M540, 231NW222.

Evidence found not to disclose any substantial breach of contract on the part of the plaintiff, and no damage to defendant on account of representations made to him as inducements to enter into the contract. 181M433, 232NW739. See *Dun. Dig.* 1805, 3828, 3839.

Application to Federal court. 47F(2d)281. See *Dun. Dig.* 5077.

On the issue of conversion, the defendants were not entitled to judgment notwithstanding the verdict. *Hector v. R.*, 234NW643. See *Dun. Dig.* 5082.

In action for malicious prosecution the court rightly denied the motion of defendants for judgment notwithstanding the verdict. *Miller v. P.*, 233NW855. See *Dun. Dig.* 5744, 5077.

The fact that the beneficiaries, the parents of the decedent, violated §§4100 and 4101 does not constitute contributory negligence as a matter of law so as to entitle defendant to judgment non obstante. *Weber v. B.*, 234NW682. See *Dun. Dig.* 2616(10), 5082.

A judgment notwithstanding verdict was properly denied where it was quite possible, that deficiency in evidence in negligence case could be supplied on another trial. *Drake v. C.*, 235NW 614. See *Dun. Dig.* 5082(8).

In an action for assault, false imprisonment, and kidnapping, where there is evidence tending to show that defendant participated in the restraint of plaintiff's liberty and in transporting her in an automobile against her will, an order granting judgment in favor of such defendant notwithstanding a verdict in favor of the plaintiff is erroneous. *Jacobson v. S.*, 236 NW922. See *Dun. Dig.* 5082.

6. Appealability of order on motion.

This section is controlled by later statute. §9498, in so far as it contemplates an appeal from an order granting a first new trial, not for errors of law alone. 173M286, 226NW846.

Where alternative motion for judgment non obstante or for a new trial is made, an appeal may be taken from the whole order disposing of the motion, but not from only that part granting or denying judgment. 229NW557.

7. Disposition of case on appeal.

Judgment not granted except when merits of case are presented fully and it is clear that litigation should end. 177M487, 225NW441.

While litigant may not depart from theory upon which case was tried, yet where an issue

of law is presented by the pleadings and there is nothing to show that it has been waived, it may be urged by an appellant who on the record was entitled to a verdict and against whom judgment has been ordered, notwithstanding the verdict. 177M509, 225NW445.

§9496. Dismissal of appeal in vacation.

Supreme Court refused to dismiss appeal upon stipulation of two out of three executors. 178 M509, 227NW660.

§9497. Appeal, when taken.

1. When judgment entered.

Time to appeal was limited to six months from entry of original judgment, and not amendment thereof. 181M466, 233NW10. See *Dun. Dig.* 316.

3. Appeal from order.

No appeal having been taken to the Supreme Court from an order dismissing an appeal from probate court within statutory time, the attempt to appeal will be dismissed. 174M133, 218NW546.

Amendment after time for appeal is not permissible. 180M344, 230NW787.

Where a second motion for new trial is made after time for appeal has expired, proper practice requires prompt application for a vacation of the first order pending consideration of the second motion, leave to submit the latter being first secured. *Barrett v. S.*, 237NW15. See *Dun. Dig.* 7080, 7081.

Where a motion for a new trial is denied, and, without a vacation of that order and after the time for appeal therefrom has expired, a second motion for a new trial is denied, the last order is, in real substance, nothing more than one refusing to vacate an appealable order and so not appealable. *Barrett v. S.*, 237NW15. See *Dun. Dig.* 309.

§9498. Appeals to supreme court.—* * * *

4. From an order granting or refusing a new trial, or from an order sustaining a demurrer, providing that when an order granting a new trial is based exclusively upon errors occurring at the trial the court shall expressly state in its order or memorandum the reasons for and the grounds upon which such new trial is granted and in such case an appeal may be taken from such order.

Provided further that when upon the entry of an order overruling a demurrer, the trial court shall certify that the question presented by the demurrer is in his own opinion important and doubtful and such certification is made part of the order overruling the demurrer, an appeal from such order may be taken. (As amended Apr. 20, 1931, c. 252.)

* * * *

STATUTE GENERALLY

½. In general.

An order for assessment of capital stock under §§8024-8027 is conclusive only as to the amount, priority, and necessity of the assessment, and findings in such order relative to personal defenses which are to be litigated in the action to recover the assessment are not final. 172M33, 214NW764.

No appeal lies from an order for judgment, and it cannot be reviewed by means of an appeal from an order refusing to vacate. 172M51, 215NW180.

Appeal from judgment did not bring up for review denial of motion for new trial for newly discovered evidence. 173M250, 217NW127.

Appeal from an order granting a new trial, held not frivolous. *Gale v. F.*, 220NW156.

An order settling the final account of a receiver is a "final" appealable order. The entry of judgment thereon for the purpose of extending the time of appeal is unauthorized and does not extend the time for that purpose. 176M470, 223NW775.

Exclusion of a statement of facts from bill of exceptions as inaccurate is not reviewable on appeal from order denying new trial. 176M472, 223NW912.

An order of clerk of district court denying a motion to tax costs is not appealable. 178M232, 226NW700.

Appeal from order of trial court affirming action of clerk in denying motion to tax costs and enter judgment, held frivolous. 178M232, 226NW700.

No appeal lies to review a decision of a juvenile court acting under Mason's St. §§8636 to 8689. *State v. Zenzen*, 227NW356.

Jurisdiction on appeal cannot be conferred by consent of counsel or litigants. The duty is on appellant to make jurisdiction appear plainly and affirmatively from the printed record. *Elliott v. R.*, 233NW316. See Dun. Dig. 286.

The power of the district court to review and vacate an appealable order made before judgment, or to permit a renewal or repetition of the motion, is not lost because of expiration of the time for appeal. *Barrett v. S.*, 237NW15. See Dun. Dig. 1512(38).

¾. Party aggrieved.

One defendant cannot complain of a verdict in favor of a codefendant. *Erickson v. N.*, 232NW715. See Dun. Dig. 310.

SUBDIVISION 1.

5. From judgment in action commenced in district court.

Where court grants new trial as to single issue, the order, together with order refusing to vacate same, are reviewable on appeal from judgment entered after second trial. 180M185, 230NW473.

Review extends to appealable and nonappealable orders, and includes sufficiency of evidence and rulings and proceedings on trial when properly preserved by exception and assigned in motion for new trial. 180M185, 230NW472.

SUBDIVISION 2

7. Orders held appealable.

An order refusing to discharge a garnishee is not appealable except when the motion challenges the jurisdiction of the court. 173M559, 218NW730.

8. Orders held not appealable.

Order impounding sum of money in hands of client to await determination of respective rights of several attorneys, held not appealable. 180M30, 230NW113.

SUBDIVISION 3

9. Construed strictly.

The order must finally determine the action or some positive legal right of the appellant relating thereto. 176M11, 222NW295.

An order permitting defendant to pay the amount into court and directing another claimant to be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. 176M11, 222NW295.

10. Orders held appealable.

An order determining the amount of default in the payment of alimony and directing the payment thereof within the specified time is not appealable, being conditional and not final, so an order to reduce alimony is appealable. 176M464, 217NW488.

Order granting motion for new trial on minutes after lapse of thirty days from coming in of verdict, held to involve a part of the merits and appealable. 179M136, 228NW558.

11. Orders held not appealable.

Order granting plaintiff leave to file a supplemental complaint against a garnishee held not appealable. 172M368, 215NW516.

Neither an order denying a motion to bring in an additional party nor an order denying a motion to strike from the calendar nor an order denying a motion to a judgment on the pleading is appealable. 173M183, 217NW106.

An order denying a motion for judgment notwithstanding disagreement of the jury, is not appealable. 176M302, 223NW146.

Order granting new trial, after reinstatement of action to enforce attorney's lien and entry of order for judgment, held not appealable under this subdivision. 178M230, 226NW699.

Order impounding sum of money in hands of client for payment of fees of several attorneys when amount to which each was entitled was determined, held not appealable. 180M30, 230NW113.

SUBDIVISION 4

When a trial court grants a new trial "exclusively upon errors occurring at the trial," it should indicate what the errors are. *Hudson-Duluth Furriers, Inc. v. M.*, 235NW537. See Dun. Dig. 7084(76), 394.

12. Orders held appealable.

In order to review an order overruling a demurrer, there must be an appeal, and court cannot simply certify the question up. 174M66, 218NW234.

Statute prohibits an appeal from an order granting a new trial unless the trial court expressly states that the new trial was granted exclusively for errors of law. 174M606, 219NW291; 174M611, 219NW928.

Where order granting new trial made January 23, did not state on what grounds the new trial was granted and on February 14, 1928 the court filed a memorandum stating that the order of January 23, was made solely on the ground of errors of law and directing that the memorandum be made a part of that order, the memorandum will be considered on appeal from the order. *Gale v. F.*, 220NW156.

An order denying a new trial is appealable. *Andersen v. C.*, 234NW289. See Dun. Dig. 300.

13. Orders held not appealable.

Where an appeal from probate court is dismissed in the district court for want of jurisdiction, there is no basis for a motion for new trial, and where such motion is made, no appeal lies from the order denying it. 174M133, 218NW546.

An appeal lies from an order granting a motion for a new trial made on the ground of insufficiency of evidence, if after a former trial a new trial was granted on that ground. 174M237, 219NW149.

Where defendant moved in the alternative for judgment notwithstanding verdict or a new trial, and a new trial was granted and the motion for judgment denied, an appeal from the denial of a judgment is ineffectual. 174M237, 219NW149.

An order denying a motion to vacate an order denying motion for a new trial is not appealable. 177M474, 225NW399.

Order granting new trial after order for judgment enforcing lien of attorney held not appealable under subs. 3 or 7, but one under this subdivision and not appealable in absence of statement that it was based exclusively upon errors of law. 178M230, 226NW699.

An order granting a new trial for insufficiency of evidence, unless there has been a like verdict on a prior trial, is not appealable. 178M232, 226NW700.

This subdivision, as amended by Laws 1913, c. 474, controls §9495 as regards appeals from orders for first new trials. 178M286, 226NW846.

Order granting new trial is not appealable unless trial court expressly states that it is based exclusively on errors of law. 180M344, 230NW787.

Order granting a new trial without stating the ground, therefore, held not appealable. *Karnofsky v. W.*, 237NW425. See Dun. Dig. 300.

14. Orders sustaining or overruling a demurrer.

Matters considered on certification of question. 176M529, 224NW149.

SUBDIVISION 5

15. Orders held appealable.

Order setting aside an order vacating an order for an amendment to a judgment is appealable. 181M329, 232NW322. See Dun. Dig. 301.

16. Orders held not appealable.

Order granting plaintiff leave to file a supplemental complaint against a garnishee held not appealable. 172M368, 215NW516.

Order impounding fund in hands of client for distribution among attorneys when their respective shares were determined, held not appealable. 180M30, 230NW113.

SUBDIVISION 7

18. Definitions.

"Special proceeding" is one which may be commenced independently of pending action by petition or motion, upon notice, to obtain special relief. *Anderson v. L.*, 230NW645(1).

19. Orders held appealable.

Order annulling an order vacating an order for an amendment to a judgment is appealable. 181M329, 232NW322. See Dun. Dig. 302.

An order, upon an order to show cause submitted upon affidavits determining right of respondent to an attorney's lien and the amount thereof, held a final order and appealable. *Caulfield v. J.*, 237NW190. See Dun. Dig. 302.

20. Orders held not appealable.

Order granting new trial, after reinstatement of case to enforce lien of attorneys, held not appealable under this subdivision. 178M230, 226NW699.

Order impounding attorneys' fee in hands of client to await determination of distributive shares of several attorneys, held not appealable. 180M30, 230NW113.

Order in open court, where parties have appeared. Granting motion to dismiss for want of prosecution is nonappealable. *Anderson v. L.*, 230NW645(1).

Order in foreclosure directing resale in one parcel, held not appealable. 180M173, 230NW780.

An order denying a motion to dismiss a proceeding for laches in its prosecution is not appealable. *State v. Hansen*, 237NW416. See Dun. Dig. 296a, 309.

APPEALABILITY OF ORDER GENERALLY

21. Orders held appealable.

Where alternative motion for judgment non obstante or for a new trial is made, an appeal may be taken from the whole order disposing of the motion, but not from only that part granting or denying judgment. 179M392, 229NW557.

Order denying new trial is appealable. 180M93, 230NW269.

22. Orders held not appealable.

Order for judgment is not appealable. *Palmer v. F.*, 230NW257(2).

Order denying motion for amended findings and order before judgment granting motion to file supplemental answer, held not appealable. 180M93, 230NW269.

Order directing verdict for plaintiff, order denying directed verdict for defendant, and order opening case for further testimony, held not appealable. 181M627, 231NW617.

25. Waiver of right to appeal.

By paying the costs and damages awarded a plaintiff in an action in ejectment, a defendant does not destroy his right to appeal from the judgment of restitution. *Patnode v. M.*, 234NW459. See Dun. Dig. 287(27), 463a.

26. From order refusing to vacate judgment or order.

An order refusing to vacate a nonappealable order is not appealable. 174M611, 219NW928.

No appeal lies from an order denying a motion to vacate or modify a judgment; the ground of the motion being that the judgment was erroneous, rather than unauthorized. 176M117, 222NW527.

An order denying a motion to vacate a nonappealable order is not appealable. 178M232, 226NW700.

§9500. Appeal from order—Supersedeas.

An appeal from an order denying a motion for a new trial unaccompanied by a supersedeas bond, does not prevent entry of judgment. 177M89, 224NW464.

§9508. Justification of sureties.

Appeal was not dismissed for failure to furnish bond where appellant had acted in good faith and gone to considerable expense in preparing his appeal, and he was given ten days in which to file a sufficient bond. 176M632, 221NW643.

§9512. Death of party after submission of appeal.

When the husband dies after the judgment of divorce in his favor, and pending the appeal in this court, and property rights are involved, his personal representative will be substituted and the case reviewed, notwithstanding the general rule as to the abatement of divorce actions by the death of either party. *Swanson v. S.*, 234NW675. See Dun. Dig. 15.

CHAPTER 82

Actions Relating to Real Property

ACTIONS TO TRY TITLE

§9556. Actions to determine adverse claims.

1. Nature and object of action.

When the husband dies after the judgment of divorce in his favor, and pending the appeal in this court, and property rights are involved, his personal representative will be substituted and the case reviewed, notwithstanding the general rule as to the abatement of divorce actions by the death of either party. *Swanson v. S.*, 234NW675. See Dun. Dig. 15.

7. Answer.

Answer, held not sham. 180M480, 231NW224.

8a. Evidence.

Parol evidence as to land intended to be included in mortgage. 181M115, 231NW790.

9. Judgment.

Former judgment between the parties held not resadjudicata on possession. 173M242, 217NW337.

Value of land involved as effecting jurisdiction of federal court for purpose of removal from state court. 31F(2d)136.

§9563. Ejectment — Damages — Improvements.

Written promise by remaindermen to pay for improvements erected by life tenant, held to create a mere personal obligation and constituted no defense or counterclaim in ejectment. 180M151, 230NW634.

Remaindermen are not liable for improvements made by life tenant, and holding of trial court that there was consideration for the contract is affirmed by equally divided court. 180M151, 230NW634.

§9565. Occupying claimant.

One who, through mistake as to the boundary participated in by the adjoining owner, builds a house on the land of such other, remains the owner thereof. 171M318, 214NW59.

§9566. Pleadings—Trial—Verdict.

3. Evidence.

Fraud in obtaining signature of wife to deed. 173M51, 216NW311.

9. Survey.

If the description in the verdict in ejectment