CHAPTER 549

COSTS AND DISBURSEMENTS

549.01 AGREEMENT AS TO FEES OF ATTORNEY.

HISTORY. R.S. 1851 c. 72 s. 1; P.S. 1858 c. 62 s. 1; G.S. 1866 c. 67 s. 1; G.S. 1878 c. 67 s. 1; G.S. 1894 s. 5497; R.L. 1905 s. 4337; G.S. 1913 s. 7973; G.S. 1923 s. 9470; M.S. 1927 s. 9470.

1. Definition

The word "costs" as used in this section includes disbursements. Bayard v Klinge, 16 M 249 (221); Woolsey v O'Brien, 23 M 71; Board v Board, 84 M 267, 87 NW 646.

The costs of the statute are commonly termed "statutory costs". Van Meter v Knight, 32 M 205, 20 NW 142; Robertson v Robertson, 138 M 290, 164 NW 980.

2. Right to costs statutory

The allowance eo nominee, of costs, which word includes disbursements, is a creature of statute, and unknown to common law. Bayard v Klinge, 16 M 249 (232); Andrews v Town of Marion, 23 M 372; State v Cantieny, 34 M 1, 24 NW 458; Kroshus v Co. of Houston, 46 M 162, 48 NW 770; State ex rel v Tifft, 185 M 103, 240 NW 354.

A plaintiff or a defendant who succeeds in a lawsuit and is awarded and paid his taxable costs has no further claim against his adversary for attorney's fees incurred in the lawsuit in excess of the taxable costs so recovered. Smith v Chaffee, 181 M 322, 232 NW 515.

3. An incident of the judgment

A judgment is not affected by the taxation of costs until they are entered in it. Leyde v Martin, 16 M 38 (24).

Costs are a mere incident of the judgment and go as a matter of course with every judgment in an action of legal nature without special directions and regardless of the regularity or correctness of the judgment. McRoberts v McArthur, 66 M 74, 68 NW 770.

4. Legislative control

The question of the allowance of costs to the prevailing party, or of double or added costs, is one of legislative policy, and there is no constitutional objection to the exercise of legislative discretion. Johnson v Chgo-Milwaukee, 29 M 425,

13 NW 673; Schimmele v Chgo-Milwaukee, 34 M 216, 25 NW 347; Cameron v Chgo-Milwaukee, 63 M 384, 65 NW 652.

5. Application to special proceedings

This action for the removal of a county seat, was not a civil action but a special proceeding. The statute as to mandamus, prohibition and divers other special proceedings have especial provision for costs, but the instant statute has no such provision. The trial court erred in taxing costs. Bayard v Klinge, 16 M 249 (233); Andrews v Town of Marion, 23 M 372; Kroshus v Co. of Houston, 46 M 162, 48 NW 770.

Where in order to preserve property which has been given in present and future estates, the court appoints a trustee and orders a sale or a mortgage thereof, it has the power to make an allowance for expenses, including attorney's fees. Beliveau v Beliveau, 217 M 236, 14 NW(2d) 360.

6. When court is without jurisdiction

It was error in dismissing the action for want of jurisdiction, to give judgment for costs against plaintiff, though he appeared generally. McGinly v Warner, 17 M 41 (23); Ross v Evans, 30 M 206, 14 NW 897.

Although the judgment as entered was irregular, it was valid, and plaintiff, on entering judgment, was entitled to tax and insert in the judgment his costs of the former trial, without any special directions in the remanding order. McRoberts v McArthur, 66 M 74, 68 NW 770.

7. Stipulation as to costs

The stipulation for the abandonment of the foreclosure by advertisement provided that plaintiff should pay the costs of such foreclosure, the same to "abide the event of the suit". It was error in the trial court to hold that defendant should pay them. The defendants were the prevailing parties, and the court cannot control the stipulation. Dorr v Steichen, 18 M 26 (10).

Where upon a stipulation for a judgment of dismissal with costs or notice, a judgment was entered with costs, an order vacating the allowance of costs, but refusing to set aside the judgment, will not be reversed by the appellate court because made with leave to the defendant to proceed upon notice to retax such costs. Herrick v Butler, 30 M 156, 14 NW 744.

8. Belong to party, not to the attorney

A judgment for costs and disbursements is the property of the party recovering it, and not of his attorney; subject, however, to the lien of the attorney for his services. Davis v Swedish-American, 78 M 408, 80 NW 953, 81 NW 210.

9. Nominal damages

It is error on the part of the trial court to take a case from the jury, where the evidence tends to show, or prove, that plaintiff is entitled to nominal damages, at least if the recovery of such damages will also entitle him to costs. Potter v Mellen, 36 M 122, 30 NW 438; Farmer v Crosby, 43 M 459, 45 NW 866.

Where nothing else is involved, the court will not order a new trial to enable a party to recover only nominal damages. Harris v Kerr, 37 M 537, 35 NW 379; United States v Koerner, 65 M 540, 68 NW 181.

10. Contract with attorney

The statute in regard to lien of attorneys is a remedial one, and to be largely and beneficially construed in advancement of the remedy; and the notice to be given where the compensation is not agreed upon, but implied, is not defective in omitting to state the amount. Crowley v LeDuc, 21 M 412.

The contract between the plaintiff and his attorney for compensation in a personal injury suit is construed, and in a summary proceeding the amount which the attorney should pay plaintiff is determined and is directed to be paid. Landro v Gt. Northern, 122 M 87, 141 NW 1103.

The complaint in an action by an Illinois attorney against a Minnesota attorney for a division of fees, states a cause of action. Comstock v Baldwin, 125 M 357, 147 NW 278.

An attorney is given a lien for his compensation upon the cause of action from the time of the service of the summons in the action. Where the action is settled by the parties before trial without notice to or consent of the attorney, the attorney may elect to proceed for the enforcement of his lien rights by an independent action against the defendant, or by intervention proceedings in the original action. Davis v Gt. Northern, 128 M 354, 151 NW 128; Johnson v Gt. Northern, 128 M 365, 151 NW 125; Gray v Bemis, 128 M 392, 151 NW 135; Georgian v M. & St. L. 131 M 102, 154 NW 962.

A stipulation in the contract to submit the question of the value of the attorney's services to the court at the conclusion of the action, is valid and confers on the court by a supplemental proceeding in the action jurisdiction to hear and determine the matter. Eriksson v Boyum, 150 M 192, 184 NW 961.

The statutes with reference to the compensation and lien of attorneys do not override the statute of frauds. Oxborough v St. Martin, 151 M 514, 187 NW 707.

The court properly entertained a summary proceeding to compel restoration of money retained under contract void because lacking the required written approval of a judge of the district court. Sarja v Pittsburgh, 154 M 217, 191 NW 742.

An attorney who is unfaithful to his trust and guilty of fraud on his client, thereby forfeits his right to compensation. Blackey v Alexander, 156 M 478, 195 NW 455.

Although there were no counter affidavits to the affidavits of the claimant attorneys, the court was at liberty to consider the facts disclosed by the record in the trial of the case in fixing the amount of the fees. The defendant is not a proper party to the appeal. Jensen v Chgo-Milwaukee, 160 M 122, 199 NW 579.

A contract void under the statute of frauds is relevant in an action to recover on a quantum meruit for the services rendered pursuant to such contract as an admission of value. Oxborough v St. Martin, 169 M 72, 210 NW 854.

Proceeding on a contract implied from conduct, the burden was upon the plaintiff to prove that his services were rendered under circumstances from which a promise to pay should be implied. Ertsgaard v Bowen, 183 M 339, 237 NW 1.

The fact that the court directed payment of the attorney's fees to the plaintiff's attorneys instead of to them for the plaintiffs, was not error nor important. Regan v Babcock, 196 M 243, 264 NW 803.

There is a clear distinction in the law respecting contingent fee contracts between an attorney and his client where the same relates to "favor legislation", and legislation which provides means for settlement of debts or obligations founded upon contract or violation of a generally recognized legal right, the latter being generally referred to as "debt legislation". If a contract comes within the second class it is generally recognized as a valid obligation. Hallister v Uloi, 199 M 269, 271 NW 493.

Where the client exercises his legal right to settle with his adversary, in good faith and without purpose to defraud the attorney out of his compensation, the latter may recover only the reasonable value of the services rendered by him down to the time of the settlement. Krippner v Matz, 205 M 510, 287 NW 19.

Evidence sustains the claim of the attorney that he and his client mutually entered into a legal contract wherein the attorney agreed to perform certain services for which defendant agreed to pay a certain sum; and the services were fully performed. Loring v Litman, 218 M 349, 16 NW(2d) 186.

Amount of recovery where the contract between attorney and client was entered into during existence of the relationship. 20 MLR 429.

11. Liability of state

The state is liable for costs and disbursements in civil actions brought by it, but not in criminal prosecutions. State v Buckman, 95 M 272, 104 NW 240, 289.

In proceedings to register title, the state, on the petition of the applicant, was made a party. The proceedings resulted favorably to the applicant, but as

the state was not the moving party and only incidentally and nominally a party to the litigation, costs cannot be taxed against the state. Nat'l Bond v Hopkins, 96 M 123, 104 NW 816.

549.02 COSTS IN DISTRICT COURT.

HISTORY. R.S. 1851 c. 72 s. 2; P.S. 1858 c. 62 s. 2; G.S. 1866 c. 67 s. 2; G.S. 1878 c. 67 s. 2; G.S. 1894 s. 5498; R.L. 1905 s. 4338; G.S. 1913 s. 7974; G.S. 1923 s. 9471; M.S. 1927 s. 9471.

1. Who prevailing party
2. On dismissal
3. Several parties
4. On new trial
5. Actions tried together
6. Generally

1. Who prevailing party

No general rule can be laid down as to who is the prevailing party; but in the instant case when the same persons are defendants in different actions and incur a joint expense for documentary evidence necessary for their defense in several actions, and use the same in such actions, they may charge such expense in either action, at their election, but only in the one action. Barry v McGrade, 14 M 286 (214).

The court cannot control the stipulation of parties as to costs. Dorr v Steichen, 18 M 26 (10).

Where defendant admitted the allegations of the complaint, but was able to establish the validity of new matter alleged in the answer, as to costs the defendant was the prevailing party. Harbo v Board, 63 M 238, 65 NW 457.

On appeal to the supreme court the administrator was the prevailing party and entitled to tax his disbursements. Gilman v Maxwell, 79 M 377, 82 NW 669.

The surety on plaintiff's bond in replevin is liable for costs taxable by the prevailing defendant. Katz v Amer. Bonding, 86 M 168, 90 NW 376.

Governmental authority not being involved, and it being an ordinary action for the recovery of money, defendant may properly tax costs. State v Buckman, 95 M 272, 104 NW 289; State v Fullerton, 124 M 151, 144 NW 755.

In an action to determine adverse claims to real estate, the judgment was for plaintiff, subject to a lien in favor of defendant for taxes. The lien may include taxes paid subsequent to giving of a defective notice of redemption, whether such taxes are paid before or after they became delinquent. Culligan v Cosmopolitan, 126 M 218, 148 NW 273.

In an action to determine adverse claims, the defendant prevailed, a lien on the land being given to plaintiff for taxes paid. It was not error to adjudge the lien as a whole. Kipp v Love, 128 M 498, 151 NW 201.

Defendant having prevailed in quo warranto proceedings, was entitled to tax his costs. State ex rel v Kylmanen, 178 M 164, 226 NW 709.

In the representative suit costs cannot be taxed against the corporation. In the stock division suits separate statutory costs are taxed. Keough v St. P. Milk, 205 M 128, 285 NW 809.

2. On dismissal

On dismissal for failure to prove a cause of action, defendant is entitled to only five dollars costs. Conrad v Bauldwin, 44 M 406, 46 NW 850.

Where issues have been made by the pleadings in an action of ejectment, and thereafter judgment has been entered upon a stipulation of the parties that the action shall be dismissed "on its merits", it cannot be regarded as an ordinary statutory dismissal by consent of parties. Such judgment is upon the merits of the case. Cameron v Chgo-Milwaukee, 51 M 153, 53 NW 199.

Where there is a regular trial and findings of fact and conclusions of law are made on which a judgment of dismissal is entered for defendant, he is entitled to ten dollars costs. Winnebago v NW Prtg. 61 M 373, 63 NW 1024.

An assignee subrogated to part of plaintiff's claim or alleged cause of action is not liable for costs and disbursements in a suit brought in the name of the assignor. Dreyer v Otter Tail Power, 205 M 286, 287 NW 13.

On dismissal of appeal the municipal court of St. Paul did not abuse its discretionary power in taxing ten dollar costs in favor of the plaintiff. Treat v Court Minnesota, 109 M 110, 123 NW 62.

3. Several parties

In an action for tort against several defendants on a verdict in favor of some of them, but against others, those succeeding are entitled to costs. Where several defendants appear by the same attorney, united in the same answer, and there is one trial as to all, they are entitled jointly to statutory costs and not severally. Barry v McGrade, 14 M 286 (214).

Where several defendants in good faith appear by separate attorneys and interpose separate defenses by separate answers, each is entitled, on a recovery in his favor, to separate costs, whether the action is on contract or for tort. Slama v Chgo-Milwaukee, 57 M 167, 58 NW 989; Groomes v Waterman, 59 M 258, 61 NW 139.

Intervenors appearing separately, each represented by his own attorneys, plaintiffs having joined issue on each complaint in intervention, are severally entitled to tax statutory costs. Pesis v Burdman, 190 M 563, 252 NW 454.

When a principal employs competent attorneys to defend an action brought by a third party against the agent and the principal for alleged false representations, the agent is not entitled to reimbursement for amounts incurred to additional attorneys, there being no showing of antagonistic defenses or incompetency of the attorney employed by the principal. Adams v North Range, 191 M 55, 253 NW 3.

4. On new trial

Where costs in the supreme court are discretionary, they are not recoverable unless specially awarded (or unless statutory). If a party fails to attend to making his objections before the clerk, he cannot object on appeal. Where a new trial is ordered, nothing being said about the costs of the first trial, such costs are recoverable by the party who ultimately succeeds. Myers v Irvine, 4 M 553 (435); Martin v Walker, 6 M 508 (353).

Failure of plaintiff to pay costs awarded against him in a former action is ground for a stay of proceedings. Brewster v Pratt, 6 M 53 (14).

On a former appeal the appellate court remanded the case, with directions to enter judgment for plaintiff for the undivided two-thirds of the real estate, and a new trial for one-third. The plaintiff, on entering judgment as to the two-thirds, was entitled to tax costs for the former trial without any direction as to the costs in the remanding order. McRoberts v McArthur, 66 M 74, 68 NW 770.

Neither statute nor court rule requires the payment of costs as a condition of granting a new trial on the merits. Park v Electric Co. 75 M 349, 77 NW 988.

5. Actions tried together

Actions were brought by two plaintiffs, husband and wife, to recover injuries each received in the same accident. By consent, the two cases were tried together, and separate verdicts rendered. The wife had judgment and her costs were properly taxed and paid. As to the husband, the verdict being against him, defendant was entitled as to him to tax ten dollars statutory costs. Schuler v Mpls. St. Ry. 76 M 48, 78 NW 881.

6. Generally

In an action to enforce a lien for wages for labor upon timber products, claimant is entitled under the statute to recover ten dollars statutory costs and $20.00 attorney's fees. Shelden v Padgett, 144 M 143, 174 NW 827.

Costs were denied to respondent because of inclusion in their brief of improper matter. Martin's Estate, 166 M 269, 207 NW 618.

Having been paid his taxable costs and disbursements, the prevailing party has no further claim for attorney's fees in excess of those taxable. Smith v Chaffee, 181 M 322, 232 NW 515.

Upon stipulating for the satisfaction of two judgments and discharging them of record upon payment of the principal sum and all costs, except a fee of one dollar charged upon writs of execution outstanding under which no levy had been made, the judgment creditor waived payment of the item. Stebbins v Friend-Crosby, 185 M 336, 241 NW 315.

Where purchaser of real estate recovers a judgment reforming the contract and requiring the vendor to deliver a proper deed, and restraining vendors from terminating the contract, plaintiff should have costs without any additional tender. Pettyjohn v Bowler, 219 M 55, 17 NW(2d) 83.

The state is not liable for costs in its sovereign capacity, but is liable as any other party when it appears in a proprietary capacity. OAG March 3, 1933.

A defendant in illegitimacy proceedings who has a favorable verdict, cannot tax costs. OAG Oct. 9, 1935 (199a-1).

Where in district court the suit is for more than $100.00 but the recovery more than $50.00 but less than $100.00, plaintiff may tax his costs and disbursements. Where suit is for less than $50.00, plaintiff cannot have his costs, and he shall pay the defendant's costs. 1942 OAG 18, March 12, 1942 (144-B-5).

549.03 IN ACTIONS FOR SERVICES; DOUBLE COSTS.

HISTORY. 1891 c. 41 s. 1; G.S. 1894 s. 5499; 1895 c. 109; R.L. 1905 s. 4339; 1907 c. 200 s. 1; G.S. 1913 s. 7975; G.S. 1923 s. 9472; M.S. 1927 s. 9472.

Costs allowed upon recovery of the price or value of labor may be recovered by an assignee. Clifford v Northern Pacific, 55 M 150, 56 NW 590.

Double costs were improperly allowed where no claim therefor was made in the complaint, and no proof of the right thereto on the trial. Fay v Bankers' Surety Co. 125 M 211, 146 NW 359.

549.04 DISBURSEMENTS; TAXATION AND ALLOWANCE.

HISTORY. G.S. 1866 c. 67 s. 3; 1868 c. 89 s. 1; G.S. 1878 c. 67 s. 3; G.S. 1894 s. 5500; R.L. 1905 s. 4340; G.S. 1913 s. 7976; G.S. 1923 s. 9473; M.S. 1927 s. 9473; 1943 c. 508 s. 1.

See Laws 1943, Chapter 508, Section 1.

1. Witness fees
2. Disbursements generally
3. Justice court jurisdiction
4. Generally

1. Witness fees

If a cause is set for trial on a particular day and the interval is short and the witnesses live at a considerable distance, a party may keep them in attendance. But if a considerable time is to elapse before the day of trial and the witnesses live but a short distance from the place of trial, a party cannot charge for them on days when they are not needed. Andrews v Cressy, 2 M 67 (55).

The fee of a party's own witnesses should not be charged against him. Trigg v Larson, 10 M 220 (175); Payson v Everett, 12 M 216 (137).

An attorney in a cause is not entitled to a fee for attending as a witness. A party to the action is entitled to fees as a witness only when he appears solely as a witness for other parties. Barry v McGrade, 14 M 286 (214).

Where witnesses attend and are sworn, though not subpoened, their fees may be taxed. Clague v Hodgson, 16 M 329 (291).

The fees of witnesses in attendance, but not sworn, are taxable, if their attendance was secured under a reasonable belief that their testimony would or might be necessary or material. Slama v Chgo-St. Paul, 57 M 167; Schuler v Mpls. St. Ry. 76 M 48, 78 NW 881; Berryhill v Carney, 76 M 319, 79 NW 170.

If a party acts in good faith when requesting or compelling the attendance of his witnesses, the mere fact that their testimony is immaterial or inadmissible will not deprive him of the right to tax their fees. Bad faith in such case will not be presumed on the taxation of costs before the clerk. Mankato Lime v Craig, 81 M 224, 83 NW 983; Barber v Robinson, 82 M 112, 84 NW 732; Merriam v Johnson, 93 M 316, 101 NW 308.

The case of Osborne v Gray, 32 M 53, 19 NW 81, followed and Mankato v Craig, 81 M 224, 83 NW 983, distinguished, and, it is held that in the instant case where witnesses are not called to testify a showing of the materiality of their evidence other than the usual affidavit of disbursements is necessary. Mchts. Bank v St. Anthony & Dakota, 96 M 37, 104 NW 713.

Where a case was set for trial on Tuesday, and on the preceding Saturday defendant subpoened his witness, living 75 to 100 miles away, and on Monday was informed by plaintiff, the action would be dismissed, as was done on Tuesday, witness fee may be taxed. Lloyd v Northwestern, 132 M 478, 157 NW 648, 592.

2. Disbursements generally

As a general rule the expense of procuring documentary evidence is taxable. Andrews v Cressy, 2 M 67 (55); Barry v McGrade, 14 M 286 (214); Wentworth v Griggs, 25 M 450.

Fees of the sheriff on execution under a prior judgment. Barman v Miller, 23 M 458.

The fees of notaries in taking depositions for use on the trial are taxable. Wentworth v Griggs, 25 M 450.

When the same persons are defendants in different actions and incur a joint expense for documentary evidence necessary for their defense in several actions, and use the same in such actions, they may charge such expense as a disbursement in either action at their election, provided such charge is made in one action only. Barry v McGrade, 14 M 286 (214).

Fees of the sheriff for serving a subpoena are taxable although the witness could not be found. Barman v Miller, 23 M 458.

The expense of procuring a copy of the stenographer's notes for use on a motion for a new trial may be taxed if a new trial is granted with the costs of the motion. Pinney's Will, 27 M 280, 6 NW 791, 7 NW 144; Linne v Forrestal, 51 M 249, 53 NW 547.

Where there are three trials in a cause, each resulting in a verdict for the plaintiff, who paid the jury fee in each trial, it was held proper to tax all the fees on the entry of judgment on the last verdict. Schultz v Bower, 66 M 281, 68 NW 1080.

Where an attorney has secured a number of clients and brings separate actions against a defendant whose one act of negligence has injured each client, and the attorney procures at an expense of $1,550 photographs and maps of the burned district to be used successively in the trial of each case, and the defendant makes a settlement of all cases but one, that one is entitled to tax only his proportionate share of such extra expense. Salo v Duluth & Iron Range, 124 M 361, 145 NW 114.

Where a verdict is rendered in favor of a defendant in an action for damages, wherein defendant counter-claimed, the defendant is entitled to tax his costs incurred in defending plaintiff's claim, although he did not establish his counterclaim. Ballard v St. P. City Ry. 129 M 494, 152 NW 868.

Three independent actions were brought against three different districts. By agreement, the cases were tried together to the same jury, which returned a verdict against each defendant. The court was not required to apportion the disbursements among the three defendants, two of whom are not liable. Independent School v School District, 130 M 20, 153 NW 113.

In passing sentence upon one convicted of assault, the court may require payment by the guilty party of such items of the state's expense as would be taxable in a civil action, in addition to the penalty. These disbursements must be ascertained and taxed before their payment can be made a part of the sentence. State v Morehart, 149 M 432, 183 NW 960.

Costs and disbursements taxable go to the party ultimately prevailing in the action; the party in whose favor some intermediate motion is decided is not entitled to disbursements in support of same. Cardoff v Cardoff, 152 M 399, 189 NW 124.

Plaintiff in preparing for the trial of an action involving the location of the correct line between his land and that of the defendant, paid civil engineers for a survey, and a timber cruiser for an estimate. Such sums are not taxable. Shterk v Veitch, 135 M 349, 160 NW 863.

The prevailing party in quo warranto proceedings may have his costs without an express direction by the court. State ex rel v Kylmanen, 178 M 173, 226 NW 709.

The prevailing party may collect the expense of the record and briefs only when they are printed. State ex rel v Tifft, 185 M 104, 240 NW 354.

The objectors to the final account of the trustee are entitled to their costs and disbursements. Rosenfeldt Trusteeship, 185 M 425, 241 NW 573.

Where defendant in illegitimacy proceedings has a favorable verdict he cannot tax costs. OAG Oct. 9, 1935 (199a-1).

In pauper settlement cases the prevailing party may tax clerk's costs. OAG April 12, 1938 (144b-15).

The clerk may have his fees in those cases where a municipality unsuccessfully prosecutes under an ordinance. OAG April 14, 1938 (144b-15).

3. Justice court jurisdiction

In an action, commenced in the district court, claiming damages in excess of $100.00, if the recovery be less than $50.00, the court may in its discretion allow costs. Turner v Halloran, 8 M 451 (401).

Where the damages claimed exceed the jurisdiction of a justice court, a successful plaintiff is entitled to his costs and disbursements although he recovers $50.00 or less. Greenman v Smith, 20 M 418 (370); Kimball v Southern Land, 57 M 37, 58 NW 868.

An order setting aside the taxation and allowance, by the clerk, of costs and disbursements in favor of the defendant, and that disbursements be taxed in favor of plaintiff, is not an appealable order. Felber v Southern Minn. 28 M 156, 9 NW 635.

It is error on the part of the trial court to take a case from the jury, where the evidence tends to prove that the plaintiff is entitled to nominal damages. Potter v Mellen, 36 M 122, 30 NW 438.

4. Generally

Disbursements are the expenses necessarily paid or incurred by the prevailing party. Board v Board, 84 M 267, 87 NW 846.

Where two suits are tried together, and a verdict for the defendant in each, he may elect in which action he will tax his disbursements and he may have costs in each. Sullivan v Mpls. St. Ry. 161 M 57, 200 NW 922.

While the main issue was decided in favor of defendant, the complaint was sustained as to certain illegal operations, and plaintiff must be allowed his costs and disbursements. Lipinski v Gould, 173 M 564, 218 NW 730.

Costs and disbursements are not taxable in supreme court against the secretary of state when his conduct, involved in the litigation, pertains to his governmental duties in the interest of the state. State ex rel v Holm, 186 M 331, 243 NW 133.

No general rule can be laid down as to who is the prevailing party and in the instant case neither party can complain of the courts determination that neither party be allowed to tax costs. Walsh v Kuechenmeister, 196 M 492, 265 NW 340.

Costs and disbursements are governed by statute; and as defendant prevailed upon issues made by the pleadings and litigated at trial, the court correctly found that defendant should have its costs and disbursements. Judd v City of St. Cloud, 198 M 590, 272 NW 577.

The prevailing party is one in whose favor the verdict is rendered. The courts exercise a discretion in determining what are reasonable and necessary disbursements. In an action to recover penalties under the hours of service act, being a civil action, the plaintiff on recovery may tax costs. United States v Mpls. & St. P. 235 Fed. 951.

Where, in an action at law, plaintiff was allowed recovery on main claim and defendant recovered on counter-claim, leaving only a small balance in defendant's favor, defendant may tax costs. Harlan Coal v North American, 35 F(2d) 211.

549.05 COSTS IN CERTAIN CASES COMMENCED IN DISTRICT COURT OF FOURTH JUDICIAL DISTRICT COGNIZABLE BY MUNICIPAL COURT.

HISTORY. 1925 c. 326; M.S. 1927 s. 9473-1.

549.06 SEVERAL ACTIONS; COSTS, HOW ALLOWED.

HISTORY. R.S. 1851 c. 72 s. 3; P.S. 1858 c. 62 s. 3; G.S. 1866 c. 67 s. 4; G.S. 1878 c. 67 s. 4; G.S. 1894 s. 5501; R.L. 1905 s. 4341; G.S. 1913 s. 7977; G.S. 1923 s. 9474; M.S. 1927 s. 9474.

Marshaling costs and disbursements in similar cases against same defendant covering, except for amount of damages, the same facts. Salo v Duluth & Iron Range, 124 M 364, 145 NW 114; 124 M 526, 144 NW 1134.

549.07 IN EQUITABLE ACTIONS; SEVERAL DEFENDANTS.

HISTORY. R.S. 1851 c. 72 s. 5; P.S. 1858 c. 62 s. 5; G.S. 1866 c. 67 s. 5; G.S. 1878 c. 67 s. 5; G.S. 1894 s. 5502; R.L. 1905 s. 4342; G.S. 1913 s. 7978; G.S. 1923 s. 9475; M.S. 1927 s. 9475.

In equitable actions the allowance of costs is within the judicial discretion of the trial court. Wallrich v Hall, 19 M 389 (329).

The prevailing party in an equitable action is entitled, as a matter of right, to his disbursements, as distinguished from costs, which are in the discretion of the court. Van Meter v Knight, 32 M 205, 20 NW 142.

Prior to enactment of Laws 1899, Chapter 342, laborers in log lien cases were practically without remedy if they were to pay attorneys out of the recovery. In the instant case, plaintiff may tax $10.00 statutory costs and in addition the statutory $20.00 attorney fee. Shelden v Padgett, 144 M 145, 174 NW 828.

In the instant case taxation of costs including attorney's fees were allowed in the probate court to one not the prevailing party. They were denied in the district court. Butler v Butler, 188 M 632, 249 NW 38.

549.08 IN ACTION ON JUDGMENT.

HISTORY. R.S. 1851 c. 72 s. 6; P.S. 1858 c. 62 s. 6; G.S. 1866 c. 67 s. 6; G.S. 1878 c. 67 s. 6; G.S. 1894 s. 5503; R.L. 1905 s. 4343; G.S. 1913 s. 7979; G.S. 1923 s. 9476; M.S. 1927 s. 9476.

Full faith and credit. 20 MLR 149.

Merger by judgment. 28 MLR 436.

549.09 INTEREST ON VERDICT.

HISTORY. R.S. 1851 c. 72 s. 8; P.S. 1858 c. 62 s. 8; G.S. 1866 c. 67 s. 7; G.S. 1878 c. 67 s. 7; G.S. 1894 s. 5504; R.L. 1905 s. 4344; 1909 c. 371 s. 1; G.S. 1913 s. 7980; G.S. 1923 s. 9477; M.S. 1927 s. 9477.

Stockholders' double liability is an unliquidated demand; and in an action to enforce it, interest may be allowed from the time of filing the decision but not before. Palmer v Bank, 72 M 266, 75 NW 380.

Alternative judgment in a replevin action is a money judgment; and the clerk on entry may add interest from the date of the order. Martin Bank v Bird, 90 M 336, 96 NW 915.

Prior to the enactment of Laws 1909, Chapter 371, delinquent personal property taxes did not bear interest, either from the date of delinquency or from the date of the order for judgment. State v New England, 107 M 52, 119 NW 427.

549.10 TAXATION; OBJECTIONS AND APPEAL.

HISTORY. R.S. 1851 c. 72 s. 9; P.S. 1858 c. 62 s. 9; G.S. 1866 c. 67 s. 8; G.S. 1878 c. 67 s. 8; 1885 c. 43; G.S. 1894 s. 5505; R.L. 1905 s. 4345; G.S. 1913 s. 7981; G.S. 1923 s. 9478; M.S. 1927 s. 9478.

1. Time
2. Notice
3. Disbursements
4. Specification of objections
5. Appeal to district court

1. Time

As respects the lien or validity of a judgment, the omission to include costs or the insertion therein of costs taxed without notice is an irregularity merely. A party may enter and docket his judgment so as to secure a lien without waiting to give notice of taxation of costs, and, on a retaxation, the record may be amended, and, if the costs are reduced, the amount of such reduction may be endorsed on the execution if previously issued. Leyde v Martin, 16 M 38 (24); Richardson v Rogers, 37 M 461, 35 NW 270; Fall v Moore, 45 M 517, 48 NW 404.

The time to appeal does not run against the defeated party until costs and disbursements are properly taxed and included in the judgment. Richardson v Rogers, 37 M 461, 35 NW 270.

Distinguishing, Richardson v Rogers, 37 M 461, 35 NW 270, the judgment in this case is upon its face complete and final, and the district court erred in dismissing the appeal. Mielke v Nelson, 81 M 228, 83 NW 836.

Ordinarily, costs are taxed before the entry of judgment, but this is not indispensable. Costs properly constitute a part of the judgment, and, unless they are waived or released by the prevailing party, he is entitled to have them included in the judgment as of right. A judgment is not perfected until the costs are inserted. Fall v Moore, 45 M 517, 48 NW 404.

Costs cannot be taxed and judgment entered where a verdict has been vacated and a new trial granted. Thompson v Chgo. N. W. 178 M 235, 226 NW 700.

2. Notice

A judgment for costs entered without notice or on insufficient notice, is merely irregular and subject to correction on motion. Jakobsen v Wigen, 52 M 6, 53 NW 1016; Lindholm v Itasca, 64 M 46, 65 NW 931.

If a party has appeared he is entitled to notice although he is in default for want of an answer. Davis v Red River Lbr. 61 M 534, 63 NW 1111.

A prevailing party may cause judgment to be entered without notice; and costs and disbursements may be taxed after such entry of judgment. Wilcox v Hedwall, 186 M 504, 243 NW 709.

3. Disbursements

A party must show by his affidavit that disbursements claimed are properly taxed. The affidavit should state the number of days attendance of each witness and the dates. Andrews v Cressy, 3 M 67 (55).

If witnesses are in attendance but not sworn, an affidavit merely stating that they were "necessary and material" is insufficient. The affidavit must show the necessity of having them in attendance. It may be made after objection is raised. Osborne v Gray, 32 M 53, 19 NW 81; Berryhill v Carney, 76 M 319, 79 NW 170; Mchts. Bank v St. Anthony, 96 M 37, 104 NW 713.

If the prevailing party claims traveling fees for witnesses, his affidavit should state the place of residence of each witness, the number of miles they respectively

traveled as such witnesses for the purpose of going from such place of residence to the place of trial and return thereto. Merriman v Bowen, 35 M 297, 28 NW 921; Dallemand v Swensen, 54 M 32, 55 NW 715.

That the prevailing party did not include the names of and amounts paid to expert witnesses in her verified bill of costs and disbursements does not prevent such items from being included in her taxable disbursements, on order of the trial court, pursuant to motion. Kundiger v Metropolitan, 218 M 273, 15 NW(2d) 487.

4. Specification of objections

Only such rulings in the taxation of costs will be reviewed on appeal as were excepted to by the party aggrieved. Barry v McGrade, 14 M 286 (214).

The mode of stating objections to taxation of costs is a mere question of practice and should be regulated, as far as possible, by the courts in which such objections originate; and when an objection made to the taxation of costs is reasonably susceptible of a construction given it by the trial court, the appellate court will not construe it differently. Davidson v Lamphrey, 17 M 32 (16); Schuler v Mpls. St. Ry. 76 M 48, 78 NW 881; Barber v Robinson, 82 M 112, 84 NW 732.

5. Appeal to district court

When costs are allowable in the discretion of the court, the court exercises its discretion in that regard when it affirms on appeal the taxation of such costs by the clerk. Turner v Halloran, 8 M 451 (401).

Where the clerk improperly taxes costs which are only taxable on application to the court, the irregularity is cured by the subsequent affirmance of the taxation by the court of appeal. Barman v Miller, 23 M 458.

In passing on the propriety of disbursements, the court is not confined to the affidavits presented, but may act on its own knowledge of the proceedings. Valerius v Richard, 57 M 451, 59 NW 534.

549.11 COSTS ALLOWED ON MOTION OR DEMURRER.

HISTORY. R.S. 1851 c. 72 s. 10; P.S. 1858 c. 62 s. 10; G.S. 1866 c. 67 s. 9; 1867 c. 82 s. 1; G.S. 1878 c. 67 s. 9; G.S. 1894 s. 5506; R.L. 1905 s. 4346; G.S. 1913 s. 7982; G.S. 1923 s. 9479; M.S. 1927 s. 9479.

Where costs in the supreme court are discretionary, they are not recoverable unless specially awarded; but, where the clerk allows them without order, they will stand unless the aggrieved party objects to their allowance at the time of their taxation after due notice. Myers v Irvine, 4 M 553 (435).

Where a new trial is ordered, nothing being said about the costs of the first trial, such costs are recoverable by the party who ultimately succeeds. Walker v Barron, 6 M 508 (353); Horn v Grand Rapids, 80 M 146, 83 NW 1118.

The allowance of costs to the prevailing party, upon a motion for a new trial, rests in the discretion of the court. Siebert v Mainzer, 26 M 104, 1 NW 824.

Where non-resident defendant obtained an order to reopen a judgment obtained against them by default, it was not a reasonable exercise of the discretion of the court to require such defendants as a condition of said reopening, that they file a bond with resident sureties in sufficient sum to secure the payment of any judgment plaintiff might obtain. Brown v Brown, 37 M 128, 33 NW 546.

Where in a stockholders' liability action one John Lynch was a stockholder, but the service was on John M. Lynch, not a stockholder, and judgment was docketed by default. On his motion to vacate the judgment with permission the court did not abuse its discretion in imposing $75.00 as terms to reopen. Ueland v Johnson, 77 M 543, 80 NW 700.

Where plaintiff abandoned a garnishment proceeding without notice to the garnishee, the district court did not err in awarding costs to the garnishee. Physicians v Leslie, 196 M 591, 265 NW 820.

549.12 AGAINST GUARDIAN OF INFANT PLAINTIFF.

HISTORY. R.S. 1851 c. 62 s. 13; P.S. 1858 c. 62 s. 13; G.S. 1866 c. 67 s. 10; G.S. 1878 c. 67 s. 10; G.S. 1894 s. 5507; R.L. 1905 s. 4347; G.S. 1913 s. 7983; G.S. 1923 s. 9480; M.S. 1927 s. 9480.

There being no showing of inability of guardian ad litem to pay, the motion to send remittitur to the court below without payment of costs is denied. Winters v M. & St. L. 127 M 532, 148 NW 1096.

549.13 TO DEFENDANT AFTER TENDER.

HISTORY. R.S. 1851 c. 62 s. 14; P.S. 1858 c. 62 s. 14; G.S. 1866 c. 67 s. 11; G.S. 1878 c. 67 s. 11; G.S. 1894 s. 5508; R.L. 1905 s. 4348; G.S. 1913 s. 7984; G.S. 1923 s. 9481; M.S. 1927 s. 9481.

The only tender was by check mailed after suit had been brought which was not payment. The defense of payment was properly stricken as sham. Beacon Lamp v Lombard, 165 M 480, 205 NW 889; Grill v Blakeborough, 189 M 354, 249 NW 194.

549.14 CHARGEABLE ON ESTATE OR FUND.

HISTORY. R.S. 1851 c. 72 s. 15; P.S. 1858 c. 62 s. 15; G.S. 1866 c. 67 s. 12; G.S. 1878 c. 67 s. 12; G.S. 1894 s. 5509; R.L. 1905 s. 4349; G.S. 1913 s. 7985; G.S. 1923 s. 9482; M.S. 1927 s. 9482.

A judgment against "James W. Lough, administrator of the estate", is a judgment against the administrator personally and may be enforced against his property. Lough v Flaherty, 29 M 295, 13 NW 131; Conlon v Holste, 99 M 493, 110 NW 2.

Judgment for costs and disbursements should not be entered against a receiver personally under this section unless mismanagement or bad faith is made to appear. Telford v Henrickson, 122 M 531, 142 NW 200.

This is an action in the nature of a special proceeding brought by the trustee asking allowance of his account and discharge, and it is concluded by a final order. As to costs, section 549.14 has no application. Malcolmson v Goodhue Bank, 198 M 572, 272 NW 157; 199 M 258, 271 NW 455.

The sureties on the bond of a special administrator are not liable for costs and disbursements awarded against him in an action brought by him in his representative capacity where there are no assets in the estate. Mpls St. Ry. v Rosenbloom, 208 M 187, 293 NW 256.

In an unsuccessful intervention by a part of the bondholders, the intervenors are not entitled to attorney's fees, since the services were rendered in behalf of one group of beneficiaries in an endeavor to exclude another from sharing in the trust fund. The estate in any event would have received no benefit. Olmstead Bank v Pesch, 218 M 424, 16 NW(2d) 470.

549.15 RELATOR ENTITLED TO, AND LIABLE FOR, COSTS.

HISTORY. R.S. 1851 c. 72 s. 22; P.S. 1858 c. 62 s. 22; G.S. 1866 c. 67 s. 13; G.S. 1878 c. 67 s. 13; G.S. 1894 s. 5510; R.L. 1905 s. 4350; G.S. 1913 s. 7986; G.S. 1923 s. 9483; M.S. 1927 s. 9483.

In certiorari to probate court the relator prevailed, and is entitled to costs and disbursements against the opposite party in interest. State ex rel v Probate Court, 67 M 51, 69 NW 908.

Where quo warranto proceedings are instituted by the attorney general, as the representative of the sovereignty of the state, to redress an alleged usurpation of office or corporate franchise, he is not liable, officially or otherwise, to the defendant for costs in case the proceedings fail. State ex rel v Village of Dover, 113 M 452, 130 NW 539.

The appellant who prevailed in the quo warranto proceedings was entitled to his costs and disbursements against the six relators. State ex rel v Kylmanen, 178 M 164, 226 NW 709.

549.16 ON APPEAL FROM JUSTICE.

HISTORY. R.S. 1851 c. 72 ss. 25, 26; P.S. 1858 c. 62 ss. 25, 26; G.S. 1866 c. 67 ss. 14, 15; G.S. 1878 c. 67 ss. 14, 15; G.S. 1894 ss. 5511, 5512; R.L. 1905 s. 4351; G.S. 1913 s. 7987; G.S. 1923 s. 9484; M.S. 1927 s. 9484.

If a defendant appeals to the district court from the judgment of a justice of the peace, and does not succeed in reducing the amount of the recovery one-half or more, the plaintiff is entitled to his costs and disbursements in district court. Watson v Ward, 27 M 29, 6 NW 407; Clasen v Allen, 29 M 86, 12 NW 146; Flaherty v Rafferty, 51 M 341, 53 NW 644; Thompson v Ferch, 78 M 521, 81 NW 520; Olson v Rushfeldt, 81 M 381, 84 NW 124.

The defendant who appeals from the judgment of a justice of the peace to the district court, and who, though he does not reduce the verdict against him one-half, succeeds upon the only matter litigated, is entitled to costs. Foster v Hausman, 55 M 157, 56 NW 592.

When on appeal the defendants recovery is reduced one-half, he is entitled to costs and disbursements in district court, although he made default in justice court. Conrad v Swankie, 80 M 438, 83 NW 383.

549.17 ADDITIONAL COSTS ON CHANGE OF VENUE; AMOUNT; PAYMENT OR WAIVER OF; TAXATION.

HISTORY. 1925 c. 242 s. 1; M.S. 1927 s. 9487-1.

"No judgment shall be entered in any cause" relates to a judgment upon a cause of action, and is not applicable to the prevailing party as relator in mandamus proceedings relating to change of venue. Dahl v Stoffels, 202 M 661, 279 NW 578.

549.18 SECURITY FOR COSTS.

HISTORY. 1862 c. 13 s. 1; G.S. 1866 c. 67 s. 19; G.S. 1878 c. 67 s. 19; G.S. 1894 s. 5518; 1899 c. 186; R.L. 1905 s. 4355; G.S. 1913 s. 7991; G.S. 1923 s. 9488; M.S. 1927 s. 9488.

When a judgment for costs has been entered in favor of a defendant and, on appeal, no supersedeas bond has been given, the defendant is entitled to enforce the judgment at once, and the sureties who signed the bond for costs in order to permit the plaintiff, a foreign corporation, to sue in this state, have no defense to that bond by pleading as a counter-claim the cause of action alleged by the corporation in the action in which the cost bond was given, and in which such cause of action was adjudged not to exist. Birkeland v Bruce, 165 M 184, 206 NW 384.

549.19 NEGLECT TO FILE SECURITY; PROSECUTION OF BOND.

HISTORY. 1862 c. 13 ss. 2, 3; G.S. 1866 c. 67 ss. 20, 21; G.S. 1878 c. 67 ss. 20, 21; G.S. 1894 ss. 5519, 5520; R.L. 1905 s. 4356; G.S. 1913 s. 7992; G.S. 1923 s. 9489; M.S. 1927 s. 9489.

See, Birkeland v Bruce, 165 M 184, 206 NW 384.

When a non-resident plaintiff has not filed security for costs, defendant may make the objection only by motion, not by answer. The court may allow a non-resident plaintiff to file security for costs, nunc pro tunc, after the action is commenced. Henry v Bruns, 43 M 295, 45 NW 444.