CHAPTER 545

MOTIONS AND ORDERS

545.01 MOTIONS AND ORDERS; SERVICE OF NOTICE.

HISTORY. 1867 c. 67 ss. 1 to 3; G.S. 1878 c. 66 ss. 84 to 86; G.S. 1894 ss. 5224 to 5226; R.L. 1905 s. 4123; G.S. 1913 s. 7749; G.S. 1923 s. 9246; M.S. 1927 s. 9246.

See annotations under section 544.03, subdivision 4.

The affidavits upon which the plaintiff's second motion was based, averring a meritorious cause of action and that plaintiff's failure to reply properly and in due time was caused by his unfamiliarity with court practice and his attorney's neglect, were sufficient to warrant the relief granted. McLaughlin v Breckenridge, 122 M 154, 141 NW 1134, 142 NW 134.

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

A misnomer of the defendant by adding to its corporate name the words "Relief Department" was not a ground for dismissal, jurisdiction having been acquired. The defect was amendable as of course. Wise v Chicago, Burlington, 133 M 434, 158 NW 711.

An order to show cause, in proper form and properly served, is as effective as a statutory notice of motion to bring into court the party to whom it is directed and to give jurisdiction over him. Larson v Minn. Northwestern, 136 M 425, 162 NW 523.

A motion to strike out evidence must specify the objectionable evidence. Alexander v Employees Mutual, 173 M 501, 217 NW 601.

An order of a court commissioner and a writ of habeas corpus having been issued, it was error on the part of the district court to vacate the one and quash the other upon an order to show cause served upon the commissioner alone. It should have been served upon the petitioner for the writ. State v Hemenway, 194 M 124, 259 NW 687.

The fact that a notice of motion, duly served, was not filed with the clerk until after the hearing on the motion, both parties by their counsel being present and taking part without objection, did not affect the jurisdiction of the court to hear the motion. Wenell v Shapiro, 194 M 368, 260 NW 503.

Appellant's motion that the court withdraw the issues from the jury and make findings and order for judgment on behalf of appellant on all issues, cannot be construed as a motion to direct a verdict. Bottolfson v Ydstie, 195 M 501, 263 NW 447.

The strict rule of res judicata does not apply to motions in a pending action. The district court has jurisdiction and may in its discretion allow the renewal of a motion to vacate a judgment and relieve from default. Wilhelm v Wilhelm, 201 M 462, 276 NW 804.

A municipal court organized under Laws 1895, Chapter 229, has right to issue an order to show cause, thereby shortening time for hearing on a motion to vacate a writ of attachment. OAG July 19, 1939 (361a).

545.02 MOTIONS, WHERE NOTICED AND HEARD.

HISTORY. 1867 c. 67 s. 4; G.S. 1878 c. 66 s. 87; 1881 c. 7 s. 1; 1885 c. 267; G.S. 1894 s. 5227; R.L. 1905 s. 4124; 1909 c. 433 s. 1; G.S. 1913 s. 7750; G.S. 1923 s. 9247; M.S. 1927 s. 9247; 1945 c. 563 s. 1.

If a motion is made in an adjoining county it is not necessary that the moving papers or the record on appeal show that it is proper to make it there, for the

presumption is in favor of the jurisdiction. Johnston v Higgins, 15 M 486 (400); Ingram v Conway, 36 M 129, 30 NW 447; Drake v Sigafoos, 39 M 367, 40 NW 257.

If the judge of the district court in the district where an injunction of the court has been disobeyed is disqualified from acting, proceedings for such contempt may be had in an adjoining district. State ex rel v District Court, 52 M 283, 53 NW 1157.

The overruling of the defendant's objection based upon the ground that plaintiff's second motion to vacate and reopen was a renewal, without leave, of his former motion upon the same grounds, was equivalent to an order granting the plaintiff leave to present his motion. McLaughlin v Breckenridge, 122 M 154, 141 NW 1134, 142 NW 134.

The supplemental answer entitled the plaintiff, on motion to judgment on the pleadings. Edwards v Smith, 124 M 538, 144 NW 1090.

Upon a motion for judgment on the pleadings, every reasonable intendment will be indulged in favor of the pleading attacked. Robertson v Corcoran, 125 M 118, 145 NW 812.

In mandamus the pleadings are the writ and the return. When the motion is by the relator for judgment on the pleadings, the court looks to the allegations of the writ admitted by the return and the allegations of new matter in the return. State ex rel v Barlow, 129 M 181, 151 NW 970 .

Section 545.02 is not applicable to a motion for a new trial, or some other motion of necessity to be heard and determined by the judge who presided at the trial or who had taken some previous action which requires him personally to determine the motion. State ex rel v District Court, 161 M 520, 201 NW 302.

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

Findings should not be made upon the granting of a motion for judgment on the pleadings. Jackson v Minnetonka, 166 M 323, 207 NW 632.

The owners having failed to redeem from the foreclosure sale and the defendants having stipulated that they make no claim under their lien, against that portion of the tract not covered by the mortgage, judgment was properly granted on the pleadings, there being nothing further to litigate. Betcher v Ebert, 169 M 337, 211 NW 323.

On a motion for judgment on the pleadings findings of fact and conclusions of law should not be made. Lowe v Nixon, 170 M 391, 212 NW 896.

When order requires motion for a new trial to be submitted to trial judge outside his district, against the protest of one of the parties, a writ of prohibition should issue. State ex rel v Johnson, 173 M 271, 217 NW 351.

The voters who first give notice of intention to circulate a petition for the removal of a county seat have the exclusive right of way for the consideration and disposition of their petition before any other such petition can be filed and have the consideration of the county board. Moore v Mayer, 174 M 397, 219 NW 458.

In mandamus, relator's motion for judgment on the pleadings presumes the truthfulness of the allegations of the answer. State ex rel v Youngquist, 178 M 442, 227 NW 891; Erickson v Magie, 183 M 60, 235 NW 526.

There should be no findings of fact when judgment is granted on the pleadings. A judgment on the pleadings cannot be granted: (a) where allegations of a complaint cover material and necessary matters which are properly denied in the answer; and (b) where an answer alleges proper affirmative defenses to plaintiff's cause of action. Chilson v Travelers, 180 M 9, 230 NW 118.

The rule of practice and procedure in moving for judgment upon the pleadings, and upon the opening statement of counsel established. Following, Barrett v Minneapolis, St. Paul, 106 M 51, 117 NW 1047, and St. Paul v Johnson, 127 M 443, 149 NW 667. Mahutga v Minneapolis, St. Paul, 182 M 362, 234 NW 474.

Where in 1930 a motion to vacate a judgment was denied with leave to renew an unexplained delay until 1930 to take advantage of the leave was laches. Roscoe v Ar-en Company, 185 M 1, 239 NW 763.

Where the plaintiff was not the real party in interest, judgment on the pleadings was rightly granted. Prebeck v Hibbing, 185 M 303, 240 NW 890.

That other persons, not parties to the action in which the judgment attacked was rendered, are now made parties defendant does not prevent judgment on the pleadings. Murray v Calkins, 186 M 192, 242 NW 706.

In a motion for judgment on the pleadings, only the pleadings can be considered, and a contention supported by affidavits tending to show that a pleading is sham is not for consideration. Bolstad v Hovland, 187 M 60, 244 NW 338.

Because one motion for judgment on the pleadings has been denied, the district court is not without power to hear and grant a second motion for the same relief. Lamson v Towle, 187 M 368, 245 NW 627.

For the purposes of a motion for judgment on the pleadings, an allegation that there was due, without question, to plaintiff from defendants, a sum liquidated by contract, prevails over a pleaded release, by its terms embracing all plaintiff's demands against defendants and releasing them on payment of much less than the alleged liquidated demand. Hopkins v Heskett, 189 M 322, 249 NW 584.

A motion for judgment on the pleadings is not a favored way of testing the sufficiency of a pleading; and if by a liberal construction the pleading can be sustained such a motion will not be granted. Gastomezik v Gastomezik, 191 M 119, 253 NW 376.

Motion for judgment on the pleadings by plaintiff is in the nature of a demurrer. It challenges the sufficiency of the answer and admits the facts therein set out as true. Northwestern v First National, 193 M 333, 258 NW 724.

In deciding a motion submitted upon affidavits the court is not required to make findings of fact. Streissguth v Chase Securities, 198 M 17, 268 NW 638.

It is permissible in the sound discretion of the court to receive oral testimony upon the hearing of a motion. Meddick v Meddick, 204 M 113, 282 NW 676.

On this motion for the vacation of an order it was not required to take oral testimony. The showing was sufficiently adequate to justify the order without oral testimony. It is discretionary with the court whether or not oral testimony be taken. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

Summary judgment on the pleadings is precluded where issue of fact is raised; and such judgment must be sustained by undisputed facts appearing in the pleadings. National Surety v Ellison, 87 F(2d) 399.

545.03 EX PARTE MOTIONS.

HISTORY. 1867 c. 67 s. 4; G.S. 1878 c. 66 s. 87; 1881 c. 7 s. 1; 1885 c. 267; G.S. 1894 s. 5227; R.L. 1905 s. 4125; G.S. 1913 s. 7751; G.S. 1923 s. 9248; M.S. 1927 s. 9248.

Upon the decision of any cause, the court may grant a reasonable stay of proceedings which will enlarge the ordinary statutory stay, and is not controlled by the literal terms of General Statutes 1894, Section 5227 (section 545.03), in that respect. State ex rel v Searle, 81 M 467, 84 NW 324.

Although the court has no authority to extend the time within which to propose and settle a case or bill of exceptions upon application ex parte, and without notice to the opposite party, yet, if finally the case is settled upon proper notice, and the various extensions made ex parte were for reasonable cause, and the final settlement of the case did not prejudice the opposing party, such order of settlement will not be considered as an abuse of discretion. Tweto v Horton, 90 M 451, 97 NW 128.

Writ of prohibition may issue where court is exceeding its legitimate powers in a matter over which it has jurisdiction, if no other speedy and adequate remedy is available. State ex rel v Johnson, 173 M 271, 217 NW 351.

The trial court properly vacated the two prior orders made extending the time as they had been procured ex parte and without notice as required by section 545.03. Hammond v Flour City Co. 217 M 428, 14 NW(2d) 452.