Appeals and Reviews in Civil Actions

CHAPTER 605

APPEALS FROM DISTRICT COURT

605.01 APPEAL TO SUPREME COURT.

HISTORY. R.S. 1851 c. 81 s. 1; P.S. 1858 c. 71 s. 1; G.S. 1866 c. 86 s. 1; G.S. 1878 c. 86 s. 1; G.S. 1894 s. 6132; R.L. 1905 s. 4357; G.S. 1913 s. 7993; G.S. 1923 s. 9490; M.S. 1927 s. 9490.

While act approved March 1, 1867, allowed an appeal from an order granting a new trial, the act applies only to judgments and orders in a civil action under General Statutes 1866, Chapter 86. The instant case was brought under Special Laws 1864, Chapter 2, and is a special proceeding to which the act approved March 1, 1867, is not applicable. McNamara v Minnesota Central, 12 M 388 (269); Conter v St. P. & S. C. 24 M 313.

Special Laws 1878, Chapter 150, being "an act to authorize the location of an avenue around Lake Phalen," gives an appeal from the district to the supreme court. County of Ramsey v Stees, 27 M 14, 6 NW 401.

The commissioners under the condemnation proceedings awarded plaintiff $200.00, and on appeal to the district court the jury increased the award to $1,250, whereupon the railway corporation attempted to dismiss and abandon the proceedings. Prior to the judgment the corporation may renounce the right to acquire the land, and may abandon all proceedings, but not thereafter. Witt v St. P. & N. 35 M 404, 29 NW 161.

A judgment vacating a town or village plat is appealable as a "final order affecting a substantial right" within the meaning of General Statutes 1894, Section 6140, Clause 6 (section 605.09); but must be taken within the time fixed for appeals from orders generally, namely, within 30 days. Koochiching v Franson, 91 M 404, 98 NW 98.

In a proceeding by the state against a corporation and its officers, charging them with the violation of the anti-trust statute, the state may appeal from a judgment in favor of the defendants. State v Duluth Bd. of Trade, 107 M 506, 121 NW 395.

Inasmuch as the writ of mandamus is designed, among other things, to compel the exercise of a judicial function, but not to control the manner of its exercise, it cannot be resorted to for the purpose of reviewing an order of the district court, determining the manner of the trial of a civil action. If a jury trial is denied, where a litigant is entitled to it and asserts his right, the error can be reviewed only on appeal. Swanson v Alworth, 159 M 193, 198 NW 453.

Where the same debt claimed by plaintiff is also claimed by another, an order permitting defendant to pay the amount into court and directing that the other claimant be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. Seeling v Deposit Bank, 176 M 11, 222 NW 295.

A trial court has no jurisdiction in civil cases to certify questions to the supreme court. Newton v Mpls. St. Ry. 186 M 437, 240 NW 470.

Where one party serves notice of appeal on the opposing party but takes no steps to perfect the appeal, the trial court does not lose jurisdiction to vacate prior order and amend findings. The trial court retains jurisdiction until return has been made to the supreme court. Lehman v Norton, 191 M 211, 253 NW 663.

Statutes governing appeals are remedial in their nature and should be liberally construed. The propriety of this rule is particularly pertinent when the order

or judgment appealed from involves finality. Stebbins v Friend, 191 M 561, 254 NW 818.

Notice of appeal from the probate court to the district court is not "process," and service of the notice on election day is not prohibited by section 645.44, subdivision 4, which prohibits the service of process on that day. Dohmen v Simmons, 200 M 57, 273 NW 364.

In condemnation proceedings the state took a single appeal from awards made by commissioners to the owners of two separately owned tracts. The appeal was properly dismissed for duplicity. State ex rel v May, 204 M 564, 285 NW 834.

An order denying a motion for judgment based upon a stipulation of liability is not an appealable order within the provisions of section 605.09. Rodgers v Steiner, 206 M 637, 289 NW 580.

A writ of certiorari to review a judgment of the municipal court of Duluth having been improvidently issued, is quashed. The remedy is by appeal. Warner v Anderson, 212 M 610, 3 NW(2d) 673.

Irregularity of procedure in the assessment of recovery in entry of judgment upon default cannot be raised upon appeal to the supreme court unless the appellant has applied to the trial court for relief against such irregularity. (Overruling Reynolds v LaCrosse, 10 M 178 (144), and reinstating the rule of Babcock v Sanborn, 3 M 141 (86)). Whipple v Mahler, 215 M 578, 10 NW(2d) 771.

After an appeal to the supreme court is perfected, the lower court cannot properly make any order or render any decision affecting the order or judgment appealed from, except to amend the same to the end it may correctly express the original intention of the court. State ex rel v Bentley, 216 M 148, 12 NW(2d) 347.

Under Minnesota law, appeal does not vacate or annul judgment, and matters determined remain res judicata until the judgment is reversed. Simonds v Norwich Union, 73 F(2d) 412.

Appeal from judgment, stay of execution. 24 MLR 816.

Appealable orders. Orders involving the merits or in effect determining the action. 24 MLR 859.

605.02 TITLE ON APPEAL.

HISTORY. R.S. 1851 c. 81 s. 4; P.S. 1858 c. 71 s. 4; G.S. 1866 c. 86 s. 2; G.S. 1878 c. 86 s. 2; G.S. 1894 s. 6133; R.L. 1905 s. 4358; G.S. 1913 s. 7994; G.S. 1923 s. 9491; M.S. 1927 s. 9491.

605.03 REQUISITES OF APPEAL.

HISTORY. R.S. 1851 c. 81 s. 5; P.S. 1858 c. 71 s. 5; G.S. 1866 c. 86 s. 3; G.S. 1878 c. 86 s. 3; G.S. 1894 s. 6134; R.L. 1905 s. 4359; G.S. 1913 s. 7995; 1917 c. 66 s. 2; 1917 c. 166; G.S. 1923 s. 9492; M.S. 1927 s. 9492.

1. Generally
2. Notice of appeal
3. Service
4. Amendment
5. Waiver of appeal
6. Dismissal

1. Generally

Where a judgment dissolving a corporation is in question, and the issue is properly raised, an appeal from the judgment cannot be dismissed on motion; nor does a cash deposit in lieu of a bond stay proceedings on the judgment. Thwing v McDonald, 134 M 148, 156 NW 780, 158 NW 820.

Appeal fee must be deposited within the statutory time to make the appeal effective. Baxter v Orinoco Co. 158 M 530, 197 NW 219.

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 Retail Hdwe. Co. 181 M 573, 233 NW 316.

An order denying a motion to vacate a prior appealable order is not appealable; but an order of the district court dismissing an appeal from the probate court is a final order in a special proceeding and as such is appealable. In re Jaus, 198 M 243, 269 NW 457.

The state on appeal need not pay the $10.00 appeal fee. 1936 OAG 155, Aug. 3, 1936 (346c).

Changes in procedure. Laws 1917, Chapter 283.

2. Notice of appeal

A notice of appeal that fails to identify the order sought to be removed for review is ineffectual for that purpose. It must contain a description of the order or judgment. Galloway v Litchfield, 8 M 188 (160); Gregg v Uhless, 25 M 272; Town of Haven v Orton, 37 M 445, 35 NW 264; Anderson v Co. of Meeker, 46 M 237, 48 NW 1022.

A notice of appeal by a guardian ad litem defective in not stating specifically the character in which he acts in taking the appeal, is not a nullity, if it affirmatively appear from the return that he was in fact such guardian and that he acted in that capacity. In re Allen, 25 M 39.

An ex parte order adding new parties defendant to an action is not appealable; but an order denying a motion to vacate such order is appealable, and is not bad for duplicity because in the notice of appeal is embodied an appeal from the ex parte order, and also an appeal from an order granting leave to amend the complaint. Sundberg v Goar, 92 M 143, 99 NW 638.

The appeal is from the judgment and is not rendered ineffective by the reference in the notice of appeal to non-appealable orders, or to the items claimed to have been erroneously omitted from the judgment. Salo v Dul. & Iron Range Ref. 124 M 361, 145 NW 114.

A party whose motion for a new trial has been granted is not aggrieved by the order so that the rulings adverse to him on the trial may be reviewed on cross-appeal. The notice of plaintiff's appeal from the order granting their motion for a new trial does not in terms embrace an appeal from the court's orders on the demurrers interposed, even if such orders were appealable. Bjorgo v First Nat'l. 127 M 105, 149 NW 3.

The written notice received through the mail by the aggrieved party set the time for appeal running; and an appeal taken more than 30 days after receipt of the written notice of the decision, is not effective. Bridgham's Estate, 158 M 467, 197 NW 847.

The notice of appeal must be served within the time provided by statute. If so served the court may for cause shown relieve the appellant from mistake in failing to file the appeal bond and pay the fee on appeal within the prescribed time. Northern Oil v Birkeland, 164 M 466, 203 NW 228, 205 NW 449, 206 NW 380; State ex rel v Ryberg, 169 M 263, 211 NW 11.

The surety on a warehouseman's bond appealed from the allowance of certain claims against the estate of the insolvent warehouseman, but served notice on only one of the claimants. The appeal was dismissed as to the other claimants for lack of jurisdiction. Anderson v Krueger, 170 M 225, 212 NW 198.

In perfecting an appeal under section 605.03, the appellant must file with the clerk of the lower court the notice of appeal, with proof of service thereof on the adverse party. Costello v Dallman, 184 M 49, 237 NW 690.

Notice of appeal should be liberally construed. The notice is sufficient if it substantially states the facts required by statute, and it will not be rendered insufficient by mere surplusage, clerical errors, or other defects which could not have misled. Village of Aurora v Commissioner, 217 M 64, 14 NW(2d) 292.

3. Service

Notice of appeal to supreme 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 M 232 (217).

Service on the clerk is not good unless the notice reach the clerk within the proper time. Thorson v St. P. F. & M. Ins. Co. 32 M 434, 21 NW 471.

A notice of appeal having been served on the adverse party, a filing of such notice with the clerk of the court, with proof of such service, is a sufficient compliance with the statutory requirement of service on the clerk. State v Klitzke, 46 M 343, 49 NW 54.

Notice of appeal to the district court by the contestant of a will may properly be served upon the attorney for the proponent of the will. In re Brown, 32 M 443, 21 NW 474.

An appeal may be taken against a co-plaintiff or co-defendant and notice of appeal should be served on them as well as on the opposite party. Atwater v Russell, 49 M 57, 51 NW 629.

Notice of appeal must be served on each adverse party when it is sought to review in this court any order or judgment, although said party did not appear in the action or proceeding in the district court. Frost v St. Paul Co. 57 M 325, 59 NW 308; Oswald v St. P. Globe, 60 M 82, 61 NW 902; Lambert v Scand. Bank, 66 M 185, 68 NW 834; Kells v Nelson Lbr. Co. 74 M 8, 76 NW 790.

An assignee applied on proper notice to have his final account allowed. Of the 41 creditors who had filed claims, three appeared and opposed the allowance of compensation to the assignee or his attorneys. The claim was disallowed and the assignee apealed, but served the notice on the three creditors only. On motion to dismiss the appeal, the service was held sufficient. Davis v Swed. Bank, 78 M 408, 80 NW 953, 81 NW 210.

A party not served is not before the supreme court. Adams v City of Thief River Falls, 84 M 30, 86 NW 767.

On appeal by garnishee from a judgment obtained against it on its disclosure, the defendant was not a necessary party to the appeal. Rushford Bank v Benston, 194 M 414, 260 NW 873.

Each defendant moved separately for judgment notwithstanding the verdict or for a new trial. The fact that one defendant did not make the other defendant a party to the motion nor to the appeal, does not entitle plaintiff to a dismissal on his appeal. Kemerer v Mack, 198 M 316, 269 NW 832.

Failure to join a respondent party to the action who is the real party in interest and whose interests are vitally affected by the result here is fatal to the appeal, and it will be dismissed. Long v Ryan, 203 M 332, 281 NW 75.

Appeal dismissed because there had been no service on the defendant corporation. Weiland v Northwestern, 203 M 600, 281 NW 364.

Co-defendants in the ordinary negligence case are not adversary parties within the meaning of the statute requiring service of a notice of appeal to the supreme court "on the adverse party." Olson v Neubauer, 211 M 222, 300 NW 613.

Where after trial of an action in lower court, a party abandons the action, he cannot later appeal. Singer v Allied Factors, 216 M 443, 13 NW(2d) 378.

4. Amendment

General Statutes 1894, Section 6134 (section 605.03), authorizes the supreme court to allow a defective appeal bond to be corrected, or a new one to be substituted therefor; and the court will do so, and deny a motion to dismiss the appeal from such defect. Watier v Buth, 87 M 205, 91 NW 756, 92 NW 331.

Having carefully examined the record, the court is convinced that the appellant has not been deprived of any substantial right, and to save the time of the court appellant's motion to perfect his appeal is denied. Wheeler v Crane, 141 M 78, 169 NW 476, 597.

A properly executed and approved supersedeas bond may be substituted for a defective one previously filed. Mixed Local v Hotel Employees, 211 M 617, 1 NW(2d) 133.

5. Waiver of appeal

The trial court erred in setting aside the service of the summons and the amended summons. The appeal was not waived by a subsequent personal service

pending appeal; nor did such subsequent service render the validity of the first a moot question. Venner v Gt. Northern, 108 M 62, 121 NW 212.

The trial court did not lose jurisdiction because defendant served a notice of appeal. Until the appellant complies with the provisions of section 605.03 the trial court has power to reconsider the case and amend its findings. Lehman v Norton, 191 M 213, 253 NW 663.

6. Dismissal

The appeal herein was dismissed upon the ground that appellant failed to deposit $15.00 with the clerk. This is a motion asking that the appeal be reinstated. Appeal denied. Baxter v Orinoco Co. 160 M 535, 202 NW 829.

The failure of the employee to make a deposit of $10.00 within 20 days after the service of his notice of appeal from an adverse decision of the referee, did not require the industrial commission to dismiss the appeal. The $10.00 requirement is directory rather than mandatory. It is a deposit to cover transcript. It is not a filing fee. Rutz v Tennant, 191 M 232, 253 NW 665.

605.04 RETURN TO SUPREME COURT.

HISTORY. R.S. 1851 c. 81 s. 6; P.S. 1858 c. 71 s. 6; G.S. 1866 c. 86 s. 4; G.S. 1878 c. 86 s. 4; G.S. 1894 s. 6135; R.L. 1905 s. 4360; 1913 c. 55 s. 1; G.S. 1913 s. 7996; 1917 c. 66 s. 3; G.S. 1923 s. 9493; M.S. 1927 s. 9493.

1. Generally
2. Settled case or bill of exceptions
3. Assignments of error
4. Briefs
5. Dismissal on appeal

1. Generally

A memorandum of the trial judge generally is no part of the order or finding unless expressly made a part thereof; and in the instant case the order granting a new trial is clear and positive, and the memorandum may not be referred to for the purpose of impeaching it. Alton v Chicago, Milw. 107 M 457, 120 NW 749.

The supreme court cannot review the action of a trial court unless the record presented is properly authenticated. Fred v Segal, 122 M 43, 141 NW 806.

A ruling of the trial court excluding a document from evidence cannot be reviewed when the document is not in the record and there is no other testimony to show its materiality. Schall v Northland, 123 M 214, 143 NW 357.

A trial court has jurisdiction to settle and allow a case after an appeal has been taken from an order denying a new trial. State ex rel v Childress, 127 M 533, 149 NW 550.

It is probable that there was a mistake in making up the record, but it cannot be corrected on this ex parte application for a rehearing. If the facts justify correction, application should be made to the court below on due notice. The case is remanded for that purpose. Martinson v Hensler, 132 M 442, 157 NW 714.

A hospital clinical record offered in evidence and excluded was perhaps competent, but it is not returned to the appellate court and its materiality is not shown. Its exclusion cannot be held to be reversible error. Manning v Chicago, Gt. Western, 135 M 229, 160 NW 787.

The appeal is dismissed because the record did not contain the order appealed from. Apelt v Melin, 135 M 480, 160 NW 486.

The time prescribed by statute having expired, before the deposit of the appeal fee and no mistake being shown, the appeal never became effective and is dismissed. It might be otherwise, had a valid excuse been made and proved. Wheeler v Crane, 141 M 79, 169 NW 476, 597; Baxter v Orinoco Co. 158 M 530, 197 NW 219; Baxter v Orinoco Co. 160 M 535, 202 NW 829.

The order on its face is based upon the files and records; and the original files and records being here are sufficiently authenticated. Laff v Laff, 161 M 122, 200 NW 936.

On appeal the theory of the case may not be shifted from that at the trial. Kessler v Krudenier, 174 M 434, 219 NW 552.

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 by the supreme court. Arvidson v Slater, 183 M 446, 237 NW 12.

The notice of appeal was sufficient; as was the bond. All the requirements of the statute were met and the appeal was timely. The trial court was in error in dismissing the appeal. Devenney's Estate, 192 M 265, 256 NW 104.

Unless error in the admission or exclusion of evidence is manifest from a mere inspection of the objection, it will not be considered on appeal where the brief presents no argument in support of the assignment. Greear v Paust, 192 M 287, 256 NW 190.

There being no record of what counsel said in his opening statement, an objection to a remark of the court regarding it is too indefinite to review. State v Lynch, 192 M 534, 257 NW 278.

On appeal after a second trial, evidence taken at the first which is no part of the record at the second, cannot be considered by judicial notice or otherwise. Taylor v N. States Power, 196 M 22, 264 NW 139.

Error in respect to the charge cannot be considered on appeal for it was not discussed in the brief, nor was the portion excepted to set out in the motion. Pearson v Novell, 200 M 58, 273 NW 359.

Whether plaintiff is entitled to a judgment as a matter of law will not be considered by the supreme court where there was no motion for a directed verdict or for judgment non obstante. Strand v Boehland, 203 M 9, 279 NW 746.

Where an action has been fully litigated and upon appeal the decision affirmed, the defeated party may not again have a new trial on the ground that witnesses made mistakes or wilfully testified falsely. Nichols v Village of Morristown, 204 M 212, 283 NW 748.

Rule 4 of the supreme court places the burden upon the appellant to cause the clerk of the court below to transmit the files to the supreme court prior to the date set for hearing. McFadden v Winston, 209 M 242, 296 NW 18.

Problem of preserving excluded evidence in the appellate record. 13 MLR 169.

2. Settled case or bill of exceptions

A stipulation, not approved by the trial court, cannot be substituted for a settled case or bill of exceptions. State ex rel v Chase, 165 M 268, 206 NW 396.

Where motion to dismiss action for insufficiency of complaint is made at any stage of trial, and motion is granted and plaintiff appeals from denial of his motion for a new trial, a case or bill of exceptions must be settled and included in printed record to obtain a review. Tergeon v Johnson, 165 M 482, 205 NW 888.

Motion to dismiss the appeal for failure to print the settled case denied where the printed record reflects enough of the proceedings below to enable the court to pass upon all questions raised by the appellant. Begin v Liederbach, 167 M 84, 208 NW 546.

Where the evidence has been taken and reported to the court by a referee in proceedings supplementary to an execution, the lack of a settled case signed by the judge is not a ground for dismissing an appeal from an order appointing a receiver. Wilkins v Corey, 168 M 103, 209 NW 754.

If the settled case shows that documents were received, and the certificate of settlement makes no mention of them, the fact as shown in the settled case prevails over certificate. Sheffield v Chgo. Gt. Western, 168 M 402, 210 NW 282.

Upon an appeal from an order overruling a demurrer there is no place for a bill of exceptions. Oehler v City of St. Paul, 174 M 66, 218 NW 234.

Questions raised in this case can only be raised by a settled case or bill of particulars. The matter cannot be heard on affidavits. State ex rel v Qvale, 180 M 580, 230 NW 472.

In reviewing orders of the trial court made pursuant to motions and orders to show cause and other orders based upon the records, the rule of Radel v Radd, 123 M 299, 143 NW 741, and prior cases, requiring a settled case, bill of exceptions, or 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 the court. Fidelity v Brown, 181 M 392, 232 NW 740.

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 Kelley, 183 M 194, 235 NW 910.

An appeal by a surety company, from a judgment obtained by the state, alleging error because of a statement relative to disposition of the money when recovered, is futile without a settled case or bill of exceptions, there being no finding of fact to support the appeal and it being no concern of the surety company what disposition the state makes of the money. State v Waddell, 187 M 647, 246 NW 471.

In absence of a settled case, the only question on appeal (after trial without a jury) from the judgment is whether the findings of fact support the conclusions of law. State ex rel v Juvenile Court, 188 M 125, 246 NW 544; Elton v Northwestern, 192 M 116, 255 NW 857.

The absence of a settled case does not permit a review under the record before the court. Hellins v Nelson Co. 188 M 336, 247 NW 385.

Where the appeal is from a judgment, the validity of which depends on the files and records in the case, no settled case or bill of exceptions is necessary. Muettenberg v Joblinski, 188 M 398, 247 NW 570.

Where there is no settled case or bill of exceptions there is raised on appeal from the judgment the sufficiency of the findings to sustain it, but not errors in law or defects in pleadings. Union Central v Page, 191 M 360, 251 NW 911.

An appeal from an order denying a new trial will be dismissed where there is no settled case or bill of exceptions. Lund v Thomas, 195 M 352, 263 NW 110.

Where there is no settled case, the only question on appeal from a judgment is whether findings of fact support the conclusions of law and the judgment. Erickson v Kleinman, 195 M 622, 263 NW 795.

The affidavit of defendants cannot supply the absence of a settled case. Olson v Lichten, 196 M 352, 265 NW 25.

Where there is neither a bill of exceptions nor a settled case, upon trial had before the court without a jury, the only question presented upon appeal from the judgment is whether the findings of fact sustain the conclusions of law. Miller's Estate, 196 M 543, 265 NW 333; County of St. Louis v Magie, 198 M 127, 269 NW 105.

A finding cannot be attacked as not sustained by the evidence where there is no settled case or bill of exceptions. Hermann v Kahner, 198 M 331, 269 NW 836.

The introduction in evidence of an abstract under section 600.19 without incorporating in the settled case the instruments referred to in the abstract which are claimed to create a defect in the chain of title, is not effective to prove a breach of covenant of seizin in a deed. Baker v Rodgers, 199 M 148, 271 NW 241.

On appeal from a judgment in an action tried without a jury, where there is neither a bill of exceptions nor a settled case, the only question that can be raised is that the findings of fact by the trial judge do not support the judgment. No question as to the sufficiency of the pleadings can be raised. Schaefer v Thoeny, 199 M 610, 273 NW 190.

To secure review on appeal of a ruling of the trial court in admitting or excluding evidence, it is indispensable that there should be a bill of exceptions or case containing the evidence in question, the objection of counsel, the ruling of the court thereon and so much of the other evidence in the case as may be necessary to enable the appellate court to intelligently review the action of the trial court. Timm v Schneider, 203 M 1, 279 NW 754.

The question of fact upon which the trial court based its decision as to the tying agreement is conclusive in the absence of a settled case or bill of exceptions. General Corp. v De Marce, 203 M 28, 279 NW 750.

Since there is no settled case the appellate court must assume that plantiff was a resident for the required time. Meddick v Meddick, 204 M 114, 282 NW 676.

The supreme court must accept as true the finding sof fact, when the case is before the supreme court without a bill of exceptions or settled case and appellant has not challenged the findings. Beliveau v Beliveau, 217 M 235, 14 NW(2d) 360; Hammond v Flour City, 217 M 427, 14 NW(2d) 452.

3. Assignments of error

Assignments of error not discussed and assignments which do not point out the alleged error in the record will not be considered on appeal. Sticha v Benzick, 156 M 52, 194 NW 752.

Where a party moves the court below to amend more than one finding of fact, or where there are several findings, an assignment of error is insufficient in the supreme court which merely states that the findings are not sustained by the evidence, or that the court erred in denying the motion to amend. Taylor v Chgo. & Gt. Western, 165 M 266, 206 NW 404.

Assignments of error not discussed because of the failure of the appellant to put material exhibits before the court and comply with Rule 9 requiring reference to folios and pages of the record. Cornwell v Harvey, 167 M 428, 209 NW 317.

The supreme court cannot consider assignments of error involving questions not presented to the trial court. State Bank v Forney, 174 M 402, 219 NW 546.

There being only one assignment of error, that only can be considered. West Duluth v N. W. Textile, 176 M 588, 224 NW 245.

A conclusion of law, not expressly assigned as error on the appeal, was so closely related to other conclusions assigned as error that it should not be permitted to stand when the others are set aside. Wilde v Wilde, 177 M 190, 224 NW 852.

Where there are several separate findings of fact and conclusions of law, a general assignment of error that the findings of the court are not sustained by the evidence and are contrary to law is insufficient to challenge any finding. Warner v Shimon, 186 M 229, 242 NW 718.

Error assigned upon permitting two inconsistent defenses need not be decided since proof did not establish either. Boeder v Taggatz, 187 M 337, 245 NW 428.

Where the printed brief of an appellant assigns error upon portions of the charge, but fails to discuss or point out the fault, it is not incumbent on the appellate court to demonstrate their correctness. Cohoon v Lake Region Co. 188 M 429, 247 NW 520.

The assignment of error was not sufficient to direct the trial court's attention to the alleged error. Randall v Briggs, 189 M 175, 248 NW 752.

In the instant case, there being no assignments of error, there can be no review. White v Mazal, 192 M 522, 257 NW 281.

The amendment proposed by the appellant is defective in that there are six paragraphs of findings of fact by the trial court, and an assignment of error that "the evidence does not sustain the findings of fact," is insufficient. Jordan v Jordan, 192 M 617, 256 NW 169.

Where findings of fact and conclusions of law are made by the trial court, the defeated party, by moving for a new trial on the ground that "the decision is not justified by the evidence and is contrary to law" and by appeal assigning as error "the denial of his motion for a new trial" does not properly raise any question for review. North Central v Speranzce, 193 M 120, 258 NW 22.

Only errors assigned below may be made the basis for assignments of error on appeal. Hendrickson v Bannitz, 194 M 528, 261 NW 189.

On appeal from a judgment, the question of the sufficiency of the evidence to sustain the findings and the judgment of the court is presented where the

sufficiency of the evidence is questioned. There being a settled case, the assignment of error is sufficient. Adjustment Service v Buelow, 196 M 563, 265 NW 659.

Each defendant moved separately for judgment non obstante or a new trial. The fact that one defendant did not make the other defendant a party to the motion nor to the appeal does not entitle plaintiff to a dismissal of the appeal. Kemerer v Mack, 198 M 316, 269 NW 832.

Where appeal is from an order denying a motion for amended findings of fact and conclusions of law and, in the alternate for a new trial, an assignment of error challenging the conclusions of law as not sustained by the findings of fact and evidence is sufficient. C.I.T. Corp. v Cords, 198 M 337, 269 NW 825.

There being nine specific findings of fact, an assignment "that the findings and conclusion are contrary to the testimony herein" is insufficient as not being in proper form. Skoog v Schmahl, 198 M 504, 270 NW 129.

It is questionable whether the assignments of error upon the charge of the court present anything for review. No specific position thereof is assigned as erroneous. Doody v St. P. City Co. 198 M 576, 270 NW 583.

Only errors assigned below can be considered on appeal from an order denying a motion for a new trial. Marty v Nordby, 201 M 469, 276 NW 739.

No assignment of error in this court attacks any portion of the court's charge. Hence the criticism of the charge in the brief and oral orgument is of no avail. Nelson v Murphy, 202 M 234, 277 NW 916.

Where error is claimed in respect of instructions, good practice requires that alleged erroneous instructions should be given in haec verba, and there should be a separate assignment as to each instruction claimed to be erroneous. Vietor v Costello, 203 M 41, 279 NW 743.

The refusal to strike the whole of Thompson's evidence is not assigned as error. Byland v Carroll, 203 M 484, 281 NW 873.

Where the assignments of error do not present for review the instructions given below, the rules stated in the charge become the law of the case by which the sufficiency of the evidence to sustain the verdict is determined. Mullany v Firemen's Ins. Co. 206 M 29, 287 NW 118.

The action brought by the original plaintiff was taken over by the receiver who failed to recover. The original plaintiff appealed but the receiver did not join. The appeal must be dismissed because appellant is not an "aggrieved party," and no assignment of error is made relative to the judgment for costs. Singer v Allied Factors, 216 M 445, 13 NW(2d) 378.

On appeal a specification of error made in a motion for a new trial is unavailable unless point has been preserved both by assignment of error and appropriate argument in the brief. Hanse v St. Paul City Railway, 217 M 432, 14 NW(2d) 473.

An error corrected in the trial court will not be considered on appeal though it is claimed that the correction was not adequate where it is not pointed out in what respects, if any, it was inadequate. Standard v Wolf, 219 M 128, 17 NW(2d) 329.

4. Briefs

Where a brief is filled with scandalous and libelous statements concerning the opposing party and his witnesses and attorneys, it will be stricken from the files. State v Horr, 163 M 142, 203 NW 979; Hughes v Hughes, 204 M 592, 284 NW 781.

On the court's own motion, briefs which attacked the fairness, honesty and ability of the trial judge was stricken from the files. Northern Oil v Birkeland, 164 M 466, 203 NW 228, 205 NW 449, 206 NW 380.

Matter not a part of the record should not be printed in briefs of counsel, or comment made thereon. Sargent v Bryan, 166 M 45, 207 NW 178.

Instructions assigned as erroneous will not be considered where the brief makes no effort to point out any error therein and no prejudicial error is obvious on mere inspection. Nelson v Babcock, 188 M 584, 248 NW 49.

Cases must be argued on appeal upon the theory upon which they were tried. Livingstone v Havens, 191 M 623, 255 NW 120.

Appellant's brief is stricken as unfit and defamatory, and appellant is given 40 days within which to file a proper brief. Sennaker v Bickle, 197 M 651, 268 NW 195.

Because of disregard to court rules and too much abstinence from concise statement, no statutory costs will be awarded to the prevailing party. Lestico v Kuehner, 204 M 133, 283 NW 122; McDermott v Mpls. & Southern, 204 M 220, 283 NW 116.

The supreme court does not feel called upon to pass upon a question which counsel have not discussed, and upon which they have given the court no aid in their briefs. Mechanics Svgs. Bank v Thompson, 58 M 346, 218 NW 462; Maytag v Commsr. 218 M 462, 17 NW(2d) 37; Porter v Grennan, 219 M 14, 16 NW(2d) 906.

An appellant will generally be relieved of default in printing and filing his brief within the time prescribed in Rule XI; but in the instant case there was no showing excusing the default, and his petition is denied. Hauge's Estate, 219 M 192, 17 NW(2d) 305.

5. Dismissal on appeal

NOTE. See, Baxter v Orinoco Co. 160 M 535, 202 NW 829; Rutz v Tennant, 191 M 232, 253 NW 665; Section 605.03 (6).

Since the wife was not party to the intervention proceeding below, she is entitled to a dismissal of the appeal as to her. Veranth v Moravitz, 205 M 24, 284 NW 849.

605.05 POWERS OF APPELLATE COURT.

HISTORY. R.S. 1851 c. 81 s. 8; P.S. 1858 c. 71 s. 8; G.S. 1866 c. 86 s. 5; G.S. 1878 c. 86 s. 5; G.S. 1894 s. 6136; R.L. 1905 s. 4361; G.S. 1913 s. 7997; G.S. 1923 s. 9494; M.S. 1927 s. 9494.

1. Prior to enactment of Laws 1913, Chapter 245

Upon a joint appeal by several parties, the supreme court may reverse, affirm or modify the judgment or order appealed from as to any or all of the parties. Nelson v Munch, 28 M 314, 9 NW 863; Anderson v Hanson, 28 M 400, 10 NW 429.

When there is a failure to comply with the rules under which the appeal is taken, the court may dismiss. Kimball v Southern Land Co. 57 M 40, 58 NW 868.

The decision of a former appeal, reviewing a former trial of an action, is the law of the case on an appeal reviewing a second trial, if the evidence was substantially the same on both trials. Braucht v Graves-May Co. 96 M 387, 104 NW 1089, 106 NW 112.

An order or decision of the trial court, otherwise right as a matter of law, will not be reversed merely because the reasons assigned therefor by the court were wrong. Kipp v Clinger, 97 M 135, 106 NW 108.

Where a new trial has been directed by the supreme court, the parties to the action may waive the fact that a mandate has not been sent down to the trial court. Courtney v M. & S. St. M. 100 M 434, 111 NW 399.

The justices being equally divided the necessary result is an affirmance. Lutzer v St. P. Table Co. 121 M 258, 141 NW 115.

Circumstances have made certain cases moot cases. Anderson v Louisberg, 121 M 528, 141 NW 97; State Board v Downey, 121 M 529, 141 NW 1134.

The 15 years had run, but the extra five years for defendants under disability was not considered by the trial court. If any of the defendants are under disability, judgment should not be directed for the plaintiff, and a new trial is necessary. Finley v Erickson, 122 M 235, 142 NW 198.

Where error in the case bears only on the question of the amount of damages, a new trial may be granted on that alone; and where defendant's testimony admits a certain amount, plaintiff may have the option of accepting that amount in preference to a new trial. Stevens v Wisconsin Co. 124 M 421, 145 NW 173.

The supreme court is without authority to make findings of fact in causes presented on appeal, or to direct the trial court to find a particular fact, except perhaps where the evidence is conclusive upon the question. A reversal of a judgment upon the ground that the findings of the trial court are not sustained by the evidence is not to be understood as a direction to the court to change its findings without further action. Lawton v Fiske, 129 M 380, 152 NW 774.

When a new trial is granted it may, in a proper case, be limited to a trial of issues constituting less than an entire cause of action. Hagstrom v McDougall, 131 M 389, 155 NW 391; Smith v Gt. Northern, 133 M 192, 158 NW 46.

An erroneous finding is amendable as a matter of law, and an amendment may be directed without a retrial. Breen v Cameron, 132 M 357, 157 NW 500.

Certain material facts found by the trial court not being supported by the evidence, and the record containing evidence which might support the finding of other material facts, a proper result can best be reached by a new trial. Jacobson v Braisie, 132 M 417, 157 NW 645.

The supreme court has jurisdiction to remand a case to enable appellant to renew his motion for a new trial upon the ground of newly discovered evidence. Jensen v Fischer, 132 M 475, 157 NW 498.

Decision in former appeal is the law in the case. Jones v City of St. Paul, 133 M 464, 158 NW 251.

Where the supreme court reverses the order denying a new trial, without expressly saying that a new trial is granted, and without limiting the issues to be tried, the effect of such reversal is to grant a new trial on all the issues. O'Rourke v O'Rourke, 134 M 7, 158 NW 704; State ex rel v Brill, 134 M 471, 158 NW 908.

Erroneous dismissal does not warrant a new trial for merely nominal damages. Erickson v Minn. & Ontario, 134 M 210, 158 NW 979.

New trial granted on the question of amount only. Orr v Bennett, 135 M 444, 161 NW 165.

Judgment may be affirmed because appellant unreasonably delayed the filing of briefs. Crescent Cr'y v Massachusetts, 135 M 464, 160 NW 663.

2. Generally thereafter

When demurrer to sufficiency of complaint is sustained, or motion for judgment on the pleadings is granted and judgment entered, plaintiff may obtain a review on appeal without a case or bill of exceptions; but if the motion is made during the trial, the case or bill must be a part of the printed record. Tergeon v Johnson, 165 M 482, 205 NW 888.

Rehearing denied. The appellate court modified some of the wording in the opinion but adheres to its decision. Bailey v Mpls. St. P. Co. 166 M 123, 207 NW 560.

In the instant case it is both "necessary and proper" to order a new trial. Begin v Liederbach, 167 M 89, 208 NW 546.

In the absence of abuse of discretion the fixing of fees is the province of the trial court. In re Hill Furn. Co. 173 M 619, 216 NW 784.

The appellate court cannot conclude that the trial judge failed to exercise the judicial discretion he possessed in regard to any matter presented by motion for a new trial, unless the record plainly so disclosed. School District v Aiton, 175 M 346, 221 NW 424.

On appeal from a judgment after trial, there being no motion for a new trial, nor errors in rulings, a review is limited to the consideration as to whether or not the evidence sustains the findings. Potvin v Potvin, 177 M 53, 224 NW 461.

While an order striking portions of the answer is not reviewable, yet in this case on appeal from an order denying a new trial, the issue tendered by the stricken averments remain because it went to an essential of the case. Johnson v Maryland Co. 177 M 103, 224 NW 700.

The fact that in a motion to amend the findings and conclusions which motion was denied, the plaintiff in the divorce proceedings asked for less relief than she was entitled to, does not limit the relief that may be granted on an appeal from the judgment. Wilde v Wilde, 177 M 189, 224 NW 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 appeal from an order denying an alternate motion for judgment non obstante verdicto or for a new trial. Matesic v Maras, 177 M 240, 225 NW 84.

After trial to the court, and on appeal from the judgment without settled case or bill of exceptions, the only question is whether the findings of fact support the judgment. Wright v Avenson, 178 M 415, 227 NW 357.

On appeal from a judgment any order or part of an order made subsequent to the verdict and affecting the judgment may be reviewed. Rieke v St. Albans Co. 180 M 540, 231 NW 222.

On reargument, case was remanded for trial and determination of issues remaining undisposed of in the trial court. Dial v Waters, 181 M 606, 233 NW 870.

On appeal, affidavits of new evidence are considered only on motion for a new trial. Wheaton v Woell, 182 M 212, 234 NW 14.

When the trial court determines that its charge was inadequate and prejudicial, and grants a new trial, the appellate court leans toward sustaining the order. Hector v Royal Indemnity, 182 M 414, 234 NW 643, 235 NW 675.

A defect in the complaint not challenged in the lower court cannot be urged in the appellate court after a defense has been litigated on the merits as if such defect did not exist. Gleason v Duluth Nest, 183 M 512, 237 NW 196.

Where it is apparent the trial court gave full consideration to all the evidence, and has refused to make other specific findings, the appellate court will not remand for more definite findings. Buro v Morse, 183 M 518, 237 NW 186.

It fairly appears that the verdict was rendered upon the theory that there was an extension, and not upon the theory that there were no damages. The trial court, explicitly instructed the jury that there must be a verdict for the plaintiff unless there was an extension. One of the two original theories in the case was thus eliminated. Bemis v Nesbitt, 183 M 577, 237 NW 586.

The action being only for specific performance with no issue as to damages, plaintiff cannot claim a money judgment. Arntson v Arntson, 184 M 60, 237 NW 820.

Where no exceptions were taken, or proper specifications of error in the motion for a new trial, there can be no review on appeal. Cannon Falls v Peterson, 184 M 298, 238 NW 487.

On appeal from a judgment, there being no motion for a new trial and only a motion by the appellant for a directed verdict, the only issue before the appellate court is the sufficiency of the evidence to support the judgment. International v Nat'l Bond Co. 184 M 548, 239 NW 663.

In the absence of abuse of discretion, the question whether foundation for an expert's opinion of value is laid was for the trial court. Rahn v First Nat'l, 185 M 246, 240 NW 529; Backstrom v N. Y. Life, 194 M 67, 259 NW 681.

Where it appears probable that a party has a good cause of action or defense, and that deficiency of proof may be remedied on another trial, judgment should not be ordered. Yager v Held, 186 M 71, 242 NW 469.

The respondents, after trial on the merits, and findings and judgment in their favor, are not in a position to question the jurisdiction of either probate or district court. Overvold's Estate, 186 M 359, 243 NW 439.

Refusal of the trial court to vacate a default judgment and permit an answer will not be reversed by the appellate court except on a clear showing of abuse of discretion. Nystrom v Nystrom, 186 M 490, 243 NW 704.

Where decisive facts found by the court are sustained by the evidence, it is not necessary to specifically discuss other proposed findings of fact which would not change the result. Johnson v Grady, 187 M 104, 244 NW 409; McKay v McKay, 187 M 521, 246 NW 12.

The trial court did not abuse its discretion in denying a motion for a change in the place of trial. Desjardins v Emeralite Co. 189 M 356, 249 NW 576.

The appellate court will not review the correctness of the instructions or the failure to give them to commissioners appointed under the Elwell Law, Laws 1911, Chapter 185. Board v Bremner, 190 M 534, 252 NW 451, 253 NW 761.

The appellate court after a remittitur is regularly sent down in a criminal case, and has no power to recall the same for the purpose of entertaining an application for rehearing. State v Waddell, 191 M 475, 254 NW 627.

The sufficiency of the evidence, rulings made, and proceedings had upon trial, if properly raised below and exceptions taken, or if properly raised by assignment of error on motion for a new trial, may also be reviewed. Rawleigh v Shogren, 192 M 483, 257 NW 102.

A new trial is not necessary where error in the instructions permitted the jury to return too large a verdict. The matter may be rectified by a reduction in the amount. Hackenjos v Kemper Co. 193 M 37, 257 NW 518, 258 NW 433.

Where there is a motion for judgment non obstante verdicto, but no motion for a new trial, the only objections that can be raised on appeal are, (1) whether the court had jurisdiction, (2) whether the court erred in denying the motion for a directed verdict; and, (3) whether the evidence is sufficient to justify the verdict. Objections cannot be raised to pleadings, rulings on the trial, to the charge, or to the amount of the verdict. Eichler v Equity Farms, 194 M 8, 259 NW 545; Michler v Nelson, 194 M 499, 260 NW 865.

Where a party duly served with notice of appeal moves the district court to dismiss the appeal for want of service on all necessary parties, it may be shown that such mover was the only adverse party to appellant in the probate court, there being nothing on the face of the record to the contrary. Nelson's Estate, 195 M 144, 262 NW 145.

The jurisdiction of the district court over the parties and the subject matter will be presumed unless want of jurisdiction affirmatively appears on the face of the record or is shown by extrinsic evidence in a direct attack. Fulton v Okes, 195 M 247, 262 NW 570.

The appellate court and the trial court from which an appeal is taken in a divorce proceeding have concurrent jurisdiction to award temporary alimony pendente lite. Bickle v Bickle, 196 M 392, 265 NW 276.

A judgment will not be reversed on appeal unless the record affirmatively shows material error. Johnson v Gustafson, 201 M 629, 277 NW 252.

Where testimony is stricken out and the jury charged to disregard it, the presumption on appeal is that it was so disregarded. Eystad v Stambaugh, 203 M 392, 281 NW 526.

Where the members of the industrial commission are equally divided in opinion on an appeal from a referee's decision awarding compensation to an injured employee, an affirmance of the referee's decision occurs by operation of law. Barlow v Mpls.-Moline, 214 M 564, 9 NW(2d) 6.

An assignment of error that the court erred in entering and docketing a judgment in favor of respondent and against appellant is to general to raise the question whether parties or actions were misjoined, whether the complaint stated a cause of action, or whether the judgment was improperly entered without order of the court. Whipple v Mahler, 215 M 578, 10 NW(2d) 771.

When an action at law is tried to the court, court's fact findings are conclusive in courts of review, no matter how convincing the argument that findings should have been different under the evidence. United States v Gamble-Skogmo, 91 F(2d) 372.

Where record on appeal contains no settled case or bill of exceptions, the only question is the sufficiency of the findings to support the judgment, it being presumed that the evidence sustains the findings, and if facts found are not within the issues, that they were litigated by consent. Pike Rapids Co. v M, 99 F(2d) 902.

Jurisdiction of appellate court after remand. 16 MLR 700.

3. Allegations thereafter

The court found that the defendant paid the plaintiff. The plaintiff does not appeal, so the payment stands as a verity on appeal. The counter-claim was not litigated, and a new trial is granted. Stolp v Reiter, 190 M 383, 251 NW 903.

The state is not in a position to question counsel fees allowed. State ex rel v Lesslie, 195 M 408, 263 NW 295.

The plaintiff is not in a position to claim error on the admission of evidence of certain conversations having himself opened the subject in presenting his own evidence. Priebe v Selte, 197 M 460, 267 NW 376.

The use by the court in his charge of the words "stumble" and "has and our" are alleged to be error; but as the use of the words was not called to the court's attention until the jury had retired, the words are not sufficiently prejudicial to warrant reversal. Doody v St. Paul Ry. 198 M 573, 270 NW 583.

Appeal dismissed, appellant not having availed himself of the proper remedies. Weiland v Northwestern, 203 M 600, 281 NW 364.

Whether the complaint and proof made out an action for a declaratory judgment need not be decided, for on the merits the decision was favorable to respondents, defendants and intervenor. City of Bemidji v Ervin, 204 M 90, 282 NW 683.

Where the trial court in issuing a temporary injunction indicated a willingness to modify it upon motion as being excessive in some respects, the appellate court will not consider any question of such excessiveness of restraint in the absence of presentation of the question to the trial court upon a motion to modify. Jannetta v Jannetta, 205 M 266, 285 NW 619.

The applicability of the statute of limitations will not be considered on appeal if it was not passed upon by the trial court, the facts being in dispute. Township v Co. of Yellow Medicine, 205 M 452, 286 NW 881.

There was only one final order of the commissioner fixing the valuations involved. The appeal clearly specified that it was taken from that order. Village of Aurora v Commissioner, 217 M 70, 14 NW(2d) 292.

The plaintiff having adopted a rule that special damages might be recovered if they were the proximate result of the breach, is not in a position to urge upon appeal that a different rule, with reference to special damages, should have been submitted to the jury. Lanesboro v Forthun, 218 M 377, 16 NW(2d) 326.

4. Scope of review

Where an order is in part appealable, the supreme court can review the entire order. Long v Mutual Life, 191 M 165, 253 NW 762.

The review must follow the theory of the trial court where the "repair" rule was properly applied. Waldron v Page, 191 M 302, 253 NW 894.

There will be no review in the appellate court on fact questions where all the evidence on the question is not included in the record. Safro v Lakofsky, 191 M 532, 255 NW 94.

A party having tried his case before the trial court on one theory, cannot on motion for a new trial, or on review, shift to another. Peoples Bank v Dickie, 191 M 558, 254 NW 782.

The question of ultra vires as between the donor and the bank as trustee has not been raised, and therefore not considered. City of Canby v Bank of Canby, 192 M 580, 257 NW 520.

Where a defendant rests upon his motion for judgment without asking for a new trial, errors at the trial cannot be reviewed or considered on appeal. Oxborough v Murphy, 194 M 335, 260 NW 305; Ginnestad v Rose, 194 M 531, 261 NW 194.

The issue of the contract for the Diesel engines was not urged at the trial, nor argued by counsel, and will not be considered in the instant case. Ahlquist v Commonwealth, 194 M 599, 261 NW 452; Farmers Bank v Anderson, 195 M 475, 263 NW 443.

An order sustaining a demurrer to two of three defenses is not reviewable by the appellate court from an order denying a new trial after a directed verdict in favor of plaintiff on the issue constituting the third defense. Northwestern v Wood, 195 M 98, 262 NW 161.

There having been no motion for a new trial, the sole question before the appellate court is whether the evidence reasonably sustains the verdict. Robbins v N. Y. Life, 195 M 205, 262 NW 210, 872; Taylor v Northern States, 196 M 22, 264 NW 139.

On appeal from an order denying a new trial, errors assigned upon the denial of an appellant's motion to amend a finding of fact or conclusion of law may be reviewed. Sullivan v Ebner, 195 M 232, 262 NW 574.

The trial court properly dismissed the appeal of the counsel for an alleged incompetent, who had appealed from an order of the probate court denying restoration to capacity. In re Foust, 195 M 289, 262 NW 875.

Sufficiency of the evidence to justify the verdict cannot be reviewed on appeal from the judgment unless: (1) a motion was made in the trial court and denied, or; (2) under the statute for judgment non obstante, or; (3) there was a motion for a directed verdict on the ground of insufficiency of evidence. Ydstie Estate, 195 M 501, 263 NW 447.

An appellate court may properly base a decision upon a ground not presented to the trial court where the question, raised for the first time on appeal, is decisive of the controversy on the merits. Skolnick v Gruesner, 196 M 318, 265 NW 44.

The disposition of the motion made and submitted several months after entry of the judgment cannot be reviewed on appeal from the judgment. In re Peoples State Bank, 197 M 480, 267 NW 482.

On appeal from an order denying a motion for a temporary injunction pending determination of the action, the appellate court does not try the merits of the suit, or decide disputed questions of law and fact, which are for determination in the first instance by the trial court. State v Tri-State Telephone, 197 M 575, 267 NW 489.

On a question of public convenience and necessity, the insufficiency of the findings of the railroad and warehouse commission, and of the trial court is not available, there being no request to make the findings more specific or to find upon any certain issue. Chicago & NW. v Verschingel, 197 M 580, 266 NW 709.

Probate courts have no power to investigate the validity of an assignment of the interest of an heir or legatee; the decree of distribution should be to the legal successor of the property, leaving questions of disputed rights between these and the claimants against them to be adjudicated in the ordinary courts. State ex rel v Probate Court, 199 M 305, 271 NW 879.

A mere arithmetical error, plainly appearing, in reckoning the amount due, should be corrected in the trial court. Barnard v Mpls. Dredging Co. 200 M 331, 274 NW 229.

There being no motion for a new trial, excessiveness of the verdict is not reviewable on appeal from the judgment. Nelson v Garden Valley Co. 201 M 198, 275 NW 612.

A party cannot change or shift his position on appeal. Lee v Peoples Coop. 201 M 266, 276 NW 214; Slawson v Northern States, 201 M 313, 276 NW 275.

While that part of the order which denies amendment of the findings is not appealable, the part which denies a new trial is. Schoedler v N. Y. Life, 201 M 327, 276 NW 235; Marty v Nordby, 201 M 469, 276 NW 739.

Inadvertant errors in the charge not brought to the attention of the court at the trial will not be considered on appeal. State v Sprague, 201 M 415, 276 NW 744.

As to probate matters, the jurisdiction of the district court is appellate, not original, and hence parties cannot consent to give jurisdiction to the appellate court to try a matter not submitted to and determined by the probate court. Peterson's Estate, 202 M 31, 277 NW 529.

Upon appeal from probate court, the district court has no greater or different jurisdiction than the probate court, and functions only as an appellate court and not as a court of original jurisdiction. Roberts' Estate, 202 M 217, 277 NW 549.

The action having been tried below as one involving a direct and not a collateral attack on a judgment, will be so regarded on appeal. Siewert v O'Brien, 202 M 314, 278 NW 162.

Plaintiffs alone appealed. Their rights as opposed to the defendants were before the court. The conflicting rights as between the defendants not having been passed on by the trial court are not before the appellate court. Dehnhoff v Heinen, 202 M 303, 278 NW 351; Gilloley v Sampson, 203 M 233, 281 NW 3; Olson v Gopher State, 203 M 267, 281 NW 43.

Alleged error in reception of evidence to which no exception was taken and no assignment of error is made in the motion for new trial, will not be reviewed on appeal. Papke v Pearson, 203 M 130, 280 NW 183.

Because a new trial was ordered on other grounds, the appellate court refrained from passing upon the sufficiency of the medical testimony. Ross v Duluth-Missabe, 203 M 313, 281 NW 76, 271.

If appellant was entitled to a change of venue, his remedy was by mandamus from the supreme to the trial court before the trial there took place. Weiland v Northwestern, 203 M 600, 281 NW 364.

On appeal from an order granting a new trial, the review is limited to errors assigned in the motion for new trial. Parlin v First Nat'l, 204 M 200, 283 NW 408.

In the instant case the circumstances are such that the appellate court is justified in disposing of the case on the merits. Lustman v Lustman, 204 M 228, 283 NW 387.

Issues both of law and fact will be considered on appeal in accordance with the theory on which the case was tried and submitted below. Schultz v Krosch, 204 M 585, 284 NW 782.

A party is not only bound to make specific objections at the time the evidence is offered, but he is also limited on appeal to the objections raised in the court below. Becker Bank v Davis, 204 M 603, 284 NW 789.

When an issue is settled as a matter of law by the record, the appellate court will determine the question, thereby avoiding necessity for retrial. Penn Company v Clarkson, 205 M 517, 287 NW 15.

An order removing a person from public office will not be reviewed by certiorari after the repeal of the statute under which such person claimed the right to hold such office. State ex rel v Brown, 216 M 135, 12 NW(2d) 180.

Respondent improperly included in its brief what occurred at the first trial, there having been a new trial granted from which no appeal was taken. Settlement of Stewart, 216 M 485, 13 NW(2d) 375.

The scope of review is limited to proceedings before the trial court without reference to the P.W.A. regulatory provisions; and defendant having submitted his case on a certain theory of the law cannot complain that such theory was erroneous. French v Lindh, 216 M 521, 13 NW(2d) 479.

Appellate courts exist for the purpose of reviewing and correcting the work of trial courts, not of supervising and directing them. Anderson v Farwell, 217 M 110, 14 NW(2d) 311.

5. Dismissal of appeal

Appeal dismissed on court's own motion because order denying amendment of pleading is not appealable. Greber v Harris, 167 M 522, 209 NW 30.

It appearing conclusively that this appeal can serve no purposes other than those of delay, it is dismissed. Mpls. Holding v Matchan, 174 M 401, 219 NW 457.

Both parties moved to dismiss because the cause was moot. Appeal dismissed with costs to defendant. Ridgway v Mirkovich, 192 M 618, 256 NW 521.

Brief stricken as defamatory, and appeal dismissed, there being no settled case. Senneka v Bickle, 197 M 651, 268 NW 195.

The matter being moot, there is no occasion to pass on the motion to dismiss the appeal. Kieger v St. Paul City Railway, 216 M 38, 11 NW(2d) 757; Kerzie v Rodine, 216 M 44, 11 NW(2d) 771.

6. Affirmance

Order affirmed for failure of appellant's brief to comply with Rule 8 requiring a concise statement of the case and of the points relied upon for reversal. Heins v Peoples Bank, 163 M 193, 203 NW 624.

In view of the contradictory evidence, it was not an abuse of discretion to deny a new trial, notwithstanding some of the proposed new evidence, if believed, would result in an acquittal. State v French, 168 M 341, 210 NW 45.

Where a judgment has been affirmed by an appellate court, the lower court cannot thereafter modify or change the judgment unless authorized to do so by statute or by the supreme court. County of Traverse v Veigel, 179 M 589, 229 NW 882.

When one justice of the court is disqualified and the others are equally divided in opinion, the order of the trial court will be affirmed. Ellingson v Polk Co. Bank, 186 M 48, 242 NW 626; Hunt v Ward, 193 M 168, 258 NW 145, 259 NW 12; Martin v Martin, 204 M 621, 284 NW 294; State v Certain Land, 204 M 605, 282 NW 658; Fried v Lafayette, 205 M 620, 285 NW 615; Sudeith v Ryan, 205 M 620, 287 NW 7.

An appeal from an order granting a new trial for errors of law alone, one being designated by the order under review and others thereby indicated by the order under review, and others thereby indicated only by a general statement such as "other errors in the reception of testimony," the burden is on the respondent, needing to do so to secure affirmance, to show error other than the one specifically designated by the trial court as the basis for the order. Peterson v Pete-Erickson Co. 186 M 583, 244 NW 68.

The finding that relator suffered severe accidental injuries on Aug. 15, 1931, which did not arise out of and in the course of the employment, finds such support in the evidence that it cannot be disturbed on appeal. Lorenz v Lorenz Co. 187 M 444, 245 NW 615.

Where the court has dismissed a mortgage moratorium application and the same does not show any equity or right to relief, the appellate court will not reverse the order of dismissal, although the order was made on a motion asking for the dismissal only on the ground of lack of jurisdiction. Petters & Co. v Jefferson Bank, 195 M 497, 263 NW 453.

Upon the record, the appellate court must sustain the order of the trial court in adjudging defendant in contempt. The court cannot relieve because of present attitude of the plaintiff. Defendant's plea for leniency must be made to the trial court. Johnson v Froelich, 196 M 87, 264 NW 232.

The parties having stipulated that no remittitur issue in case of affirmance, the clerk was ordered to enter final judgment in the supreme court in accordance with the provisions of Rule XX. State v First Bank Corp. 198 M 619, 270 NW 574.

Although the reason given for a decision may be erroneous, it will be affirmed if the decision is correct on other grounds. In re Vanderlip, 202 M 206, 277 NW 909.

Where the appeal is based upon excessive damages, there will be an affirmance where it is admitted that the damages as reduced by the trial court are not excessive. Glubka v Teegarden, 202 M 594, 279 NW 567.

Where a decision has been fully litigated and on appeal the decision affirmed, the defeated party may not again have a new trial on the ground that witnesses made mistakes or wilfully testified falsely in the trial. Nichols v Village of Morristown, 204 M 212, 283 NW 748.

On appeal, the respondent, without a cross appeal, may urge in support of the order or judgment under review any sound reason for affirmance, even though it is not the one assigned by the trial judge for his decision. Penn Co. v Clarkson, 205 M 517, 287 NW 15.

7. Reversal

Where the trial court grants a new trial solely upon an alleged error in the charge to the jury and the charge given is proper and without error, the order granting a new trial is reversed. Herberg v Feldman, 168 M 218, 210 NW 44.

The inadvertent failure of the court to include a small item in computing the amount due is not ground for reversal. Application may be made to the trial court for correction. First Nat'l. v St. Anthony & Dak. 171 M 461, 214 NW 288.

Order will not be reversed where appellant has consented to it in open court. Township of Helena v Froman, 173 M 621, 217 NW 114.

No rulings were made in the trial court which entitle the defendant to a new trial. There was no abuse of judicial discretion. Manufacturers' v Moshier, 177 M 388, 225 NW 283.

The refusal of the trial court to reopen a case will not be reversed on appeal except for a very clear abuse of judicial discretion. Johnson v Hallman, 177 M 619, 225 NW 283.

The trial court may grant a new trial on the single issue of the amount of damages. Lundblad v Erickson, 180 M 185, 230 NW 473.

Where judgment has been ordered non obstante upon a defendant's motion in the alternate, the trial court's denial of a new trial may be regarded as prematurely ordered and is to be entertained and determined in the event of a reversal of the judgment. Reike v St. Albans Co. 180 M 540, 231 NW 222.

Injunction was the proper remedy. The trial court dismissed the case at the conclusion of the trial and made no findings as to two important disputed questions. There was a reversal. Nat'l. Cab v Kunze, 182 M 155, 233 NW 838.

Judgment will not be reversed on appeal on theory not presented at the trial, and not specified in the assignments of error. Homstad v Helgren, 184 M 648, 239 NW 602.

A judgment resting upon findings of fact unsupported by the evidence should be reversed. A new trial results without the appellate court expressly so stating. Yager v Held, 186 M 71, 242 NW 469.

Both parties proceed upon the theory that the reversal results in a new trial, but not so. There must be a reference to the opinion to determine the result of a reversal of a judgment. The record shows the amount of permissible recovery which the trial court may find on motion. Village of Hallock v Pederson, 189 M 469, 250 NW 4.

Where the medical experts were unable, at the time of trial, to give a reliable prognosis as to future disability, pain or damage, it is advisable to grant a new trial in case of a verdict deemed excessive rather than to reduce the amount of the verdict. Howard v Village of Chisholm, 191 M 245, 253 NW 766.

The trial judge was in error when he granted defendant's motion for verdict notwithstanding the verdict. On reversal the matter goes back to the trial judge to determine whether or not a new trial be granted, there having been no holding on that issue. Mardorf v Dul. Transit Co. 194 M 537, 261 NW 177.

A judgment entered upon findings of fact and conclusions of law must be reversed upon appeal if the findings of fact call for conclusions of law and judgment in favor of the party against whom it is entered. Robitshek v Maetzold, 198 M 586, 270 NW 579.

While it is doubtful if the evidence sustains the verdict in the present state of the record, the plaintiff should be given the opportunity of another trial rather

than have judgment ordered against him. Preveden v Met. Life, 200 M 523, 274 NW 685.

A judgment for defendant will not be reversed on appeal simply to allow plaintiff to recover nominal damages. Erickson v Midland Nat'l, 205 M 224, 285 NW 611.

The burden rests upon the appealing party to show prejudicial error, and if he fails to do so, the appellate court will not reverse. Waters v Feibelkorn, 216 M 489, 13 NW(2d) 461.

8. Modification

See, State v Erickson, 185 M 60, Benson v Stanly, 188 M 390; also, see Guaranty Trust v M, 98 F(2d) 345.

9. Discretionary rulings

The court did not err in denying defendant's motion to make the complaints more definite and certain. Such order is largely discretionary. Cullen v Pearson, 191 M 136, 253 NW 117, 254 NW 631.

On conflicting affidavits, an order of the trial court opening a default and permitting defendant to defend, being largely in the discretion of the trial judge, will not be reversed in the absence of abuse of discretion. Roe v Widme, 191 M 251, 254 NW 274.

The selection of the person to be appointed guardian of an incompetent is a matter peculiarly for and within the discretion of the appointing court, and an appellant who seeks to overthrow the decision below is required to clearly establish error. In re Guardianship of Dahmen, 192 M 407, 256 NW 891.

As to whether a change of the place of trial should be granted or denied is a matter resting largely in the discretion of the trial court, and its action will not be reversed on appeal except for clear abuse of discretion. State ex rel v Dist. Court, 194 M 595, 261 NW 701.

The trial court did not abuse its discretion in granting the temporary injunction restraining the county auditor from recommending to the state tax commission a refundment. School District v Lindhe, 195 M 14, 261 NW 486.

Where the trial court refuses to submit special interrogatories to the jury, there is no reversible error, in the absence of abuse of discretion. Halos v Nachbar, 196 M 387, 265 NW 26.

Where the findings of facts, based on affidavits, justify the appointment of a receiver pending foreclosure, the appellate court cannot disturb the action of the trial court, in the absence of a showing that it acted arbitrarily or without reasonable cause. Lincoln Life v Brack, 196 M 433, 265 NW 290.

In the absence of a showing of clear abuse of judicial discretion, the refusal of the lower court to grant a new trial on the ground of newly discovered evidence will not be disturbed. Jorstad v Benefit Ass'n, 196 M 568, 265 NW 814.

The trial court did not abuse its discretion in denying plaintiff's motion for a temporary injunction in this suit. State v Tri-State Tel. Co. 197 M 575, 267 NW 489.

An order granting a temporary injunction will not be set aside except upon a showing that the lower court abused the discretion vested in it. Behrens v City of Mpls. 199 M 363, 271 NW 814.

The trial court was in error in granting a new trial, the error upon which he based the order not being prejudicial. Ensor v Duluth Transit, 201 M 152, 275 NW 618.

The granting of a new trial for alleged misconduct of jurors and bailiff, rests in the discretion of the trial court. There was no abuse of discretion in the instant case. State v Warren, 201 M 369, 276 NW 655.

The trial court abused its discretion in failing to vacate the default of the defendant. Kennedy v Torodor, 201 M 422, 276 NW 650.

The improper remarks of counsel were prejudicial, and the trial court erred in not instructing the jury to disregard them. It was an abuse of judicial discretion on the part of the trial judge in refusing to grant a new trial. Anderson v Hawthorn Fuel, 201 M 580, 277 NW 259.

The trial court did not abuse its discretion in refusing to extend the time in which to settle and in refusing to settle a proposed case. Hartman v Phoenix Finance, 203 M 388, 281 NW 364.

The exercise of the trial court's discretion in refusing to grant a new trial for alleged misconduct of the prevailing party, will not be reversed on appeal unless the record discloses abuse of discretion. Ryan v Intnat'l Harv. 204 M 177, 283 NW 129.

Whether the statements of decedent to his son were or were not res gestae, was primarily for the trial court. Noesen v M. St. P. C. 204 M 237, 283 NW 246.

Granting or refusing a new trial for inadequacy of damages rests largely in the discretion of the trial judge. Pye v Diebald, 204 M 319, 283 NW 487.

Whether a witness offered as an expert possesses the requisite qualifications involves so much of the element of fact that great consideration must necessarily be given to the decision of the trial judge. Detroit Lakes v McKenzie, 204 M 490, 284 NW 60.

Whether claim of surprise, made in support of a litigant's request for leave to impeach his own witness, is well founded in fact is a preliminary question for the trial judge. His ruling thereon will not be disturbed unless abuse of discretion appears. State v Saporen, 205 M 358, 285 NW 898.

The action for injunction being maintainable, the interlocutory orders granting the ancillary remedy of receiver and a temporary injunction must be upheld where the record shows no abuse of judicial discretion. State ex rel v O'Neil, 205 M 366, 286 NW 316.

Discretionary rulings are upheld except where there is a clear abuse. Peterson v Davis, 216 M 60, 11 NW(2d) 800; Vasatka v Matsch, 216 M 530, 13 NW(2d) 483; Lehman v Lehman, 216 M 538, 13 NW(2d) 604; Crosby's Estate, 218 M 149, 15 NW(2d) 501.

10. Proceedings in trial court on reversal

Plaintiff who has made out a prima facie case showing that he is entitled to substantial damages will, for error in dismissing his case, be granted a new trial of all issues, any deficiency of proof of damages may be supplied at the second trial. Erickson v Minn. & Ont. 134 M 209, 158 NW 979; Gilloley v Sampson, 203 M 234, 281 NW 3.

When an order denying a new trial is reversed without directions, either party may demand a retrial on all issues; if with directions, the court should dispose of the case by trying only the issues relating to the direction. A new trial on all issues will be had when there is a reversal on the ground that the findings are not justified by the evidence. Nash v Kirschoff, 161 M 409, 201 NW 617.

The trial court erred in granting judgment non obstante. Upon reversal, the motion for a new trial, which has never been decided, awaits disposition by the trial court. Parker v Fryberger, 165 M 375, 206 NW 716; State ex rel v Dist. Court, 195 M 169, 262 NW 155.

Where a judgment is reversed solely upon the ground that it is not the one that should have been rendered, the court below is at liberty to proceed in any way not inconsistent with the opinion of the court. Nat'l. Surety v Wittich, 186 M 93, 242 NW 545.

Upon a reversal with a new trial granted, the issues to be tried may be limited in a manner stated in the opinion. Stolp v Reiter, 190 M 283, 251 NW 903.

On reargument, plaintiff's petition for instructions to the trial court are denied. The matter of allowance of an amendment of pleadings is a matter properly directed to the discretion of the trial court. Craig v Baumgartner, 191 M 42, 254 NW 440; Stolp v Reiter, 195 M 375, 263 NW 118.

Issues that have been satisfactorily determined upon a fair trial need not be retried when a new trial is granted, if in holding their determination final no prejudice results. Sleeter v Progressive Co. 191 M 108, 253 NW 531.

There remaining no question for determination as to time and place of injury, and the jury having properly determined the question of defendant's negligence, a new trial should be had on the issue of damages only. Newlieb v Antonoff, 193 M 248, 258 NW 309; Dall v Scandrett, 201 M 316, 276 NW 281.

The decision of the trial court ordering sale of the property was reversed on appeal with direction to partition in kind. As there had been a finding as to values and as the two farms were of unequal value, nothing remained but to determine the amount of owelty. A new trial was not necessary. Kaufman v Eckhardt, 195 M 569, 263 NW 610, 264 NW 781.

In federal employers liability cases when a verdict is excessive, due to passion or prejudice, a new trial must be ordered on all issues. Westover v C. M. & St. P. Ry. 197 M 194, 204, 266 NW 741, 267 NW 204.

Judgment for plaintiff in the trial court was sustained on appeal, but reversed in the supreme court of the United States. A new trial must be had as a matter of course. Rambo v Chgo. & Gt. Western, 197 M 652, 268 NW 199.

The appellate court having directed the trial court to disallow certain items, it was error for the court below not to disallow the items. A mandate ordering a trustee's account be surcharged in a principal sum does not authorize the addition of interest. Malcolmson v Goodhue Bank, 200 M 486, 274 NW 652.

A motion to amend and substitute a new pleading calculated to present a direct attack on the orders involved in the former appeal in this case, but which new pleading shows on its face that it states no cause of action, was properly denied by the trial court. Melgaard's Will, 204 M 194, 238 NW 112.

A minor and inadvertent error (a matter of interest improperly charged) in the decision of the trial court should be corrected by motion to the trial court rather than by modification in the supreme court. Clarke's Will, 204 M 574, 284 NW 876.

11. Law of the case

A former decision is the law of the case only insofar as it is applicable to the facts developed on the second trial, and the special findings of a jury, found by the appellate court to be sustained by the evidence and undisturbed by the trial court on final disposition of the case, are to that extent the law of the case. Murphy v Casey, 157 M 1, 195 NW 627.

The ruling on a former appeal that the question of contributory negligence was for the jury is the law of the case as the evidence remains the same in substance. A similar rule prevails relative to other subjects. Kitchen v Fashion Garage, 158 M 136, 196 NW 929; Cosmopolitan Bank v Sommervold, 158 M 356, 197 NW 743; Goldman v Cristy, 165 M 237, 206 NW 392; Molden v M. & St. P. Co. 167 M 132, 208 NW 541; In re Assessment of Robert St. 167 M 525, 209 NW 632; Mardorf v Dul. Transit, 199 M 328, 271 NW 588.

When contributory negligence is relied upon as a defense to an action for damages sustained on a highway crossing, and it is shown that a freight train on one track obstructed plaintiff's view of the other track on which there was a passenger train, plaintiff is entitled to go to the jury if there is a fair doubt with respect to his alleged negligence. The decisions in McCarthy v C. M. & St. P. 154 M 350, 191 NW 819, is the law of the case. McCarty v C. M. & St. P. 159 M 339, 198 NW 814.

Decision on a former appeal, determining the effect of evidence erroneously excluded on the first trial, but now in the record and uncontroverted, is the law of the case. Friedman v Nathan, 165 M 136, 205 NW 945; State v Ill. Cent. 205 M 621, 286 NW 359.

Questions involved and directly decided on an appeal from a judgment rendered non obstante verdicto are res judicata on a subsequent appeal from an order denying a new trial. Parker v Fryberger, 171 M 384, 214 NW 276.

Decision on former appeal is the law of the case. Merchants v Dyste, 173 M 436, 217 NW 483; Donaldson v Mona Co. 193 M 283, 258 NW 504; Pearson v Norell, 200 M 58, 273 NW 359.

Where a case has been tried by the parties and submitted to the jury by the court without objection, upon a certain construction of the pleadings such construction will be conclusive on the parties, unless it be conclusively shown by the record that the successful party should not recover. Pitzen v Nord, 174 M 216, 218 NW 891; State v Sprague, 201 M 415, 276 NW 744; Allen v Central Motors, 204 M 295, 283 NW 490.

No question which might have been raised and determined on appeal from order granting new trial, can be raised on plaintiff's appeal from a judgment subsequently entered. School District v Aiton, 175 M 346, 221 NW 424.

Where an issue of law is presented by the pleadings, and there is nothing in the record to show that it has been waived, it may be urged on appeal by an appellant who on the record was entitled to a verdict and against whom judgment has been ordered non obstante verdicto. Buck v Patrons Ins. Co. 177 M 509, 225 NW 445.

Where the court's charge is not excepted to or sufficiently assigned as error in the motion for a new trial, it becomes the law of the case. Hawley v Town of Stuntz, 178 M 411, 227 NW 358; George v C. & R. I. 183 M 610, 235 NW 673, 237 NW 876; Farnham v Pepper, 193 M 222, 258 NW 293; Parkin v Sykes, 203 M 249, 280 NW 849.

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 appeal. Kozisek v Brigham, 183 M 457, 237 NW 25.

The opinion of the appellate court on the first appeal held that plaintiff had not made out a case of liability on the part of the defendant. Unless plaintiff has strengthened his case on the second trial he cannot prevail on second appeal. Larsen v Northern Pacific, 185 M 313, 241 NW 312.

Questions involved and which might have been raised on a former appeal are concluded by the decision on such appeal; but not when the appellate court has expressly directed that its conclusion is without prejudice to the party's right to apply for a rehearing on his motion for a new trial in so far as it is based upon assignments of error other than those which were considered on appeal. Wilcox v Hedwall, 186 M 500, 243 NW 711.

Mandamus does not lie unless, without reference to any writ or order of court, it be the plain duty of the officer in question to do the act sought to be compelled. State ex rel v City of Duluth, 195 M 563, 262 NW 681, 263 NW 912, 266 NW 736.

Case will be considered on appeal in accordance with the theory on which they were tried in the trial court. Harris v Eggermont, 196 M 469, 265 NW 322.

Where in an action triable to the court, issues of fact are submitted to a jury, and counsel concurs with the court upon the meaning of the issues submitted, so as to impress the jury with that view, they will be bound thereby, although the expression of such meaning may not be legally accurate. Walsh v Kuechenmeister, 196 M 483, 265 NW 340.

The granting of a rehearing on the ground of newly discovered evidence rests in the discretion of the industrial commission. Unless there is a clear abuse of discretion, the order cannot be disturbed. That is expecially true where, as in this case, the matter has been before the appellate court on former appeal. State v Traver, 198 M 237, 269 NW 393.

Where there are two appeals presenting the same questions of fact or law, a decision in one appeal will dispose of the other. Flaugh v Egan Co. 202 M 615, 279 NW 582; Marschinke v Eagan Inc. 202 M 625, 279 NW 587.

The stipulation must be considered controlling by the appellate court. Lichterman v Laundry Union, 204 M 79, 283 NW 752.

Where a statute is passed, clearly retroactive in effect, during the pending of an action on appeal, the case may be disposed of by the appellate court in accordance with the said statute. Donaldson v Chase, 216 M 269, 13 NW(2d) 1.

Having failed to plead or prove the P.W.A. regulations, they are deemed waived in proceeding before the appellate court. French v Lindh, 216 M 521, 13 NW(2d) 479.

Where evidence, relative to the time the insured and defendant intended liability policy should be cancelled, was substantially the same as that presented at the first trial, the trial court at the second trial properly submitted the issue to the jury in accordance with the holding of the supreme court in Merchants v St. Paul Mercury, 214 M 544, 8 NW(2d) 827. The ruling of the supreme court in the first case, was the law of the case in the second trial. Farmers Mutual v St. Paul Mercury, 218 M 386, 16 NW(2d) 463.

There being no objection to the charge of the court when delivered or in the motion for a new trial, the charge became the law of the case, even though erroneous. Kane v Locke, 218 M 486, 16 NW(2d) 545.

The decision on a former appeal is "law of the case" on a question presented therein unless evidence at a subsequent trial differs substantially from that considered on former appeal, and the decision must be followed in all subsequent proceedings unless clearly and manifestly erroneous. C.St.P.M.&O. v Kulp, 102 F(2d) 352.

12. Moot questions

Plaintiffs brought an action to enjoin the construction of a bridge. The application being denied, an appeal was taken. The bridge was completed before a hearing could be had, and was properly dismissed as moot. Moore v McDonald, 165 M 484, 205 NW 894.

Both parties agree that as matters now stand all pending proceedings are moot. The appeal is dismissed with costs awarded to defendant. Ridgway v Mirkovich, 192 M 618, 256 NW 521.

Determination as to whether plaintiff's contributory negligence appears as a matter of law, it is held, upon facts stated in the opinion, not necessary to decision, as errors complained of by losing party are found not well taken, and jury having returned a general verdict for the defendant. Hartwell v Progressive Co. 198 M 488, 270 NW 570.

While an injunction may issue to protect the possession of the incumbent against a claimant whose title is in dispute, the issue of possession pendente lite becomes moot if the claimant, under a certificate of election, goes into office. Doyle v Ries, 205 M 82, 285 NW 480.

An order removing a person from office will not be reviewed by certiorari after the repeal of the statute under which the parties claimed the right to hold the office. State v Brown, 216 M 135, 12 NW(2d) 180.

Affirmance by the supreme court of an order denying a motion to modify a divorce judgment so as to give the defendant custody of a child renders moot the question whether an order restraining the plaintiff from interfering with defendant's temporary custody of the child pending the determination of the motion to modify the judgment was in force pending an appeal. Christianson v Christianson, 217 M 561, 15 NW(2d) 24.

There being a reversal from that part of the holding of the lower court wherein the witness fees were objected to, the appeal on that phase of the case, becomes moot. Kundiger v Metropolitan, 218 M 273, 15 NW(2d) 487.

13. Findings of fact

The appellate court will not determine questions of fact in cases where the evidence is conflicting; nor set aside the verdict based on conflicting evidence, the verdict having been confirmed by the trial court. State v Boice, 157 M 374, 196 NW 483; Williams v Bushnell, 157 M 459, 196 NW 491; Miller v Cont. Ins. 157 M 489, 196 NW 651; Stanek v Jindra, 162 M 452, 203 NW 215; Harrington v Keegan, 162 M 508, 202 NW 50; Finke v Meyer, 162 M 518, 202 NW 729; Healy v Morden, 168 M 450, 210 NW 290; Merchants v Dyste, 173 M 436, 217 NW 483; Kuske v Jevne, 173 M 584, 218 NW 99; Gilson v Knouf, 174 M 442, 219 NW 457; Colman v Mironowski, 174 M 507, 219 NW 758; Jessup v Amer. Ry. 175 M 617, 221 NW 240; Brodsky v Brodsky, 176 M 198, 222 NW 931; McLellan v Stevens, 176 M 419, 223 NW 770; Barnhart v Hendrickson, 178 M 400, 227 NW 356; Flatt v Hirmke, 178 M 621, 227 NW 853; Cullen v Pearson, 191 M 136, 253 NW 117, 254 NW 631; Luck v Mpls. St. Ry. 191 M 502, 254 NW 609; Nichols v Village of Morristown, 195 M 621, 263 NW 900; Mears v McCarthy, 199 M 117, 271 NW 99.

The same effect must be given to findings of fact of the trial court based upon depositions or stipulated testimony as upon testimony given by witnesses orally in the presence of the trial court. State Bank v Walter, 167 M 37, 208 NW 423.

Verdict perverse and there must be a reversal, and a new trial ordered. Begin v Liederbach, 167 M 84, 208 NW 546.

Findings of fact in a judicial road proceeding have the same force and effect as the findings in an ordinary civil action, and are not to be disturbed by the trial court if there is evidence reasonably tending to support them. In re Judicial Road, 176 M 94, 222 NW 578.

There being no settled case, on the record brought up, the findings of the trial court are presumed to be correct. West Dul. Co. v N. W. Textile, 176 M 588, 224 NW 245; Mercantile Bank v Vogt, 178 M 282, 226 NW 847.

On one point only was there a direct conflict. The evidence sufficiently supports the trial court. Alexander v Wells-Dickey, 177 M 101, 224 NW 849.

The claim that the finding is not supported 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. Riebel v Muller, 177 M 602, 225 NW 924.

It is sufficient if the trial court's findings are fairly supported by the evidence. Perhaps they might have been different, but the evidence sustains them as they are. Wunderlich v Lovell, 178 M 275, 226 NW 933.

The fact issue whether a misrepresentation was made as one of fact or opinion having been determined by a jury on competent evidence, the verdict will not be disturbed on appeal. Gunnarson v Metropolitan, 181 M 37, 231 NW 415.

A finding of fact will not be disturbed unless manifestly contrary to the evidence though the issue is one which must be proved by clear and convincing evidence. Mollan's Estate, 181 M 217, 232 NW 1.

There being evidence to support the findings and order for judgment and no question of error, the decision below must be affirmed. Gensler v Feinberg, 181 M 436, 232 NW 789; Lepak v Michel, 182 M 171, 233 NW 851; Nelson v Erickson Co. 183 M 193, 235 NW 902; Gordon's Est. 184 M 217, 238 NW 329; Meacham v Ballard, 184 M 607, 240 NW 540; Mienes v Lucker, 188 M 162, 246 NW 667; Klimes v Hauck, 190 M 634, 252 NW 219; Busch v Norrenberg, 202 M 290, 278 NW 34.

In a negligence case, where there is no available error, the verdict of the jury on the issue of negligence in defendant's favor, when sustained by the evidence, generally ends the case. Arvidson v Slater, 183 M 446, 237 NW 12; Spates v Gillespie, 191 M 1, 252 NW 835; Matz v Krippner, 191 M 580, 254 NW 912.

Findings will be sustained if they have reasonable support in the evidence; and this rule applies although the construction of documentary evidence is involved; and to the trial court's conclusions from disputed facts and its inferences from undisputed facts, even if the appellate court might be inclined to draw different inferences. Sommers v City of St. Paul, 183 M 545, 237 NW 427.

The order appealed from was based upon conflicting affidavits. The dispute as to facts having been resolved by the trial court will not be disturbed. Mossee v Consumers Hay Co. 184 M 198, 238 NW 327; Sheffield v Clifford, 186 M 300, 243 NW 129.

A judgment resting upon findings of fact unsupported by the evidence should be reversed. As a matter of course, this results in a new trial. Yager v Held, 186 M 71, 242 NW 469.

An issue of compromise and settlement, arising on conflicting testimony, is settled finally by the verdict. Midwest Co. v Donovan Co. 187 M 580, 246 NW 257.

To justify reformation of an instrument, the evidence must be clear, persuasive, and convincing; but effect is nevertheless given to the rule that the appellate court will not on appeal disturb the findings of the trial court unless they are manifestly contrary to the evidence. Hartigan v Norwich Union, 188 M 48, 246 NW 477.

The trial court's determination, as to effect of misconduct of jurors and officers on the verdict will not be disturbed by the appellate court. Hillius v Nelson Co. 188 M 336, 247 NW 385.

The appellate court will not disturb the order of the trial court who denied defendant's motion to dismiss an attachment, even though the case for the attaching creditor was far from strong. Callanan v Callanan, 188 M 609, 248 NW 45.

If there is evidence reasonably tending to sustain the finding of the trial court, it will not be set aside. Holtorf v Rochester Mutual, 190 M 44, 250 NW 816.

Rejection by a city council of the application of one claiming under the veterans preference law, on adequate evidence having been found not arbitrary, will not be disturbed on appeal. State ex rel v Barker, 190 M 370, 251 NW 673.

The evidence reasonably sustains the verdict. The verdicts, approved as they are by the trial court, will not be disturbed. McIlvaine v Delaney, 190 M 401, 252 NW 234; Bader v Gensler, 191 M 571, 255 NW 97.

Evidence viewed in a light most favorable to the prevailing defendant. The decision of the trial court is affirmed. Dow v City of St. Paul, 191 M 28, 253 NW 6; Cullen v Pearson, 191 M 136, 253 NW 117, 254 NW 631; Weese v Weese, 191 M 526, 254 NW 816; Matlincky v Christianson, 192 M 166, 255 NW 625; Bauer v Miller Co. 197 M 352, 267 NW 206.

Jury's finding based upon conflicting evidence will not be disturbed on appeal, especially where such verdict has the approval of the trial court. Farnham v Pepper, 193 M 222, 258 NW 293; State v Rasmussen, 193 M 374, 258 NW 503; Harris v North Star Co. 193 M 480, 259 NW 16; Fleischmann v N. W. National, 194 M 227, 260 NW 310; Citrowski v Libert, 194 M 269, 260 NW 297.

On a question of the sufficiency of the evidence to sustain a verdict, the evidence is to be viewed here in the light most favorable to the party in whose favor the verdict is rendered. Rochester Bread v Rapinwax, 193 M 246, 258 NW 302; Wright v Engelbert, 193 M 509, 259 NW 75; Fredhom v Smith, 193 M 569, 259 NW 80; Bertha v Fisk, 194 M 507, 261 NW 182; Mardorf v Dul. Transit, 194 M 537, 261 NW 177; Nye v Bach, 196 M 330, 265 NW 300; Hack v Johnson, 201 M 9, 275 NW 381; Barndt v Searle, 202 M 82, 277 NW 363; Turnmire v Jefferson Co. 202 M 307, 278 NW 159; Hanson v Hall, 202 M 381, 279 NW 227; Ranwick v Nunan, 202 M 415, 278 NW 589.

Where a trial is had to a court, a reversal will not be granted on the ground that the findings are not justified by the evidence unless the findings are clearly against the weight of the evidence or without any reasonable support therein. Miller v Norwich Union, 193 M 423, 258 NW 747.

The court did not abuse judicial discretion in denying a new trial on the ground of newly discovered evidence. The evidence does not call for or compel the amended findings requested by the defendant. Johlf's v Cattoor, 193 M 553, 259 NW 57.

The appellate court cannot help on a question of fact where the evidence permits a finding either way. Young v Thorpe, 193 M 576, 259 NW 404.

Where a case is submitted for decision upon a stipulation of all the facts, neither party will be heard on appeal to suggest that the facts were other than as stipulated or that any material fact was omitted. Montfort's Estate, 193 M 594, 259 NW 554.

On review of a verdict directed for the defendant, in the recital of facts the appellate court must adopt those most favorable to the plaintiff. Montague v Loose-Wiles, 194 M 549, 261 NW 188; Jude v Jude, 199 M 217, 271 NW 475; Anderson's Estate, 199 M 588, 273 NW 89.

The discretion of the trial court was not abused in granting a temporary injunction to restrain the county auditor from recommending to the tax commission the sale of certain personal property. School District v Lindhe, 195 M 14, 261 NW 486.

The appellate court is bound by the jury's findings on fact issues where the evidence permits a finding either way. Walsh v Dahl, 195 M 36, 261 NW 476; Thornton v Johnson, 195 M 385, 263 NW 108.

A verdict of a jury upon a specific question of fact submitted to them in an equity action is as binding on the court as a general verdict in a legal action, and subject to the same rules as to setting aside for insufficiency of evidence. Ydstie's Estate, 195 M 501, 263 NW 447; Walsh v Kuechenmeister, 196 M 483, 265 NW 340.

The appellate court cannot take a hand in determination of fact issues; cannot count witnesses, nor weigh their testimony; but the court is governed by what is obvious to an unprejudiced mind sitting in judgment. Nichols v Village of Morristown, 195 M 621, 263 NW 900; Cosgrove v McGonagle, 196 M 12, 264 NW 134.

In case of a veteran removed from his employment, in reviewing the sufficiency of the evidence to sustain the county board and decision of the district court affirming, the appellate court is limited to a determination of whether there is evidence reasonably sufficient to sustain such findings. State ex rel v Eklund, 196 M 216, 264 NW 682.

On conflicting evidence, a verdict of damages for conversion of bailed property will not be disturbed. Johnson v Bentzen, 196 M 436, 265 NW 297.

Only in case the evidence for the prevailing party is clearly false or insufficient will this court interfere after two trials and verdicts each time for the prevailing party, and approval of the final verdict by the trial court. Pellowski v Pellowski, 196 M 572, 265 NW 440.

Where expert witnesses as to the value of attorney's fees varied from $1,000 to $12,000, the appellate court will not disturb an allowance of $6,000. Kolars v Delnick, 197 M 183, 266 NW 705.

The supreme court has repeatedly held that its sole inquiry in reviewing fact issues is whether there is any evidence in the record reasonably tending to sustain th conclusion of the trier of fact. House v Anderson, 197 M 284, 266 NW 739.

It is for the triers of fact to choose not only between conflicting evidence, but also between opposed inferences. Reinhard v Univ. Exchange, 197 M 371, 267 NW 223; Chamberlain v Taylor, 198 M 274, 269 NW 525.

Where fact issues alone are involved, it is the duty of the appellate court on appeal to sustain the verdict unless it is manifestly contrary to the evidence. Stock v Fryberger, 197 M 399, 267 NW 368.

The supreme court is not a super-jury, and cannot weigh the evidence. It can only determine whether or not the decision is reasonably supported by the evidence. Hamilton v Freeman, 198 M 308, 269 NW 635.

The rule guiding the appellate court in the review of findings of the trial court in tax proceedings is the same as that applied in ordinary civil actions. State v Oliver Iron Mining Co. 198 M 385, 270 NW 609.

A matter of intention is one of fact, and all rules relating to findings of fact apply here. Nitky v Ward, 199 M 334, 271 NW 873.

While the nature and extent of the services was disputed by the brothers and sisters, the credibility of such evidence was for the jury, and it is not within the province of the supreme court to say to which witnesses the greater weight be given. Hage v Crookston Trust, 199 M 536, 272 NW 777.

The findings of fact of the industrial commission are entitled to very great weight and the reviewing court will not disturb them unless they are manifestly contrary to the evidence. Colosimo v Giacomo, 199 M 600, 273 NW 632.

The rule as to hearings before referees appointed when demand is made to the commissioner of public safety is the same as in civil actions. The reviewing court does not determine the weight of evidence. Hughes v Department, 200 M 19, 273 NW 618.

Powers of the supreme court in reviewing election contest cases is as in other civil cases. Pye v Hanzel, 200 M 135, 273 NW 611.

The appellate court may review the evidence only for the purpose of justifying the findings. The findings are not to be set aside unless clearly without reasonable support. Markert v Magee, 200 M 292, 274 NW 174.

Findings on conflicting evidence that a member of a corporation did not by conduct assent to an alleged amendment of the articles of incorporation, are final on appeal. Midland v Range Ass'n, 200 M 538, 274 NW 624.

Neither story is inherently improbable, nor is one statement more likely to be true than the other. In that situation the trial court's finding is conclusive. Exsted v Exsted, 202 M 426, 279 NW 554.

Where the evidence is conflicting, it is the duty of the triers thereof to determine the facts; and on appeal it is the duty of the court to view the evidence in the light most favorable to the party whose claims the triers of fact believe. Utgard v Helmerson, 202 M 637, 279 NW 748; Goodspeed v Gallagher, 202 M 660, 279 NW 265; Vaegemast v Hess, 203 M 207, 280 NW 641; Kohrt v Mercer, 203 M 497, 282 NW 129; Vorlicky v Metropolitan, 206 M 34, 287 NW 109.

The statements being conflicting, the only inquiry of the reviewing court is to determine whether the result reached by the jury is sustained by the evidence. Shuster v Vecchi, 203 M 78, 279 NW 841.

The question of excessiveness of the verdict is peculiarly for the trial court, and the appellate court will not disturb in the absence of a clear case of abuse of discretion. Hughes v City of Duluth, 204 M 5, 281 NW 871; McCarthy v Fahey, 204 M 99, 282 NW 657.

On a motion to set aside the service of a summons in a divorce action based on a claim of non-residence of the plaintiff, the trial court's finding as to the facts will not be disturbed in the absence of abuse of discretion. Meddick v Meddick, 204 M 113, 282 NW 676.

Not only the findings of fact but the inferences as well of the trial court will be sustained in the absence of any unreasonable finding or interpretation. Kayser v Carson, Pirie Co. 203 M 578, 282 NW 801.

In the absence of abuse of discretion, the appellate court will not only accept the findings of fact, and the inferences of the trial court, but will also adopt the theory upon which the case was tried. Judge v Endriss, 204 M 591, 284 NW 788.

The appellate court found sufficient evidence to warrant sustaining the finding of the trial court to the effect that there was no fraud in obtaining the deed. Hughes v Hughes, 204 M 592, 284 NW 781.

When an action is tried by the court without a jury, a review may be had on appeal from the judgment on the question of the sufficiency of the evidence to justify the findings, there being brought up a settled case containing all the evidence. Fearon v Fitzgerald, 205 M 57, 285 NW 285.

The finding by the trial court that the executor named in the will, being a non-resident, was unsuitable, will not be disturbed. Estate of Barck, 215 M 625, 11 NW(2d) 149.

The evidence reasonably sustains the trial court's finding that the conveyance was not intended as security, but as an absolute conveyance. St. Paul Mercury v Lyell, 216 M 7, 11 NW(2d) 491.

There is reasonable evidence to sustain the findings of the lower court. Jensen v Christianson, 216 M 92, 11 NW(2d) 798.

Issues of negligence and contributory negligence were fact questions for the jury. Kane v Locke, 216 M 170, 12 NW(2d) 495.

A verdict concurred in by the trial court must be set aside and a judgment entered to the contrary when there is no evidence reasonably sustaining the verdict and no probability of a second trial supplying the deficiency. Marsden's Estate, 217 M 1, 13 NW(2d) 765.

The appellate court defers to the discretion of the trial court as to the weight to be attached to testimony of expert witnesses. Village of Aurora v Commissioner, 217 M 64, 14 NW(2d) 292.

The appellate court in cases of law or equity or when appraising the weight to be attached to motions must look at the record objectively and avoid substituting its judgment for that of the trial court or of the trier of facts. Anderson v Farwell, 217 M 110, 14 NW(2d) 311; Boxrud v Ronning, 217 M 518, 15 NW(2d) 112; Albert v Edgewater, 218 M 20, 15 NW(2d) 460; State v Continental Oil, 218 M 123, 15 NW(2d) 542.

The issue before the appellate court is whether the evidence reasonably sustains the verdict in the trial court. Upon review the testimony is considered in the light most favorable to the prevailing party below. Hoverson v Hoverson, 216 M 228, 12 NW(2d) 497; Hoverson v Hoverson, 216 M 237, 12 NW(2d) 501; Simms v Fagan, 216 M 283, 12 NW(2d) 783; Rebne v Rebne, 216 M 379, 13 NW(2d) 18; Dittrich v Ubl, 216 M 396, 13 NW(2d) 384; French v Lindh, 216 M 521, 13 NW(2d) 479; Restoration of Masters, 216 M 553, 13 NW(2d) 487; Meixner v Buecksler, 216 M 586, 13 NW(2d) 754; Warren v Merchants, 217 M 445, 14 NW(2d) 450; State v Minnesota Federal, 218 M 229, 15 NW(2d) 568; London's Estate, 218 M 349; 16 NW(2d) 186; James v Chicago, St. Paul, 218 M 333, 16 NW(2d) 188.

An appellate court must avoid substituting its judgment for that of the jury in passing on the weight and credibility of conflicting testimony. Smith v Co. of Ramsey, 218 M 326, 16 NW(2d) 169.

Where the evidence is in conflict, a finding of fact will be sustained. Brack v Brack, 218 M 503, 16 NW(2d) 557; Visneski v Visneski, 219 M 217, 17 NW(2d) 313.

Where defendants rest solely on a motion for judgment without asking for a new trial, errors at the trial, whether in the rulings or instructions to the jury, cannot be reviewed or considered on appeal. The only question for consideration is whether from the record it clearly appears that plaintiffs are not entitled to recover. Koch v Lidberg, 219 M 199, 17 NW(2d) 308.

In reviewing the evidence to determine whether the court erred in directing a verdict, the court must accept as true the evidence favorable to the plaintiff and accord her the benefit of all the reasonable inferences which may be drawn therefrom. Flagg v Chgo. Gt. Western, 143 F(2d) 92.

605.06 JUDGMENT NOTWITHSTANDING VERDICT.

HISTORY. 1895 c. 320; R.L. 1905 s. 4362; 1913 c. 245 s. 1; G.S. 1913 s. 7998; 1915 c. 31 s. 1; 1917 c. 24 s. 1; G.S. 1923 s. 9495; M.S. 1927 s. 9495.

1. Prior to enactment of Laws 1913, Chapter 246
2. Motion on trial for directed verdict necessary
3. Motion for judgment
4. Constitutional
5. Inapplicable to trial by court
6. Appealability of order on motion
7. Disposition of case on appeal
8. Scope of review on appeal from judgment

1. Prior to enactment of Laws 1913, Chapter 245

Where it is perfectly obvious that fatal deficiencies of proof could not be supplied on another trial judgment should be ordered. White v Miller, 66 M 119, 68 NW 851; Brennan v Gt. Northern, 80 M 205, 83 NW 137; Baxter v Covenant Mutual, 81 M 1, 83 NW 459; Swenson v Erlandson, 86 M 263, 90 NW 534; Martyn v Minn. Internat'l, 95 M 333, 104 NW 133.

Judgment should not be ordered unless it clearly appears from the whole evidence that the cause of action sought to be established does not, in point of substance, constitute a legal cause of action or a legal defense. When it appears probable that a party has a good cause of action or defense and that deficiencies of proof might be remedied or another trial, judgment should not be ordered. Greengard v St. P. Co. 72 M 181, 75 NW 221; Cruikshank v St. P. Co. 75 M 266, 77 NW 958; Marquardt v Hubner, 77 M 442, 80 NW 617; McKibben v Gt. Northern, 78 M 232, 80 NW 1052; Kreatz v St. Cloud School, 79 M 14, 81 NW 533; Fohl v Common Council, 80 M 67, 82 NW 1097; Brennan v Gt. Northern, 80 M 205, 83 NW 137; Jones v C. St. P. M. & O. 80 M 488, 83 NW 446; Baxter v Covenant Mutual, 81 M 1, 83 NW 450; Martin v Courtney, 81 M 112, 83 NW 503; Bragg v C. M. & St. P. 81 M 130, 83 NW 511; Saurs v Gt. Northern, 81 M 337, 84 NW 114; Levine v Barrett, 83 M 145, 85 NW 942, 87 NW 847; Kruezer v Gt. Northern, 83 M 385, 86 NW 413; Fohl v C. & N. W. 84 M 314, 87 NW 919; Marengo v Gt. Northern, 84 M 397, 87 NW 1117; Kurstelska v Jackson, 84 M 415, 87 NW 1015; Lindem v Northern Pacific, 85 M 391, 89 NW 64; Roe v Winston, 86 M 77, 90 NW 122; Glover v Sage, 87 M 526, 92 NW 471; Olson v Minn. Co. 89 M 280, 94 NW 871; Johnson v Peterson, 90 M 503, 97 NW 384; Fischer v Sperl, 94 M 421, 103 NW 502.

It is not alone sufficient to authorize judgment that the evidence was such that the trial court, in its discretion, ought to have granted a new trial. Marquardt v Hubner, 77 M 442, 80 NW 617.

If there is some evidence reasonably tending to prove a good cause of action or defense, judgment cannot be ordered. Bragg v C. M. & St. P. 81 M 130, 83 NW 511.

Judgment not authorized where there is a clear conflict in evidence on material issues. Hess v Gt. Northern, 98 M 198, 108 NW 7, 803.

Inconsistency in verdicts, general and special, furnishes no basis for judgment notwithstanding verdict. Bell v Northern Pacific, 112 M 488, 128 NW 829.

2. Motion on trial for directed verdict necessary

It is error to grant a motion made under Laws 1895, Chapter 320, for judgment non obstante verdicto, unless the moving party made a motion to direct a verdict in his favor at the close of the testimony. Hemstad v Hall, 64 M 136, 66 NW 366; Netzer v City of Crookston, 66 M 355, 68 NW 1099; Sayer v Harris, 84 M 216, 87 NW 617; Johnson v Hegland, 175 M 572, 222 NW 272; Timmons v Pfeifer, 180 M 5, 230 NW 260; Romann v Bender, 190 M 419, 252 NW 80; Skolnick v Gruesner, 196 M 318, 265 NW 44; Callahan v City of Duluth, 197 M 402, 267 NW 361; Midland Life v Wilson, 199 M 618, 273 NW 195.

Judgment notwithstanding the verdict cannot be granted unless there was a motion for directed verdict when the evidence was closed, nor, in any event, where the record, as here, warrants a verdict in a substantial amount. Olson v Heise, 194 M 280, 260 NW 227, 261 NW 476.

Neither party moved for a directed verdict. There being no evidence to rebut plaintiff's prima facie case, plaintiff's motion for a new trial should have been granted, but only on the issue of the amount of damage. Lee v Zaske, 213 M 244, 6 NW(2d) 793.

Defendant did not move for a directed verdict at the close of the testimony. Such a motion is a condition precedent to the right to judgment notwithstanding the verdict. In re Larson, 215 M 598, 11 NW(2d) 440.

A motion for judgment notwithstanding the verdict does not lie unless there is a motion to direct a verdict at the close of the testimony. Raspler v Seng, 215 M 596, 11 NW(2d) 440; Johnson v Whitney, 217 M 468, 14 NW(2d) 765.

Defendant properly protected his record by making a motion for a directed verdict at the close of the trial. If he was entitled to a directed verdict, judgment non obstante was properly granted. Reiter v Porter, 216 M 483, 13 NW(2d) 372.

Motion for a directed verdict should not be granted unless there is a complete absence of evidence reasonably sustaining plaintiff's claim, or unless evidence in support of the claim is wholly incredible and unworthy of belief or so conclusively overcome by other uncontradicted evidence as to leave nothing upon which the verdict can stand. The test is not whether the court might in the exercise of discretion grant a new trial, but whether it would be its manifest duty to do so. Kundiger v Prudential, 219 M 25, 17 NW(2d) 50.

Where the liability of the three defendants was several, the jury's exoneration of two did not aid the third defendant; nor can the defendant complain that the verdict for plaintiff was insufficient in amount. Henvit v Thurber, 56 F(2d) 828.

In determining admissibility of evidence where there is conflict between the state and the federal rule, plaintiff is entitled to the benefit of the more favorable rule. Where several issues of fact are tried and any one of them is erroneously submitted to the jury over the objection of the defendant against whom a general verdict is returned, defendant is entitled to a new trial. Roth v Swanson, 145 F(2d) 263.

3. Motion for judgment

A party is not entitled to a verdict under the statute unless, after verdict, he specifically moves for it. The court cannot grant such relief on a mere motion for a new trial. Kernan v St. P. Ry. 64 M 312, 67 NW 71; Crane v Knauf, 65 M 447, 68 NW 79; Netzer v City of Crookston, 66 M 355, 68 NW 1099.

The motion may be in the alternative; that is, for judgment notwithstanding the verdict, or, in case that is denied, for a new trial. Netzer v City of Crookston, 66 M 355, 68 NW 1099; St. Anthony Bank v Graham, 67 M 318, 69 NW 1077.

The notice of motion must state that the party will ask for a judgment in his favor and this notice must appear in the record on appeal. Netzer v City of Crookston, 66 M 355, 68 NW 1099.

Motion for judgment notwithstanding the verdict, made at conclusion of trial and denied, does not bar motion for a new trial on a settled case, if seasonably made. Sallden v City of Little Falls, 102 M 358, 113 NW 884.

Laws 1917, Chapter 24, amending Laws 1913, Chapter 474, and Laws 1915, Chapter 31, left unchanged the provision with respect to appeals. Snure v Schlitz, 139 M 516, 166 NW 1068.

No verdict being rendered, the trial stopping with no final disposition, appellant is not entitled to judgment non obstante but to a new trial. Trainer v Lammers, 152 M 415, 188 NW 1013.

While the evidence was extremely improbable, it was not so incredible but what the jury might have believed it and there is no reversal. Savings Bank v Schaal, 156 M 424, 195 NW 141.

In this personal injury case the evidence justified the refusal to direct a verdict in favor of the defendant, at the close of the testimony, and therefore the motion for judgment non obstante verdicto was properly denied. O'Halloran v Chicago & Burlington, 156 M 471, 195 NW 144.

The jury found for the plaintiff and the trial court denied defendant's motion for a directed verdict. On appeal, the record was such that the appellate court reversed the lower court. Capritz v Chgo. & Gt. Western, 157 M 29, 195 NW 531.

In this action for damages because of the lessee's violation of the terms of a mining lease, the lessee was not entitled to judgment non obstante verdicto, for there was evidence warranting a substantial recovery, though not in the amount awarded. Keating v Inland Steel, 157 M 243, 195 NW 1016.

The evidence justified the jury in finding defendant guilty of negligence in not placing proper rail guards around a bridge, and it was error in the trial court in granting judgment non obstante verdicto. Comstock v Gt. Northern, 157 M 345, 196 NW 177.

The court has no authority under the statute to grant a motion for judgment notwithstanding the verdict where the moving party did not ask for a directed verdict at the close of the testimony. Funkley v Ridgway, 158 M 265, 197 NW 280; Friedland v Hocking, 158 M 389, 197 NW 751; Yencho v Kruly, 158 M 408, 197 NW 752; Romann v Bender, 190 M 419, 252 NW 80; Gendler v Kresge, 195 M 578, 263 NW 925; Skolnick v Gruesner, 196 M 325, 265 NW 44; Callahan v City of Duluth, 197 M 403, 267 NW 361.

Plaintiff was not entitled to either a dismissal or judgment non obstante, for the jury could find that defendant had a good defense to plaintiff's cause of action. Dairy Land Co. v Paulson, 160 M 42, 199 NW 398.

The evidence justified a finding that the automobile, insured against fire loss by defendant, was damaged by an accidental fire, hence defendant cannot have judgment non obstante verdicto. Automotive Co. v Nat'l Insurance, 162 M 35, 202 NW 32.

Defendant did not move for a new trial but only for judgment non obstante which was denied. Upon an appeal from the judgment following assignments of error in the admission of evidence will not be considered. Krause v C. M. & St. P. Ry. 162 M 102, 202 NW 345.

Upon an appeal from a judgment entered pursuant to an order granting a motion for judgment notwithstanding the verdict, where a new trial is asked, the inquiry is directed to the sufficiency of the evidence tending to support the verdict. Strickland v First St. Bank, 162 M 235, 202 NW 727.

Where defendant asks for judgment notwithstanding the verdict but not for a new trial, the only question presented is whether the evidence is sufficient to sustain the verdict. Fink v Northern Pacific, 162 M 365, 203 NW 47.

Defendant is not entitled to judgment non obstante, for, as to one item included in the verdict, there is no assignment of insufficiency of the evidence to support a recovery. Farmers' Bank v Nat'l Surety, 163 M 257, 203 NW 969.

Judgment should be reversed and no trial granted on appeal from judgment, after denial of defendant's motion for judgment non obstante verdicto or a new trial, where probable that deficiency in plaintiff's proof may be supplied on another trial. Farmers' Bank v Merchants' Bank, 164 M 300, 204 NW 965; Garbisch v Amer. Express, 177 M 494, 225 NW 432; Drake v Connolly, 183 M 89, 235 NW 614.

When an order for judgment is granted by the trial court on an alternate motion, and on appeal the order is reversed, on the going down of the remittitur

the motion for judgment stands as denied, and the motion for a new trial is before the court for disposition. Wegman v Mpls. St. Ry. 165 M 41, 205 NW 433; Parker v Fryberger, 165 M 374, 206 NW 716; Trovatten v Hanson, 171 M 130, 213 NW 536.

Motion for a directed verdict at close of the trial is a statutory condition precedent to the granting of a motion for judgment non obstante verdicto. Wilcox v Wiggins, 166 M 125, 207 NW 23.

The evidence relating to the mechanics of the instruments involved in the accident were such that plaintiff's injury could not have been caused in the manner related in his testimony, and the court properly granted a judgment notwithstanding the verdict. Kairos v Gt. Northern, 167 M 140, 208 NW 655.

The evidence was such that the court clearly erred in granting judgment notwithstanding the verdict. King v Mpls. St. Ry. 167 M 309, 208 NW 1007.

A verdict should not be directed nor judgment non obstante ordered for defendant if from all the facts developed in the trial it appears that plaintiff has a cause of action. Jepson v Central Ass'n, 168 M 19, 209 NW 487.

There was a want of evidence on the part of the defense and the trial court properly ordered judgment non obstante. Hawley Co. v Nordling, 168 M 70, 209 NW 484.

Where the appealing defendant rests upon a motion for judgment notwithstanding the verdict, the only question is whether it clearly appears that the plaintiff is not entitled to recover. Smith v Gray Motor Co. 169 M 45, 210 NW 618.

There was a lack of evidence on the part of the plaintiff and the trial court rightfully directed a judgment for the defendant notwithstanding the verdict. Messenbring v Blackwood, 171 M 105, 213 NW 541.

An order denying a motion for judgment notwithstanding a disagreement of the jury is not appealable. Johnson v Burmeister, 176 M 302, 223 NW 146.

In an automobile accident case, the contributory negligence of the plaintiff was for the jury, and defendants are not entitled to judgment non obstante. Weckworth v Proudfoot, 171 M 321, 214 NW 52.

Evidence failed to prove negligence on the part of the defendant so a judgment for the defendant non obstante was correct. Opperud v Byram, 173 M 378, 217 NW 379.

Questions involved and directly decided on an appeal from a judgment rendered non obstante verdicto are res judicata on a subsequent appeal from an order denying a new trial. Parker v Fryberger, 171 M 384, 214 NW 276.

Evidence examined and found practically conclusive against the verdict; and, the action having been fully tried and no error claimed, judgment was properly ordered non obstante. Street v Rosebrock, 173 M 522, 217 NW 939; Smith v Hansen, 174 M 272, 219 NW 151.

The defendant moved in the alternative for judgment notwithstanding the verdict or a new trial. A new trial was granted and the motion for judgment denied. He appealed from so much of the order as denies his motion for judgment non obstante. Such an appeal is ineffectual. Lincoln v Ravicz, 174 M 237, 219 NW 149.

Evidence presented did not establish any defense, and judgment in favor of plaintiffs non obstante was properly ordered. Powell v Turnlund, 175 M 361, 221 NW 241.

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. Matesic v Maras, 177 M 240, 225 NW 84.

In an action based upon the federal safety appliance act, the evidence is insufficient to establish the existence of a defective coupler and a judgment for defendants was correctly entered notwithstanding the verdict for plaintiff. Meisenhelder v Byram, 178 M 417, 227 NW 426.

The complaint stated a cause of action. Defendant not being entitled to judgment on the pleadings was not under the common law rule entitled to judgment non obstante. Timmons v Pfeifer, 180 M 1, 230 NW 260.

The evidence to show failure on the part of the defendant to exercise ordinary care is found unsatisfactory but not so conclusive against the verdict as to justify the supreme court in granting judgment non obstante. Hunter v C. St. P. M. & O. Ry. 180 M 305, 230 NW 793, 231 NW 920.

Where judgment has been ordered notwithstanding the verdict upon a defendant's motion in the alternative, the trial court's denial of a new trial may be regarded as prematurely entered and is to be entertained and determined in the event of a reversal of the judgment. Rieke v St. Albans, 180 M 540, 231 NW 222.

The order related to only one item in the final account of the administrator and directed its payment. It was not appealable. Carson v Carson, 181 M 433, 232 NW 788.

The plaintiff fully performed his contract and is not to blame for defendant's miscalculation, and the trial court properly ordered judgment for plaintiff notwithstanding the $700.00 verdict for defendant. Arcadia Park v Anderson, 181 M 433, 232 NW 739.

In this action for malicious prosecution the court rightfully denied the motion of the defendants for judgment notwithstanding the verdict. Miller v Phillips, 182 M 108, 233 NW 855.

On the issue of conversion the defendants were not entitled to judgment non obstante verdicto. Hector v Royal Indemnity, 182 M 413, 234 NW 643, 235 NW 675.

The fact that the beneficiaries, the parents of the decedent, violated sections 181.37, 181.38, does not constitute contributory negligence as a matter of law so as to entitle defendant to a judgment non obstante. Weber v Barr, 182 M 486, 234 NW 682.

In an action for assault, false imprisonment, and kidnaping, 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 defendant non obstante verdicto in favor of plaintiff is erroneous. Jacobson v Sorenson, 183 M 425, 236 NW 922.

The evidence sustains the verdicts and the trial court properly refused to grant the motion for judgment non obstante. Holland's Estate, 189 M 172, 248 NW 750.

A motion for a directed verdict at the close of the testimony is a condition precedent to the granting of a motion for judgment notwithstanding the verdict. Krocok v Krocok, 189 M 346, 249 NW 671.

When the court, after the charge but before the jury retires, permits counsel to move for a directed verdict and denies the motion, the party may move for judgment non obstante and, on appeal, assign error on the rulings below. Flower v King, 189 M 461, 250 NW 43.

Where the only motion made by the defendant was for judgment non obstante, the only question on appeal from a judgment entered after denial is whether the evidence clearly shows that plaintiff is entitled to recover. To grant such a motion, the evidence must be conclusive to compel, as a matter of law, a result contrary to the verdict. Thom v Northern Pacific, 190 M 622, 252 NW 660.

The presumption that decedent exercised due care was so conclusively overcome by testimony of eye witnesses that the trial court was justified in ordering judgment non obstante. Williams v Jungbauer, 191 M 16, 252 NW 658.

Judgment notwithstanding the verdict is to be granted with care and caution; but the right thereto involves the duty to do so where the right is clear. First Nat'l v Fox, 191 M 318, 254 NW 8.

Not error for the trial court to order judgment for defendant notwithstanding the verdict in action for services alleged to have been rendered where plaintiff failed to prove the value of such services. Dreelan v Karon, 191 M 330, 254 NW 433.

Plaintiff's motion for judgment non obstante was properly denied, the evidence not being conclusive against the verdict and no motion for a new trial having been made. Donnelly v Stepka, 193 M 11, 257 NW 505.

Under common law rules, judgment non obstante could be entered only where the plea of the defendant confessed the plaintiff's cause of action, and the defense set insufficient matters of avoidance which, if true, would not constitute a defense. Anderson v Newsome, 193 M 159, 258 NW 157.

An order for judgment in favor of defendant non obstante should not have been granted. Such an order should only be granted where there was no evidence reasonably sustaining the verdict, or where the evidence of plaintiff was wholly incredible and unworthy of belief. Kingsley v Alden, 193 M 503, 259 NW 7.

Judgment non obstante cannot be granted unless there was a motion for directed verdict when the evidence was closed, nor, in any event, where the record, as here, warrants a verdict in a substantial amount. Olson v Heise, 194 M 280, 260 NW 227, 261 NW 476.

In an automobile collision case where plaintiffs obtained judgment against Fisk and Finley, the trial court properly granted Finley, driver of a small car, judgment non obstante, but affirmed the judgment as to Fisk, driver of the truck. Paulsen v Fisk, 194 M 507, 261 NW 182.

The evidence does not establish that plaintiff was guilty of contributory negligence as a matter of law, and it was error to order judgment in favor of defendant on the ground of contributory negligence. Mardorf v Duluth Transit, 194 M 537, 261 NW 177.

The evidence is conclusive that more than two years elapsed after the cause of action for malpractice accrued and this action was begun; and the trial court did not err in ordering judgment for defendant non obstante verdicto. Plotnik v Lewis, 195 M 130, 261 NW 867.

Where two defendants moved separately for judgment non obstante, or a new trial, the fact that one defendant did not make the other a party to the motion or appeal does not entitle plaintiff to a dismissal. Kemerer v Mack, 198 M 316, 269 NW 832.

The trial court's action in granting judgment notwithstanding the verdict, because the evidence of a parol modification of a written contract made 17 years prior to the trial was not clear and convincing, is sustained. Slawson v Northern States, 201 M 313, 276 NW 275.

As defendants were entitled to have their motions for a directed verdict granted, judgment in their favor, notwithstanding the verdict, was properly ordered. Selover v Selover, 201 M 562, 277 NW 205.

Defendant relies upon its motion for judgment non obstante. This admits, for the purpose of the motion, the credibility of the evidence for the adverse party, and every inference which may fairly be drawn from such evidence. Frederickson v Arrowhead, 202 M 17, 277 NW 345.

The rule of comparative negligence not having been adopted in this state, it is the rule that on a motion by the defendant for judgment notwithstanding the verdict evidence must be considered in a light most favorable to plaintiff. Haeg v Sprague-Warner Co. 202 M 425, 281 NW 261.

Whether plaintiff is entitled to judgment as a matter of law will not be considered by this court where there was no motion for a directed verdict or for judgment non obstante. Strand v Boehland, 203 M 9, 279 NW 746.

Defendant having by motion for a directed verdict insisted that there was no fact issue as to the giving of train signals, the point was not waived because the motion for directed verdict having been denied, the defendant asked appropriate instructions in submitting the case to the jury. Engberg v Gt. Northern, 207 M 194, 290 NW 579.

The evidence did not make out a case of liability and the court properly directed a verdict against the plaintiff. Pangolos v Calvert, 210 M 251, 297 NW 741.

An order denying a motion under section 605.06 for judgment notwithstanding the disagreement of a jury, is not reviewable on appeal, under section 605.09, from a judgment of dismissal entered under section 646.39. Bolstad v Bunyan, 215 M 166, 9 NW(2d) 346.

A motion for judgment notwithstanding the verdict should be granted only where there is no evidence reasonably tending to support the verdict, where the evidence in support of the verdict is unworthy of belief, or where the evidence in support of the verdict is conclusively overcome by other uncontradicted evidence. Eklund v Kapetas, 216 M 79, 11 NW(2d) 805; Reiter v Porter, 216 M 479, 13 NW(2d) 372.

The court is not justified in ignoring a verdict merely because witnesses made contradictory statements, or experts testified death could not have been caused as contended by the plaintiff. Kundiger v Metropolitan, 218 M 273, 15 NW(2d) 487.

Where judgment for defendants should have been granted during trial, and local practice permitted, court could grant judgment notwithstanding verdict. Glynn v Krippner, 47 F(2d) 281, 60 F(2d) 406.

4. Constitutional

Laws 1895, Chapter 320 (section 605.06), is constitutional, but it must be construed and applied so as not to invade the constitutional right of trial by jury. Kerman v St. P. Ry. 64 M 312, 67 NW 71; Marengo v Gt. Northern, 84 M 402, 87 NW 1117.

State court can enter judgment non obstante in case under federal employers liability act upon failure of proof. Marshall v Chicago, Rock Island, 133 M 460, 157 NW 638; Robertson v Chicago, Rock Island, 180 M 578, 230 NW 585.

5. Inapplicable to trial by court

The provisions of Laws 1895, Chapter 320 (section 605.06), do not apply to a case tried by the court without a jury. A motion made by a defeated party "for judgment notwithstanding the findings, and, if denied, for a new trial" is irregular practice, at least, and has herein been treated and disposed of solely as a motion for a new trial. Hughes v Meehan, 84 M 226, 87 NW 768; Noble v Gt. Northern, 89 M 147, 94 NW 434; Meshbesher v Channellene Co. 107 M 104, 119 NW 428.

6. Appealability of order on motion

Under Laws 1895, Chapter 320 (section 605.06), a party is not entitled to an order for judgment either in the trial or appellate court, unless he asks for that relief in his moving papers on his motion for a new trial; and an order made in such a motion, for judgment notwithstanding the verdict, is an appealable order. Kernan v St. P. Ry. 64 M 312, 67 NW 71.

The plaintiff made an alternate motion for judgment notwithstanding the verdict or for a new trial. The court denied the motion for judgment but ordered a new trial. No appeal lies from the refusal to grant judgment non obstante. St. Anthony Bank v Graham, 67 M 318, 69 NW 1077; Peterson v Mpls. St. Ry. 90 M 52, 95 NW 751; Steidl v McClymords, 90 M 205, 95 NW 906.

An order denying a motion, made under provisions of Laws 1895, Chapter 320 (section 605.06), for entry of judgment in favor of the moving party, notwithstanding the verdict against him, is not appealable. Oelschlegel v Chicago & Gt. Western, 71 M 50, 73 NW 631; Savings Bank v St. P. Plow Co. 76 M 7, 78 NW 873.

No appeal lies from an order granting a motion for judgment notwithstanding the verdict. Sanderson v Northern Pacific, 88 M 162, 92 NW 542.

Where, in accordance with Laws 1895, Chapter 320, (section 605.06), either party has moved the court to direct a verdict in his favor, which motion has been denied, and thereafter moves the court that judgment be entered in his favor notwithstanding the verdict against him, or for a new trial, and the court denies the motion for judgment, but grants or denies the motion for a new trial, the moving party may appeal from the order as a whole, and have reviewed in the appellate court that part which denied his motion for judgment. Kalz v Win. & St. Peter, 76 M 351, 79 NW 310.

The defendant made a blended motion for judgment notwithstanding the findings or a new trial in a case tried by the court without a jury, and appealed from the whole of the order denying both motions. The order is appealable as one denying a motion for a new trial, the motion for judgment being unauthorized. Noble v Gt. Northern, 89 M 147, 94 NW 434.

An order denying a motion for judgment notwithstanding the verdict is not appealable; but otherwise, where the order denies an alternative motion for judgment non obstante or for a new trial. Hostager v N. W. Paper Co. 109 M 509, 124 NW 213; Watkins v McCall, 116 M 389, 133 NW 966.

An order for judgment notwithstanding the verdict entered on a motion in the alternative for such judgment or a new trial is appealable as to the party against whom judgment is ordered. An order on such motion granting a new trial is nonappealable, except where it is stated that it is granted exclusively for errors of law, and then appealable only by the party who opposed the motion. Snyder v Minnetonka Co. 151 M 36, 185 NW 959.

Section 605.06, in so far as it contemplates an appeal from an order granting a first new trial, not for errors of law alone, made on an alternative motion for judgment notwithstanding the verdict or a new trial, is controlled by a later statute, section 605.09, which abolishes the right of appeal from an order granting a first new trial unless granted for errors of law alone. Drcha v Gt. Northern, 178 M 286, 226 NW 846.

Where an 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. Rieke v St. Albans, 179 M 392, 229 NW 557; Rogers v Steiner, 206 M 640, 289 NW 580.

An order denying a motion for judgment notwithstanding the verdict or a new trial must be appealed from within 30 days after notice. That period cannot be extended by agreement of the parties or order of the court. Unless the first order is vacated, an order denying a subsequent motion for the same relief is not appealable. General Motors v Jobe, 188 M 598, 248 NW 213.

Where an alternative motion for judgment notwithstanding 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. Mallery v Northfield Seed Co. 194 M 236, 259 NW 825.

Plaintiff's appeal from separate orders granting each defendant judgment notwithstanding the verdicts must be dismissed, since such orders are not appealable. Selover v Selover, 201 M 562, 277 NW 205.

7. Disposition of case on appeal

In extending, by Laws 1895, Chapter 320 (section 605.06), the common law remedy of judgment notwithstanding the verdict to cases where, upon the evidence, a party is entitled to judgment, it must be assumed that the legislature intended such cases to be governed by the same rule as obtained at common law where the motion was made on the record alone, and that the motion should only be granted when it clearly appears from the evidence that the cause of action or defense sought to be established could not, in point of substance, constitute a legal cause of action or a legal defense; and that it should be denied where it appears probable that the party has a good cause of action, or a good defense, and that the defects in evidence are of such character that they probably could be supplied upon another trial. Where the motion after verdict is exclusively for judgment notwithstanding the verdict, and not in the alternative, for that remedy or for a new trial, if the party is not entitled to judgment as requested, he is not entitled, at least as a matter of right, to a new trial. Cruickshank v St. P. F. Co. 75 M 266, 77 NW 958; Marquardt v Hubner, 77 M 442, 80 NW 617; Kreatz v St. Cloud School, 79 M 1, 81 NW 533.

In proceedings to establish a highway the questions as to the necessity for the road are addressed to the sound judgment of the jury, and, though their verdict is not conclusive, the court has no power, under Laws 1895, Chapter 320, (section 605.06), to direct and order judgment notwithstanding, except in cases where the evidence is clearly and indisputably conclusive on the question. Fohl v Common Council, 80 M 67, 82 NW 1097; Bragg v C. M. & St. P. Ry. 81 M 130, 83 NW 511.

The evidence is insufficient to sustain the verdict, and it was error on the part of the trial court to refuse a new trial. Fohl v C. N. W. & O. Ry. 84 M 314, 87 NW 919.

Judgment notwithstanding the verdict should not be granted except when the merits of the case are presented fully and it is clear that the litigation should end. There should be a new trial. Arcadia v Anderson, 177 M 487, 225 NW 441.

While on appeal a litigant may not depart from the theory upon which the case was tried and submitted below, yet, where an issue of law is presented by

the pleadings and there is nothing in the record to show that it has been waived, it may be urged on appeal by an appellant who on the record was entitled to a verdict, and against whom judgment has been ordered notwithstanding the verdict. Buck v Patrons Ins. Co. 177 M 509, 225 NW 445.

It being reasonably certain that no additional evidence can be produced upon which to find liability of defendant, there should be judgment notwithstanding the verdict. Diddams v Empire Machine, 185 M 270, 240 NW 895.

Judgment notwithstanding the verdict will not be granted if there is evidence reasonably sufficient to sustain the verdict. First Nat'l v Fox, 191 M 318, 254 NW 8.

For defendants to prevail in the instant case the evidence must be so conclusive as to compel a finding contrary to the verdict. Reynolds v Goetze, 192 M 38, 255 NW 249.

Since it does not clearly appear that defendant on another trial cannot obtain some relief in this action, plaintiff should not have judgment notwithstanding the verdict. Knight v Dirnberger, 192 M 387, 256 NW 657; Anderson v Newsome, 193 M 157, 258 NW 157; Rochester Bread Co. v Rapinwax Co. 193 M 244, 258 NW 302.

By resting solely upon a motion for judgment a defeated party waives all errors which would be ground for new trial. Eichler v Equity Farms, 194 M 8, 259 NW 545; Oxborough v Murphy, 194 M 335, 260 NW 305; Mishler v Nelson, 194 M 499, 260 NW 865.

A verdict, though concurred in and adopted by the trial court in its findings, must be set aside and judgment entered to the contrary where there is no evidence reasonably sustaining the verdict or finding and no probability of a second trial supplying the deficiency in proof. Marsden's Estate, 217 M 13, 13 NW(2d) 765.

Where the district court granted judgment non obstante verdicto to the defendant, but failed to pass upon defendant's motion in the alternative for a new trial, and the granting of the judgment non obstante verdicto was adjudged erroneous and reversed on appeal, the cause should be remanded to the district court with instructions to hear and rule upon the motion for a new trial. Montgomery v Duncan, 311 US 243 (255).

Powers of appellate court to reverse and enter final judgment without granting a new trial. 20 MLR 83.

8. Scope of review on appeal from judgment

On an appeal from a judgment ordered by the court notwithstanding a verdict (Laws 1895, Chapter 320, Section 605.06), any action of the trial court when admitting or rejecting evidence, and assigned as error by appellant, may be reviewed. Du Blois v Gt. Northern, 71 M 45, 73 NW 637.

Where the only motion made by defendant was for judgment notwithstanding the verdict, the only question on an appeal from a judgment entered after denial of that motion is whether the evidence clearly shows that plaintiff was not entitled to recover. The view of the evidence most favorable to plaintiff must be accepted. Thom v Northern Pacific, 190 M 622, 252 NW 660.

Where defendant rests upon its motion for judgment without asking for a new trial, errors at the trial cannot be reviewed or considered on appeal. Gimmestad v Rose Bros. 194 M 531, 261 NW 194.

Where there is a motion for judgment notwithstanding the verdict but no motion for a new trial, error on appeal can reach only the single question of whether there is any substantial evidence in support of the judgment. Golden v Lerch, 203 M 211, 281 NW 249.

Findings of fact which are controlled or influenced by error of law are not final on appeal and will be set aside. A finding of fact in the nature of a conclusion from other facts specifically found may be reviewed on appeal without a settled case or bill of exceptions to determine whether the facts specifically found support the conclusion. Holden v First Nat'l, 207 M 210, 291 NW 104.

A party cannot for the first time on appeal raise the question that his opponent specified grounds for judgment notwithstanding the verdict which were not specified in the motion for a directed verdict, where without objection the

trial court entertained all the grounds specified in the motion for judgment. Blomberg v Trupukka, 210 M 523, 299 NW 11.

Where the defendants rest solely on a motion for judgment without asking for a new trial, errors at the trial, whether in rulings or instructions to the jury, cannot be reviewed or considered on appeal. Koch v Lidberg, 219 M 199, 17 NW(2d) 308.

In equity suit, circuit court of appeals must direct trial court to enter decree which should have been entered, but in a law case, circuit court of appeals is merely a reviewing court, and cannot retry case and direct entry of judgment which it thinks should have been entered. Millers' Ins. v Warroad Co. 94 F(2d) 741.

Jury trial in will cases in Minnesota. 22 MLR 514.

Dismissal and directed verdict in Minnesota. 23 MLR 370.

Appealable orders in Minnesota. 24 MLR 860.

Federal rules of civil procedure; construction of Rule 50(b). 26 MLR 126.

605.07 DISMISSAL OF APPEAL IN VACATION.

HISTORY. 1879 c. 70 s. 1; G.S. 1878, Vol. 2 (1888 Supp.) c. 86 s. 5a; G.S. 1894 s. 6137; R.L. 1905 s. 4363; G.S. 1913 s. 7999; G.S. 1923 s. 9496; M.S. 1927 s. 9496.

Where there is a disagreement among the representatives of the decedent, the appeal should not be dismissed in vacation by two of the three executors. Mowry v Stewart Bank, 178 M 509, 227 NW 660.

605.08 APPEAL, WHEN TAKEN.

HISTORY. R.S. 1851 c. 81 s. 9; P.S. 1858 c. 71 s. 9; G.S. 1866 c. 86 s. 6; 1869 c. 70 s. 1; G.S. 1878 c. 86 s. 6; G.S. 1894 s. 6138; R.L. 1905 s. 4364; G.S. 1913 s. 8000; G.S. 1923 s. 9497; M.S. 1927 s. 9497.

1. **When judgment entered**
2. **Appeal from judgment**
3. **Appeal from order**
4. **Generally**

1. When judgment entered

Judgment must be made a matter of record in order to limit the time for taking an appeal. Humphrey v Havens, 9 M 318 (301); Hodgins v Heaney, 15 M 185 (142); Hostetter v Alexander, 22 M 559; Exley v Berryhill, 36 M 117, 30 NW 436.

A judgment is not perfected for the purpose of limiting the time for taking an appeal until the costs have been taxed and inserted therein. Richardson v Rogers, 37 M 461, 35 NW 270; Fall v Moore, 45 M 517, 48 NW 404; Maurin v Carnes, 80 M 524, 83 NW 415.

While the general rule is the same as declared in Richardson v Rogers, 37 M 461, 35 NW 270, it is held in the instant case, that the judgment is complete and final on its face, and shows when read in connection with the rule of court that plaintiff waived his right to tax costs. Mielke v Nelson, 81 M 228, 83 NW 836.

The time of appeal is limited to six months from the entry of the original judgment. The so-called modification, in the instant case, is in fact an appealable order of itself, but one the appellant is estopped from raising. Fidelity v Brown, 181 M 466, 233 NW 10.

2. Appeal from judgment

Where plaintiff recovers judgment, but not for all relief claimed, and defendant appeals and assigns errors only as to part unfavorable to him and judgment is affirmed on his appeal, the plaintiff within time limited may appeal from that part which is to his disadvantage. State ex rel v Northern Pacific, 99 M 280, 109 NW 238, 110 NW 975.

Time to appeal from judgment, complete and perfect on its face, expires six months from date of entry. Pendency of appeal from the clerk's taxation costs, which are allowed and included in the judgment, does not suspend operation of statute fixing time. Kearney v C. St. P. M. & O. 101 M 65, 111 NW 923.

On the theory that Thanksgiving day was a holiday, the appeal was perfected the following day. As Thanksgiving day had not been made a holiday by statute, the appeal is dismissed. Locke v Gas Co. 129 M 522, 151 NW 273.

Judgment was entered for plaintiff and defendant appealed. More than six months later the judgment was affirmed. It was then too late to make a motion for a new trial. Smith v Mpls. St. Ry. 134 M 292, 157 NW 499, 159 NW 623; Slimmer's Estate, 146 M 429, 178 NW 954.

Notice in writing of an order from the adverse party is ineffectual to limit the time to appeal unless the order is filed with the clerk when notice is served. Backstrom v N. Y. Life, 187 M 35, 244 NW 64.

Invoking power of court to grant an extension of time within which to have case settled and allowed upon ground that the court did not allow a sufficient stay for such purpose in its decision, is a waiver of written notice of the filing of the decision. State ex rel v Wilson, 199 M 452, 272 NW 163.

Appeal from judgment; stay of execution. 24 MLR 816.

3. Appeal from order

The time within which to appeal cannot be extended by a second entry of the same order. Carli v Jackman, 9 M 249 (235).

Where the court has once made an appealable order, but, before the time to appeal expires, thereafter reconsiders and by final order redetermines the matter, affirming the former decision, an appeal may be taken from such second order, although the time for appeal from the former order has expired. First Nat'l v Briggs, 34 M 266, 26 NW 6.

The trial court made findings of fact and an order thereon, and subsequently, by agreement of the respective parties, it made additional findings and an order thereon, and filed same. The last order is the final one in force, and an appeal might be taken therefrom within the statutory time. Billson v Lardner, 67 M 35, 69 NW 477.

Actual notice does not take the place of written notice. The obligation to give written notice rests on both parties and each must be served with notice to set the statute running as to him. Levine v Barrett, 83 M 145, 45 NW 942, 87 NW 847.

Notice cannot be given to a party for the purpose of limiting the time for appealing from a conditional order until the order becomes as to him a final order and therefore appealable. The correct practice requires the party on whom the condition is imposed to perform it and then give written notice of the making of the order and of his compliance with its terms. The opposite party must then, if he desires to appeal from the order, do so within 30 days after receiving such notice. Swanson v Andrus, 84 M 168, 87 NW 363, 88 NW 252.

An appeal may be taken from an order within 30 days after written notice of the same. Spencer v Koell, 91 M 226, 97 NW 974.

Though no notice is given, no appeal lies from order for judgment notwithstanding verdict, pursuant to which judgment is entered, after expiration of time for appeal from judgment, and more than a year from entry. Lawver v Gt. Northern, 110 M 414, 125 NW 1017.

After the expiration of six months allowed by law to appeal from a judgment, no appeal lies from an order made before judgment denying a motion for a new trial. Harcum v Benson, 135 M 23, 160 NW 80; Strand v Chgo. Gt. Western, 147 M 3, 179 NW 369.

Motion for a new trial in a criminal case should be made within six months after judgment. When made after that time denial is proper. State v Hughes, 157 M 503, 195 NW 635.

No appeal having been taken to the supreme court from an order dismissing the appeal from the probate court within the statutory time, the attempted appeal here is dismissed. Samels v Samels, 174 M 133, 218 NW 546.

An order granting a new trial cannot be amended after the time to appeal has expired. Bakkensen v Mpls. St. Ry. 180 M 344, 230 NW 787.

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 substance nothing more than one refusing to vacate an appealable order and so not appealable. Barrett v Smith, 183 M 431, 237 NW 15.

No judgment was entered. The order denying a new trial was properly made on properly enumerated ground, and is appealable. Salo v State, 188 M 618, 248 NW 39.

The period for appeal cannot be extended by agreement of parties or order of court. General Motors v Jobe, 188 M 598, 248 NW 213; Johnson v Union Svgs. Bank, 193 M 357, 258 NW 504; Guardianship of Jaus, 198 M 242, 269 NW 457.

The district court has no power to vacate an intermediate order after judgment has been entered. A judgment may not be vacated and set aside where the only objections thereto are based upon matters that might have been raised by an appeal. Johnson v Union Svgs. Bank, 196 M 588, 266 NW 169.

As the notice served of the order allowing the trustees' account was not served from the "adverse party", the statute did not run to cut off appellant's right to appeal. Malcolmson v Goodhue Bank, 198 M 562, 272 NW 157; 199 M 258, 271 NW 455.

Defendant made two motions for judgment notwithstanding the verdict or a new trial. Both were denied. The second was not heard until after the time to appeal from the first had expired. The latter order had not been vacated or superseded. The order denying the second motion was not appealable. Ross v Duluth-Missabe, 201 M 225, 275 NW 622.

To set time for appeal running, written notice should inform party that order has been filed. Notice of intention to file is not sufficient. State ex rel v Moriarty, 203 M 27, 279 NW 835.

Defendants set time running for taking an appeal therefrom by the service of notice of the filing the order on plaintiff's attorney. Where 30 days from that date expired without an appeal being taken, the action was ended. Hoffer v Fawcett, 204 M 614, 284 NW 873.

As the evidence is not palpably in support of the verdict, although a second trial, on order granting a new trial will not be reversed. Halweg Estate, 207 M 263, 290 NW 577.

The time within which to appeal from an order determining an election contest is limited in cases involving legislative offices to five days after notice of the filing the decision under Laws 1939, Chapter 345. Hanson v Emanuel, 210 M 51, 297 NW 176.

Where a motion for a new trial is denied and, without vacation of that order, irrespective of whether time to appeal therefrom has expired or not, a second motion for a new trial is denied, the latter order is in substance a refusal to vacate an appealable order and so not appealable. The proper practice requires prompt application of the first order pending consideration of the second motion, leave to submit the second being first secured. Gonyea v Duluth Ry. 219 M 523, 18 NW(2d) 318.

4. Generally

The result of a former appeal herein from the original judgment was to remand the case to the district court, with directions to modify the judgment in certain particulars; and it was so modified. An appeal lies from the judgment as modified though the time for appealing from the original judgment had expired. Malmgren v Phinney, 65 M 25, 67 NW 649.

An appeal from a judgment of the district court, in proceedings on appeal from the action of the board of county commissioners on a claim against the county, must be taken within 30 days. Brown v Co. of Cook, 82 M 542, 85 NW 550.

Actual notice does not take the place of written notice. In re Judicial Ditch, 163 M 383, 202 NW 52, 204 NW 318.

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 Retail Hdwe. 181 M 573, 233 NW 316.

Judgment debtor's driver's license should not be suspended by reason of failure to satisfy a money judgment until 30 days have passed since the expiration of the six months' period provided for appeals. 1936 OAG 283, Sept. 20, 1935 (291f).

605.09 APPEAL TO SUPREME COURT.

HISTORY. R.S. 1851 c. 81 s. 11; P.S. 1858 c. 71 s. 11; 1861 c. 22 s. 1; G.S. 1866 c. 66 s. 302; G.S. 1866 c. 86 s. 8; 1867 c. 63 s. 1; G.S. 1878 c. 66 s. 340; G.S. 1878 c. 86 s. 8; 1889 c. 106 s. 2; G.S. 1894 ss. 5489, 6140; R.L. 1905 s. 4365; 1913 c. 474 s. 1; G.S. 1913 s. 8001; G.S. 1923 s. 9498; M.S. 1927 s. 9498; 1931 c. 252; 1945 c. 463 s. 1.

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VIII. APPEALABILITY OF ORDERS GENERALLY

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IX. RELATIVE TO SPECIAL CASES

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I. APPLICABLE TO CLAUSE (1)

1. From judgment on appeal to district court

In an action before a justice of the peace by a landlord to recover possession for non-payment of rent, removed by appeal to the district court, an appeal lies to the supreme court from the judgment of the district court. Barker v Walbridge, 14 M 469 (351).

An appeal lies from a judgment of the district court affirming an order of the probate court admitting a will to probate. Penniman's Will, 20 M 245 (220).

An appeal lies from a judgment of the district court on an appeal from an award of commissioners in a railroad condemnation proceeding. Witt v St. Paul & Northern Pacific, 35 M 404, 29 NW 161.

An order of the district court affirming an order of the probate court from which an appeal has been taken, is not appealable. An appeal can be taken only from a judgment entered pursuant to such order. Hines v Taft, 185 M 650, 240 NW 890, 241 NW 796.

An order of the probate court denying a motion to revoke a prior order appointing an administrator is not appealable. Firle's Estate, 191 M 237, 253 NW 889.

Where plaintiff, who was demoted by order of a civil service commission with original jurisdiction in such matters, obtained certiorari to review the order, which resulted in an affirmance, the district court's order was "a final order, affecting a substantial right, made in a special proceeding" and appealable. Johnson v City of Minneapolis, 209 M 67, 295 NW 406.

2. From judgment originating in district court

In order to appeal to the supreme court under this clause, the judgment must be the final determination of the rights of the parties in the action. Chouteau v Rice, 1 M 24 (8); Deuel v Hawke, 2 M 50 (37); Hawke v Deuel, 2 M 59 (46); Ayer v Termatt, 8 M 96 (71); Aetna Insurance v Swift, 12 M 437 (326); Penniman's Will, 20 M 245 (220); Dodge v Allis, 27 M 376, 7 NW 732; Dobberstein v Murphy, 44 M 526, 47 NW 171; Lamprey v St. Paul & Chi. Co. 86 M 509, 91 NW 29.

A judgment which is only such in name (as the overruling of a demurrer), is not appealable. Deuel v Hawke, 2 M 50 (37); Hawke v Deuel, 2 M 59 (46).

An appeal does not lie from an order for judgment. Westervelt v King, 4 M 320 (236); Ames v Mississippi Co. 8 M 467 (417); Lamb v McCanna, 14 M 513 (385); Rogers v Holyoke, 14 M 514 (387); Hodgins v Heaney, 15 M 183 (142); Searles v Thompson, 18 M 316 (285); Ryan v Kranz, 25 M 362; Langdon v Thompson, 25 M 509; Chesterson v Munson, 26 M 303, 3 NW 695; Croft v Miller, 26 M 317, 4 NW 45; Felber v Southern Minnesota, 28 M 156, 9 NW 635; Shepard v Pettit, 30 M 119, 14 NW 511; Herrick v Butler, 30 M 156, 14 NW 794; State ex rel v Bechdel, 38 M 278, 37 NW 338; Johnson v N.P. 39 M 30, 38 NW 804; U.S. Savings v Ahrens, 50 M 332, 52 NW 898; St. Anthony v Graham, 67 M 318, 69 NW 1077; Oelschlegel v Chi. Great Western, 71 M 50, 73 NW 631; Fulton v Town of Andrea, 72 M 99, 75 NW 4; Gottstein v St. Jean, 79 M 232, 82 NW 311; Sanderson v N.P. 88 M 162, 92 NW 542.

A writ of error will lie to any final judgment, whether the action be legal or equitable. Kern v Chalfant, 7 M 487 (393).

Judgment must be formally entered in the judgment book before the appeal is taken. No appeal lies from a mere opinion, decision or finding of the court. Von Glahn v Sommer, 11 M 203 (132); Hodgins v Heaney, 15 M 185 (142); Wilson v Bell, 17 M 61 (40); Thompson v Howe, 21 M 1; Johnson v N.P. 39 M 30, 38 NW 804.

Form is not controlling, and if an order is, in effect, a final judgment, it is appealable as such. Penniman's Will, 20 M 245 (220); Lamprey v St. Paul & Chi. 86 M 509, 91 NW 29; State ex rel v McKellar, 92 M 242, 99 NW 807.

An appeal may be taken, as from a judgment, from the "final decree," in an action to foreclose a mortgage entered pursuant to General Statutes 1878, Chapter 81, Section 36. Upon such appeal, no alleged error in the judgment directing a sale under section 29 can be reviewed. Dodge v Allis, 27 M 376, 7 NW 732; Thompson v Dale, 58 M 365, 59 NW 1086; Lamprey v St. Paul & Chi. 86 M 509, 91 NW 29.

An appeal may be taken from a part of a judgment. Hall v McCormick, 31 M 280, 17 NW 620; St. Paul Trust v Kittson, 84 M 493, 87 NW 1012.

It is not necessary that it should be on the merits and preclude the parties from bringing another action. It is only necessary that it should be final in the sense of terminating the particular action. Judgments of dismissal are appealable as well as judgments on the merits. Thorp v Lorenz, 34 M 350, 25 NW 712.

The judgment entered in proceedings by a railroad company in condemnation proceedings is appealable. Witt v St. Paul & N.P. 35 M 404, 29 NW 161.

In an action for partition, the judgment provided by statute is the final judgment and is appealable. Dobberstein v Murphy, 44 M 526, 47 NW 171.

Judgment ordered by the court notwithstanding the verdict stands on the same footing as a judgment entered on a verdict. De Blois v G.N. 71 M 45, 73 NW 637.

A judgment vacating a town or village plat is appealable as an order. Koochiching v Franson, 91 M 404, 98 NW 98.

An order denying a motion in a mandamus case that the peremptory writ issue is not appealable. State ex rel v McKellar, 92 M 242, 99 NW 807.

But a final order of a court commissioner, made in habeas corpus proceedings, is, under Laws 1895, Chapter 327, appealable within 30 days after it is filed with the clerk of the district court, even if it directs the entry of a judgment for the relief awarded. State ex rel v Martin, 93 M 294, 101 NW 303.

Appeal from judgment or demurrer after denial of leave to amend brings up for review orders sustaining demurrer and denying leave to amend. Disbrow v Creamery Package Co. 110 M 237, 125 NW 115.

An appeal lies from a judgment involving only the costs and disbursements where these accrued before the cause of action was settled, were excluded from the settlement, and are not trifling in amount. Salo v Duluth Co. 124 M 361, 145 NW 114.

No appeal from an order denying a motion for judgment. Maki v St. Luke's Hospital, 126 M 13, 147 NW 668.

The rule that a party may not accept part of a judgment which is beneficial, and then attack by appeal, the judgment through which he received the benefit, is not applicable in an action of divorce where the defendant's attorneys accepted the fee awarded him and satisfied that part of the judgment, and then appealed from the remainder of it. Gran v Gran, 129 M 531, 152 NW 269.

Generally, however, the acceptance of benefits waives the right of appeal. Mastin v May, 130 M 281, 153 NW 756; Thwing v McDonald, 134 M 148, 156 NW 780, 158 NW 820.

An order of the district court sustaining an order of the probate court from which an appeal has been taken, is not appealable. The appeal must be taken from the judgment entered pursuant to such order. Ebeling v Bayerl, 162 M 379, 202 NW 817.

Where, after trial of all the issues in a case, the court grants a new trial of a single issue only, the order granting such new trial and order refusing to

vacate the same are reviewable on appeal from the judgment entered after the second trial. Lindblad v Erickson, 180 M 185, 230 NW 473.

Where a demurrer to an answer is overruled with leave to reply, and the plaintiff replies in accordance with the leave granted, and the case is tried on the issues so framed, he cannot assert error in the overruling of the demurrer; but he may, in the course of the trial, contest the sufficiency of the facts alleged or proved. Wismo v Martin, 186 M 593, 244 NW 76.

An order granting or refusing inspection of books and documents is not appealable; but is reviewable on appeal from the judgment or from an order denying a new trial. Melgaard's Will, 187 M 632, 246 NW 478.

Appeal from a judgment brings up for review only the prior proceedings which resulted in the judgment. Muellenberg v Joblinski, 188 M 398, 247 NW 570.

On appeal from a judgment, the appellate court may review any intermediate order involving the merits or affecting the judgments. Rawleigh v Shogren, 192 M 483, 257 NW 102.

Two actions involving the same subject matter resulted in judgment for defendants and plaintiff appealed. Several appeals from orders will not be separately considered, because the appeals from the judgment search the whole record. Spears v Drake, 193 M 162, 258 NW 149.

On appeal after a third trial of the action, the trial court's alleged error in granting, or the manner of granting, the third trial cannot be reviewed. Backstrom v N.Y. Life, 194 M 67, 259 NW 681.

A direction that a peremptory writ of mandamus issue is an irregular judgment from which an appeal will lie as from a judgment. State ex rel v St. Cloud Milk Co. 200 M 1, 273 NW 603.

Findings of fact, conclusions of law, and order for judgment were made. There is here an appeal from that order which is not appealable. Clarke's Will, 204 M 574, 284 NW 876.

An order denying a motion under section 605.06 for judgment notwithstanding the disagreement of a jury is not reviewable on appeal, under section 605.09, from a judgment of dismissal entered under section 546.39 (1). Bolstad v Bunyan, 215 M 166, 9 NW(2d) 346.

Appeals in suits under Laws 1925, Chapter 378, being proceedings to determine the legal settlement for poor relief, may not be taken from findings of fact and conclusions of law, but only from the judgment entered thereon or from an order granting or denying a new trial. Settlement of Stewart, 216 M 485, 13 NW(2d) 375.

Appeals from orders involving the merits or in effect determining the action. 24 MLR 859.

3. Default judgments appealable

All final judgments may be removed to the supreme court by writ of error, including those entered by default. Karns v Kunkle, 2 M 313 (268); Masterson v Le Claire, 4 M 163 (108); Hollinshead v Von Glahn, 4 M 190 (131); Reynolds v La Crosse, 10 M 178 (144); Kennedy v Williams, 11 M 314 (219); Smith v Dennett, 15 M 81 (59); Skillman v Greenwood, 15 M 102 (77); Grant v Schmidt, 22 M 1; Keegan v Peterson, 24 M 1; White v Iltis, 24 M 43; Brown v Brown, 28 M 501, 11 NW 64; Jensen v Crevier, 33 M 372, 23 NW 541; Dillon v Porter, 36 M 341, 31 NW 56; Hersey v Walsh, 38 M 521, 38 NW 613; Doud v Duluth Milling Co. 55 M 53, 56 NW 463; Northern Trust v Markell, 61 M 271, 63 NW 735; Northern Trust v Albert Lea College, 68 M 112, 71 NW 9.

Where on appeal to the supreme court from a judgment entered on default, the objection is interposed for the first time that the judgment is erroneous because the complaint failed to state a cause of action, the objection should not be favored, and if facts material to support the judgment are alleged, or are fairly inferable, by a reasonable intendment, from what is alleged in the complaint, the judgment should be sustained. Smith v Dennett, 15 M 102 (77); Northern Trust v Markell, 61 M 271, 63 NW 735.

II. CLAUSE (2)

1. Orders appealable

An order vacating an attachment is appealable. Davidson v Owens, 5 M 69 (50); Gale v Seifert, 39 M 171, 39 NW 69.

Appeal will lie from an order vacating the appointment of a receiver. Folsom v Evans, 5 M 418 (338).

An appeal may be taken from an order refusing to vacate an attachment. Ely v Titus, 14 M 125 (93).

An order refusing to appoint a receiver is an appealable order. Grant v Webb, 21 M 39.

An order modifying an injunction, and in part suspending its operation, is, in effect, one dissolving the injunction pro tanto, and is appealable. Weaver v Mississippi Co. 30 M 477, 16 NW 269.

An appeal from an order refusing to dissolve an attachment cannot be prosecuted after the attachment has been released by executing and filing the statutory bond for that purpose. Thomas v Craig, 60 M 501, 62 NW 1133.

An order appointing a receiver in a foreclosure suit pending the action is an appealable order. State ex rel v Egan, 62 M 280, 64 NW 873.

An order for a temporary injunction granted upon a hearing of the parties, and not issued ex parte, is appealable. Fuller v Schutz, 88 M 372, 93 NW 118; Kanevsky v Natl. Council, 132 M 424, 157 NW 647.

An order in a divorce action denying an allowance to the wife for suit money, attorney's fees and temporary alimony is appealable as one denying a provisional remedy. Brunn v Brunn, 166 M 283, 207 NW 616.

An order refusing to discharge a garnishee and dismiss the proceeding for lack of jurisdiction of the subject matter, the property sought to be impounded, is appealable. Fulton v Okes, 195 M 247, 262 NW 570.

2. Orders not appealable

An ex parte order granting an injunction is not appealable, the remedy being, in the first instance, by application to the court granting such order. State ex rel v District Court, 52 M 283, 53 NW 1157.

An order for a temporary injunction granted upon a hearing of the parties, and not issued ex parte, is appealable. Fuller v Schutz, 88 M 372, 93 NW 118.

An order granting or refusing an order for inspection of documents in the hands of an adversary is not appealable. Harris v Richardson, 92 M 353, 100 NW 92.

An order granting, refusing, or dissolving a temporary injunction pendente lite rests in judicial discretion, and unless there is a clear abuse of such discretion, the appellate court will not interfere. Meagher v Schussler, 106 M 539, 118 NW 664; Potter v Engler, 130 M 510, 153 NW 1088.

In an action for a permanent injunction tried to the court, where findings of fact and conclusions of law are made, that plaintiff is entitled to judgment restraining and enjoining defendants, the order for judgment is not appealable. Holliston v Ernston, 120 M 507, 139 NW 805.

The contention of plaintiff that the injury which may result to plaintiff from the denial of a temporary injunction is so disproportionate to any injury which might result to the consumers from the granting of it as to be sufficient ground for the issuance of such injunction was for the trial court to determine. Mpls. Gas Light v City of Mpls. 123 M 231, 143 NW 728.

The appellate court will not interfere with the action of the trial court in granting or refusing a temporary injunction, when the evidence as to the facts is conflicting and no irreparable injury impends. Twitchell v Cummings, 128 M 391, 151 NW 139.

An order denying a motion to discharge the garnishee is not appealable, unless the jurisdiction of the court is challenged by the motion. Shallbeter v Bernstein, 174 M 604, 218 NW 730.

An order in a summary proceeding to determine as between the four attorneys for the plaintiff their respective rights as between themselves to an agreed fee already paid to three of them, impounding the money, in the custody of the client pendente lite and requiring security for its payment to the attorneys when ordered by court, is not appealable. Mecham v Ballard, 180 M 30, 230 NW 113.

In action under federal employees liability law for injuries, the answer set up a contract to sue only in the state where the injury occurred, an order denying a motion by defendant to have the validity of the limitation first tried, determined and specifically enforced was not appealable. Detwiler v Lowden, 198 M 185, 269 NW 367, 838.

III. CLAUSE (3)

1. Construed strictly

An order involving the merits is one which determines "the strict legal rights of the parties as contra-distinguished from those mere questions of practice which every court regulates for itself and from all matters which depend upon the discretion or favor of the court." Chouteau v Parker, 2 M 118 (95); Starbuck v Dunklee, 10 M 168 (136); Piper v Johnston, 12 M 60 (27); Holmes v Campbell, 13 M 66 (58); County of Chisago v St. Paul & Duluth Co. 27 M 109, 6 NW 454; National Bank v Cargill, 39 M 477, 40 NW 570; Plano v Kaufert, 86 M 13, 89 NW 1124.

The order should be, in effect, in the nature of a final judgment in the action or at least a final determination of some material question involved therein. It must be something more than a mere intermediate order made in the course of the trial on a question of procedure. Hulett v Matteson, 12 M 349 (227); American Book v Kingdom, 71 M 363, 73 NW 1089; State v O'Brien, 83 M 6, 85 NW 1135.

It must be decisive of the question involved, or of some strictly legal right of the party appealing. An order which leaves the point involved still pending before the court, and undetermined cannot be said to involve the merits or effect a substantial right. McMahon v Davidson, 12 M 357 (232); National Bank v Cargill, 39 M 477, 40 NW 570; Mpls. Trust v Menage, 66 M 447, 69 NW 224.

To make an order appealable under the statute, allowing an appeal from an order involving the merits, it must finally determine the action or some legal right of the appellant relating thereto. Seeling v Deposit Bank, 176 M 13, 222 NW 295.

2. Orders appealable

The following orders have been held appealable: Striking out a pleading or a portion of a pleading. Wolf v Banning, 3 M 202 (133); Starbuck v Dunklee, 10 M 168 (136); Kingsley v Gilman, 12 M 515 (425); Brisbin v American Express, 15 M 43 (25); Harlan v St. Paul, Mpls. Co. 31 M 427, 18 NW 147; Vermilye v Vermilye, 32 M 499, 18 NW 832, 21 NW 736;

Setting aside stipulation as to facts in a case. Bingham v Board, 6 M 136 (82);

Refusing to vacate an unauthorized judgment. Piper v Johnston, 12 M 60 (27);

Opening a default. Holmes v Campbell, 13 M 66 (58); People's Ice Co. v Schlenker, 50 M 1, 52 NW 219;

Setting aside a stipulation for dismissal. Rogers v Greenwood, 14 M 333 (256);

Setting aside a judgment in proceedings to enforce payment of taxes. County of Chisago v St. Paul & Duluth, 27 M 109, 6 NW 454;

Allowing counsel fees in a divorce case. Wagner v Wagner, 34 M 441, 26 NW 450; Schuster v Schuster, 84 M 403, 87 NW 1014;

Allowing amendment of complaint after judgment and directing certain issues to be placed on the calendar for trial. North v Webster, 36 M 99, 30 NW 429;

Confirming sale in proceeding to wind up an insolvent corporation. Hospes v Northwestern, 41 M 256, 43 NW 180;

Denying a motion to strike from the files a settled case or bill of exceptions for irregularities in settlement thereof. Baxter v Coughlin, 80 M 322, 83 NW 190;

Vacating a previous order affirming on the merits an order of the probate court refusing to vacate its order allowing the account of the guardian. Levi v Longini, 82 M 324, 84 NW 1017, 86 NW 333;

Striking a cause from the calendar on the ground that it had been transferred to another court. Chadbourne v Reed, 83 M 447, 86 NW 415;

Denying a motion to set aside a summons. Plano v Kaufert, 86 M 13, 89 NW 1124;

Denying a motion to modify a judgment. Halvorsen v Orinoco Co. 89 M 470, 95 NW 320.

An order refusing to reduce alimony is appealable. Plankers v Plankers, 173 M 464, 217 NW 488.

An order in form granting a new trial upon the minutes of the court, but on a belated date, involves a part of the merits of the action and is appealable. Edelstein v Levine, 179 M 136, 228 NW 558.

In overruling the general demurrer to the complaint, the trial court certified the determination of the question as important and doubtful, in consequence of which defendant appealed. Hatlestad v Mutual Trust, 197 M 640, 268 NW 665.

Where an appeal lies from an order based on a holding that the court has jurisdiction, the proper method of reviewing the order is by appeal, rather than by a writ of prohibition. State ex rel v Funck, 211 M 27, 299 NW 684.

An order vacating and setting aside unconditionally an order approving settlement of a minor's personal injury action and dismissing the action is an appealable order. Elsen v State Mutual, 217 M 565, 14 NW(2d) 860.

3. Orders not appealable

Certain orders, such as the following, have been held not appealable:

An order modifying a prior order granting a new trial. Chouteau v Parker, 2 M 118 (95);

Denying a motion to change the place of trial. Mayall v Burke, 10 M 285 (224);

Denying a motion on the trial for judgment on the pleadings. McMahon v Davidson, 12 M 357 (232);

Denying a motion to set aside a complaint on the ground that it did not conform to the notice in the summons. Board v Young, 21 M 335;

Refusing to dismiss an appeal. Rabitte v Nathan, 22 M 266;

Refusing to strike out a pleading. Rice v First Division, 24 M 477; Vermilye v Vermilye, 32 M 499, 18 NW 832; Exley v Berryhill, 36 M 117, 30 NW 436; National Bank v Cargill, 39 M 477, 40 NW 570;

Refusing application to intervene. Bennett v Whitcomb, 25 M 148;

Directing compulsory reference. Bond v Welcome, 61 M 43, 63 NW 3;

Vacating a prior order vacating a judgment. Minnesota v Crossly Park, 63 M 205, 65 NW 268;

Denying a motion to strike out and dismiss objection filed to the allowance of the account of the trustee. Mpls. Trust v Menage, 66 M 447, 69 NW 224;

Appointing committee in proceedings to condemn land for enlarging a cemetery. Forest Cemetery v Constans, 70 M 436, 73 NW 153;

Denying a motion to make a pleading more definite and certain. American Book v Kingdom Co. 71 M 363, 73 NW 1089; State v O'Brien, 83 M 6, 85 NW 1135;

Denying motion to affirm an order of the probate court. McGinty v Kelley, 85 M 117, 88 NW 430;

Granting or refusing order for inspection of documents. Harris v Richardson, 92 M 353, 100 NW 92;

Denying motion to amend findings. State ex rel v Germania Bank, 106 M 539, 118 NW 686; Nikannis v City of Duluth, 108 M 83, 121 NW 212; Rase v Mpls. St. Paul, 116 M 414, 133 NW 986;

Order for judgment. Nikannis v City of Duluth, 108 M 83, 121 NW 212;

Denying a motion to amend findings to set aside conclusions and for judgment. Wolf v State Board, 108 M 523, 121 NW 395;

Allowing amended or supplemental pleading before judgment. Stromme v Rieck, 110 M 472, 125 NW 1021;

An order of the district court denying a motion to dismiss certiorari proceedings instituted to review the action of the county board in apportioning school funds. State ex rel v County of Lincoln, 129 M 300, 152 NW 541;

Order denying motion to amend complaint. Kaletha v Hall Mercantile, 157 M 290, 196 NW 361; Swanson v Alworth, 157 M 313, 196 NW 260; Greber v Harris, 167 M 522, 209 NW 30;

Denying a motion to dismiss a proceeding charging paternity of an illegitimate child. State v Riebel, 166 M 497, 207 NW 631.

Where the same debt claimed by plaintiff is also claimed by another, an order permitting defendant to pay the amount into court and directing that the other claimant be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. Seeling v Deposit Bank, 176 M 13, 222 NW 295.

An order granting plaintiff leave to file a supplemental complaint against a garnishee is not appealable. Medgorden v Paulson, 172 M 368, 215 NW 516.

An order denying a motion to bring in an additional party is non-appealable. McClearn v Arnold, 173 M 183, 217 NW 106.

An order determining the amount of default in the payment of alimony and directing payment thereof within a specified time is not appealable. Plankers v Plankers, 173 M 464, 217 NW 488.

An order denying a motion for judgment notwithstanding a disagreement of the jury is not appealable. Johnson v Burmeister, 176 M 303, 223 NW 146.

Order granting a new trial is not appealable, unless based exclusively on errors of law. Cook v Byram, 178 M 230, 226 NW 699.

When a trial court grants a new trial "exclusively upon errors occurring at the trial," it should indicate what the errors are. Hudson v McCullough, 182 M 581, 235 NW 537.

The order amending the complaint so as to make the city a party plaintiff instead of a party defendant is not appealable; neither is the order denying the motion to vacate the order granting the amendment. Gilmore v City of Mankato, 198 M 148, 269 NW 113.

An order denying a motion to bring in an additional party is not appealable. Levstek v National Surety, 203 M 324, 281 NW 260.

An order for judgment on the pleadings is not appealable. Burns v New Amsterdam, 204 M 348, 283 NW 750.

An order denying a motion for judgment based upon a stipulation of liability is not an appealable order within the provisions of section 605.09 (3) or section 605.09 (5). Rodgers v Steiner, 206 M 637, 289 NW 580.

That part of an order denying amended findings is not appealable. State ex rel v Anderson, 208 M 334, 294 NW 219.

An order denying a motion under section 605.06 for judgment notwithstanding the disagreement of a jury is not reviewable on appeal under section 605.09 (1), from a judgment of dismissal entered, under section 546.39 (1). Bolstad v Paul Bunyan, 215 M 166, 9 NW(2d) 346.

IV. CLAUSE (4)

Note as to amendment. This clause originally read: "From an order granting or refusing a new trial, or from an order sustaining or overruling a demurrer." The balance of the clause as it is at present was added by Laws 1913, Chapter 474, and as amended, Laws 1931, Chapter 252.

1. Orders appealable

The following were held appealable:

Orders granting or denying motion for a new trial after trial by referee. Humphrey v Havens, 9 M 318 (301); Schuek v Hogar, 24 M 339;

For a new trial of right in an action of ejectment. Howes v Gillett, 10 M 397 (316);

Granting or denying motion for a new trial after trial by the court. Chittenden v German American, 27 M 143, 6 NW 773; Sheffield v Mullin, 28 M 251, 9 NW 756;

Refusing to entertain motion for a new trial. Ashton v Thompson, 28 M 330, 9 NW 876; McCord v Knowlton, 76 M 391, 79 NW 397;

Granting or denying a blended motion for a new trial or for judgment notwithstanding the verdict after trial by the court. Noble v G. N. 89 M 147, 94 NW 434; Young v Grieb, 95 M 396, 104 NW 131; Westacott v Handley, 109 M 452, 124 NW 226; Cedar Rapids Bank v Mottle, 115 M 414, 132 NW 911;

From the dismissal by the district court of an appeal from the town board in a highway location matter. Burklev v Town Board, 108 M 224, 120 NW 526, 121 NW 874;

From an order granting a new trial. Strand v Loyal Americans, 122 M 118, 142 NW 10; Melin v Stuart, 122 M 523, 141 NW 812; Chippewa Bank v Haubris, 123 M 530, 143 NW 1123.

Laws 1913, Chapter 474, does not contemplate certification of questions to the supreme court, but merely saves the right of appeal from an order overruling a demurrer upon the conditions prescribed thereby, the case being reviewable the same as prior to the amendment. Benton v County of Hennepin, 125 M 325, 146 NW 1110.

An order granting a new trial for insufficiency of evidence to sustain the verdict, is appealable, where a previous verdict in favor of the appellant has been set aside on the same ground. Guest v Northern Motor Co. 149 M 231, 183 NW 147.

An order for judgment notwithstanding the verdict entered on a motion in the alternative, is appealable as to the party against whom the judgment is ordered, an order on such motion is non-appealable, except where it is granted exclusively for errors of law, and then only by the party who opposed the motion. Snyder v Minnetonka Co. 151 M 39, 185 NW 959.

An appeal lies from an order granting a motion for a new trial made on the ground of the insufficiency of the evidence, if after a former trial, a new trial was granted on that ground. Lincoln v Ravicz, 174 M 238, 219 NW 149.

Memorandum expressly made part of an order granting a new trial filed before the expiration of 30 days allowed for appeal and stating for first time that the order was made solely for errors of law at the trial may be considered part of the order to show cause on what grounds it was granted (See 175 M 622, 221 NW 681). Gale v Pearce, 176 M 631, 220 NW 156.

An order granting a new trial is generally not appealable, while an order vacating a judgment is appealable; consequently an order granting a new trial after judgment has been entered is appealable as an order vacating a judgment. Ayer v Chicago, Milwaukee, 189 M 359, 249 NW 581; Kruchowski v St. Paul Ry. 195 M 537, 263 NW 616, 265 NW 303, 821.

The written memorandum of the successor judge was sufficient, and the order is appealable. G. N. v Becher, 200 M 258, 274 NW 522.

While that part of the order which denies amendment after pleading is not appealable, the part which denies a new trial is, and upon such appeal the verdict and any finding may be challenged. Schaedler v New York Life, 201 M 327, 276 NW 235.

After trial below the trustee was surcharged $35,000. Findings of fact, conclusions of law, and order for judgment were made. There was an appeal from that order which is not appealable, but there was also a motion for amended findings or a new trial, and the trustees appeal from the order denying that motion is appealable. Clarke's Will, 204 M 574, 284 NW 876.

An appeal from both a judgment, which is appealable, and an order which is not, will be treated as a valid appeal from the judgments only. State v Rock Island, 209 M 113, 295 NW 519.

The time within which to appeal from an order determining an election contest is limited in cases involving legislative offices to five days after notice of the

filing of the decision, in cases involving other offices, the time is the same as in civil actions. Hanson v Emanuel, 210 M 51, 297 NW 176.

An order denying a motion under section 605.06 for judgment notwithstanding the disagreement of a jury is not reviewable on appeal under section 605.09, from a judgment of dismissal under section 546.39. Bolstad v Paul Bunyan, 215 M 169, 9 NW(2d) 346.

Under section 605.09 (4), an order granting a new trial is not appealable where neither the order nor the memorandum attached thereto expressly states that such order is based exclusively upon errors occurring at the trial. Seorum v Marudas, 216 M 364, 12 NW(2d) 779.

An order vacating a judgment and ordering a new trial upon specific ground that newly discovered evidence tended to establish perjury was an appealable order. Vasatka v Matsch, 216 M 530, 13 NW(2d) 483.

Effect of Laws 1931, Chapter 252. 16 MLR 82.

2. Orders not appealable

An order modifying prior offer granting a new trial is not appealable. Chouteau v Parker, 2 M 118 (95).

Where it appears affirmatively or by fair presumption from the face of the order itself that both parties submitted the motion to the lower court without argument and consented that a pro-forma order might be entered upon the motion, without examination by the court, such order is not appealable. Johnson v Howard, 25 M 558.

Nor is an order denying a motion to vacate an order sustaining demurrer and for a new trial on demurrer. Dodge v Bell, 37 M 382, 34 NW 739.

Nor for an order refusing to vacate an order denying a new trial. Little v Leighton, 46 M 201, 48 NW 95.

An order based upon an alternative motion, denying motion for judgment but granting a new trial, on the ground that the verdict was not sustained by the evidence, is not an appealable order. The former rule of court sustaining the right of appeal from such orders was abrogated by Laws 1913, Chapter 474, by which an appeal from orders granting new trials, except in certain instances, was abolished and taken away. Kommerstad v G. N. 125 M 298, 146 NW 975; Greenberg v National Council, 132 M 85, 155 NW 1053; Fitzgibbons v Yennie, 132 M 473, 157 NW 114; Schommer v Eischens, 148 M 486, 182 NW 166; Williamson v Albinson, 148 M 487, 182 NW 166; Barwold v Thuet, 149 M 495, 182 NW 719.

Under Laws 1913, Chapter 474, amended by Laws 1931, Chapter 252, an order granting a new trial is not appealable, unless it appears therefrom, or from the memorandum attached thereto, that it is granted exclusively on the ground of errors of law occurring at the trial. Heide v Lyons, 128 M 488, 151 NW 139; Montee v G. N. 129 M 527, 151 NW 1101; Lewis v Denver & Rio Grande, 131 M 122, 154 NW 945; McAlpine v Fidelity Co. 134 M 195, 158 NW 967; Pust v Holtz, 134 M 266, 159 NW 564; Snyder v Minnetonka Co. 151 M 39, 185 NW 959; Miller v County of Steele, 162 M 85, 202 NW 68; Kramer v Bennett, 174 M 606, 219 NW 291; Cook v Byram, 178 M 230, 226 NW 699; Drcha v Great Northern, 178 M 286, 226 NW 846; Olson v Heise, 197 M 441, 267 NW 425; Kelly v Bowman, 201 M 365, 276 NW 274; Thompson v Mann, 202 M 318, 278 NW 153.

When a motion for a new trial is granted upon the ground of error of law, it cannot be sustained upon the ground of insufficiency of evidence or excessive damages. Orders for new trials upon such grounds are not appealable. When the motion is made upon the grounds of errors of law, insufficiency of evidence, and excessive damages, and granted solely on the first, without consideration of the others, and the order is reversed, the second and third are for consideration of the trial court upon the going down of the remittitur. Gutmann v Anderson, 142 M 142, 171 NW 303.

Certiorari denied to review grant of new trial because verdict not sustained by the evidence. Cox v Selover, 165 M 50, 205 NW 691.

An order granting a new trial is not appealable, unless the court states expressly that it is granted exclusively for errors of law. Citizens Bank v Wade, 165 M 396, 206 NW 728.

Where 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 order denying it. Samels v Samels, 174 M 133, 218 NW 546.

An order denying a motion to vacate an order denying a motion for a new trial is not appealable. Worrlein v Maier, 177 M 474, 225 NW 399.

An order granting a new trial upon the ground of insufficiency of the evidence, unless there has been a like verdict in favor of the same party on a prior trial, is not appealable. Thompson v Chgo. & Northwestern, 178 M 232, 226 NW 700.

An order granting a new trial upon errors of law cannot be amended by inserting therein the statement required by Laws 1913, Chapter 474, upon motion made after the time to appeal has expired. Bakkensen v Mpls. Street Ry. 180 M 344, 230 NW 787.

The order denying a new trial is appealable, but the supreme court does not review abstract questions pertaining to a charge of the court where there are no applicable facts disclosed. There being no case or bill of particulars, the judge's charge is not reviewable. Anderson v City of Mpls. 182 M 243, 234 NW 289.

When a trial court grants a new trial "exclusively upon errors occurring at the trial", it should indicate what the errors are. Hudson v McCullough, 182 M 583, 235 NW 537.

An order granting a new trial is not appealable when no ground is stated in the order or the attached memorandum. Karnofsky v Wells-Dickey, 183 M 563, 237 NW 425.

For a practice act, the amendment of 1913, Chapter 474, was quite revolutionary, but it was satisfactory except as modified by Laws 1931, Chapter 252. The amendment of 1931 was equivocal and doubtful and subject to different constructions. The omission of the words "but in such case only", raises a question. In the instant case, it is construed as not authorizing an appeal from an order granting a new trial except where such order is based exclusively upon errors occurring at the trial, and the trial court expressly states in its order or memorandum, the reason for and the grounds upon which such new trial is granted. It was not the intention of the legislature to go back to the old 1905 act in inserting the words "or granting." Spicer v Stebbins, 184 M 77, 237 NW 844.

An order granting a new trial after verdict is not appealable, unless the court states therein or in an attached memorandum that it is granted exclusively for errors of law. Backstrom v New York Life, 187 M 35, 244 NW 64.

Following Edelstein v Levine, 179 M 136, 228 NW 558, an order made on a motion for a new trial based upon the minutes of the court, heard more than 30 days after the coming in of a verdict or decision, is a nullity where no stipulation or order extending the time is procured under section 547.02. Smith v Wright, 192 M 424, 256 NW 890.

Under the statute relating to new trials, "errors occurring at the trial" do not include a mistake of the jury in disposing of facts. Inadequacy of damages is not an error of law. The errors indicated are those of the trial judge in the conduct of the trial. Roelofs v Baber, 194 M 166, 259 NW 808.

Respondent moved for a new trial on 38 separately stated grounds. The motion was granted without any indication of the reasons. Such order was not appealable. Peterson's Estate, 197 M 345, 267 NW 213.

Defendant made two motions for judgment notwithstanding the verdict or a new trial. Time to appeal under the first had expired, and no appeal lies under the second because it was in effect an order refusing to vacate an appealable order, and so not appealable. Ross v Duluth & Missabe, 201 M 225, 275 NW 622; 203 M 312, 281 NW 271.

An order denying a motion to vacate an order granting plaintiff's motion for a new trial on the issue of damages only, upon the issue of inadequancy of damages, is not appealable. Marty v Nordby, 201 M 469, 276 NW 739.

Where the trial court fails to make the statement required by the 1931 amendment a writ of mandamus will lie requiring him to do so. State ex rel v Moriarty, 203 M 23, 279 NW 835.

A litigant whose alternative motion is denied as to judgment but granted as to new trial cannot appeal. Halweg's Estate, 207 M 263, 290 NW 577.

An order denying a new trial is appealable but when no ground is stated in the motion, no question is raised. An order denying a motion for amended findings is not appealable whether it be accompanied by a motion for a new trial or not. Julius v Lenz, 212 M 201, 3 NW(2d) 10.

Under section 605.09 (4) an order granting a new trial is not appealable where neither the order nor the memorandum attached thereto expressly states that such order is based exclusively upon errors occurring at the trial. Seorum v Marudas, 216 M 364, 12 NW(2d) 779.

No appeal lies from an order refusing to amend findings, and the order denying a new trial must stand because no ground for a new trial was stated. Williams v Allen, 217 M 634, 13 NW(2d) 736.

3. Demurrers

An order deciding a demurrer is appealable. St. P. Div. v Brown, 9 M 151 (141).

An order overruling a demurrer in a criminal case is not appealable. Judgment must first be pronounced thereon before an appeal can be taken. State v Abrisch, 42 M 202, 43 NW 1115.

"Defendant has taken two appeals, one from the order striking out the demurrer, and the other from the judgment entered pursuant to the order." The appeal from the order is dismissed, but the judgment appealed from is reversed. Hatch v Schusler, 46 M 207, 48 NW 782.

If a demurrer is bad, but not frivolous, and the court strikes it out as frivolous, but grants the party leave to plead over, it is error without prejudice, and on appeal there is no reversal. Friesenhohn v Merrill, 52 M 55, 53 NW 1024.

The rule that a demurrer should not be struck out as frivolous unless it be manifest from mere inspection, without argument, that there was no reasonable ground for interposing it, applied to the instant case. Olsen v Cloquet Lbr. Co. 61 M 17, 63 NW 95.

NOTE: Attention is called to changes in the rule by Laws 1913, Chapter 474, and Laws 1931, Chapter 252.

Under section 605.09 (4), there may be an appeal from an order overruling a demurrer when the court in its order certifies that the question presented is doubtful and important. There was no appeal. A mere certification of the question by the trial judge is not sufficient. Appeal is the only remedy. Oehler v City of St. Paul, 174 M 66, 218 NW 234.

When the court overrules a demurrer and certifies the question as "important and doubtful", the single question is whether the demurrer is to be sustained. The statute does not authorize the certification of a question as to the sufficiency or insufficiency of a particular reason or reasons for or against a demurrer. Marquette v Doyle, 176 M 530, 224 NW 149.

In the matter of a right of citizenship, there was a general demurrer to the complaint with a certificate of importance and doubt. There was a reversal. Koppe v Pfefferle, 188 M 619, 248 NW 41.

Defendant had a right to appeal. The court in overruling the demurrer certified the case as important and doubtful. Hatlestad v Mutual Trust, 197 M 641, 268 NW 665.

V. CLAUSE (5)

1. Orders appealable

The following orders under clause (5) have been held appealable:

An order for judgment without proof on demurrer being overruled in an equitable action. Deuel v Hawke, 2 M 50 (37);

Vacating prior order setting aside judgment, the second order being made after time to appeal from the judgment had expired. Marty v Ahl, 5 M 27 (14);

An order dismissing an appeal from the justice court. Ross v Evans, 30 M 206, 14 NW 897;

Order dismissing an appeal from the order of the town supervisors laying out a highway and from their award for damages. Town of Haven v Orton, 37 M 445, 35 NW 264;

From an order discharging a garnishee. McConnell v Rakness, 41 M 3, 42 NW 539;

From an order setting aside insurance money as exempt in an insolvency proceeding. In re How, 59 M 415, 61 NW 456;

Denying the petition of a creditor in an insolvency proceeding to be permitted to file his claim after time limited. Richter v Merchants National, 65 M 237, 67 NW 995;

An order denying the motion of the defendant, appearing specially for that purpose, to set aside the service of the summons upon him, is appealable. Plano v Kaufert, 86 M 13, 89 NW 1124.

The practice of appealing before there is either a verdict or a decision upon which a judgment may be entered is questionable. However, no objection is made and the appellate proceeds to the questions as follows: (1) Is there evidence to sustain the verdict? (2) Did the court err in the submission of the special verdict? and (3) Was the intervenor entitled to a directed general verdict? Foot v Porter, 131 M 227, 154 NW 1078.

An order annulling an order vacating an order for an amendment to a judgment is appealable. Wilson v City of Fergus Falls, 181 M 329, 232 NW 322.

An order granting a new trial is generally not appealable; but an order vacating a judgment is appealable; and an order granting a new trial vacates the verdict and judgment and is therefore appealable. Ayer v Chgo. & Milwaukee, 189 M 359, 249 NW 581.

An order dismissing a cause for want of jurisdiction is appealable. Bulau v Bulau, 208 M 529, 294 NW 845.

Appealable orders involving the merits or in effect determining the action. 24 MLR 859.

2. Orders not appealable

The following orders have been held not appealable:

An order dismissing an action before trial on application of plaintiff. Jones v Rahilly, 16 M 177 (155);

Denying a motion to set aside complaint on the ground that it does not conform to notice in the summons. Board v Young, 21 M 335;

Denying a motion to dismiss an appeal from probate court. Rabitte v Nathan, 22 M 266; Kelly v Hopkins, 72 M 258, 75 NW 374.

Since the enactment of Laws 1895, Chapter 24, no appeal will lie from an order of dismissal of an appeal from the justice court, but the appeal must be taken, if at all, from the judgment entered in district court. Graham v Conrad, 66 M 470, 69 NW 215.

An order denying a motion to set aside the report of the commissioners in condemnation proceedings is not appealable, whether an order appointing them is quaere. Fletcher v Chgo. St. Paul, 67 M 339, 69 NW 1085.

Appointing a committee in condemnation proceedings to enlarge a cemetery is not appealable. Forest Cemetery v Constans, 70 M 436, 73 NW 153.

An order striking a case from the calendar for any cause which does not prevent a trial of the action at some future term is not appealable; but where the order is based upon the ground that the cause has been transferred to another court, and the validity of the attempted removal is disputed, it is appealable. Chadbourne v Reed, 83 M 447, 86 NW 415.

An order of the district court denying a motion to affirm an order of the probate court allowing the account of an execution is not appealable. McGinty v Kelley, 85 M 117, 88 NW 430.

An order denying a motion for leave to file an amended complaint is not appealable. Swanson v Alworth, 157 M 313, 196 NW 260.

An order denying a motion to dismiss a proceeding relating to paternity of an illegitimate child is not appealable. State v Riebel, 166 M 497, 207 NW 631.

An order denying an amendment of pleading is not appealable. Gieber v Harris, 167 M 522, 209 NW 30.

An order under section 571.14 granting plaintiff leave to file a supplemental complaint against a garnishee is not appealable. Medgarden v Paulson, 172 M 368, 215 NW 516.

In a summary proceeding between attorneys as to division of fees impounding the money in the custody of the client pendente lite and requiring security for its payment when ordered by the court, is not appealable. Meacham v Ballard, 180 M 30, 230 NW 113.

An order striking a cause from the calendar is non-appealable, where it appears that it is not a final disposition of the cause in the court making the order. Stebbins v Friend, Crosby, 184 M 177, 238 NW 57.

An order granting or refusing inspection of books or documents in hands of adverse party is not appealable. Melgaard's Will, 187 M 632, 246 NW 478.

An order denying a motion for amended findings is not appealable. Dayton v McGowan, 202 M 656, 279 NW 580.

An order granting or refusing inspection of books or documents in hands of adverse party is not appealable. Melgaard's Will, 187 M 632, 246 NW 478.

An order denying a motion to dismiss an action for laches in prosecution is not appealable. Dady v Peterson, 219 M 198, 17 NW(2d) 322.

An order granting a new trial for misconduct is not appealable, since an order granting a new trial is only appealable when granted exclusively on ground of errors of law occurring at trial. Master Poultry Breeders v Iowa Hardware Mutual, 219 M 440, 18 NW(2d) 39.

VI. CLAUSE (6)

1. Order in supplementary proceedings

An order supplementary to execution, commanding to appear before the court and answer concerning his property, and an order made by the judge referring the matter to take answers of the defendant are preliminary and interlocutory orders, and not final, and are not appealable. Rondeau v Beaumette, 4 M 224 (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 M 452.

The salary of an officer of a municipal corporation due him from the corporation cannot be reached by proceedings supplementary to execution by the creditors of the officer. Roeller v Ames, 33 M 132, 22 NW 177.

An order supplementary to execution, requiring the judgment debtor to appear for examination concerning his property, is not appealable. West v De La Mott, 104 M 174, 116 NW 103.

No appeal is provided from a judgment in a special proceeding; but an appeal is provided from judgments in proceedings supplementary to execution, and the fact that the court appended to the order in a special proceeding, a direction that judgment be entered thereon did not render the order non-appealable so as to extend the time to appeal until after entry of judgment. Rosenfeldt Trusteeship, 184 M 305, 238 NW 687.

An order for judgment made in supplementary proceedings is an appealable order. Freeman v Larson, 199 M 448, 272 NW 155.

Upon an order in proceedings supplementary to execution, appellants were required to show cause why they should not pay $18,494.30 to the receiver, and on

hearing were ordered to pay. An order denying appellant's motion for amended findings or a new trial is appealable. Northern National v McLaughlin, 203 M 253, 280 NW 852.

VII. CLAUSE (7)

1. Final orders in special proceedings

A final order is one that ends a proceeding as far as a court making it is concerned. Rondeau v Beaumette, 4 M 224 (163).

An interlocutory order of a purely administrative nature made by a district court in the course of proceedings and which does not involve the merits of an action, nor affect a substantial right, is not an appealable order. Brown v Minnesota Thresher, 44 M 322, 46 NW 560.

The phrase "special proceeding" is a generic term for all civil remedies in courts of justice which are not ordinary actions. Schuster v Schuster, 84 M 403, 87 NW 1014.

A judgment vacating a town or village plat is appealable as a "final order affecting a substantial right" within the meaning of this section. Koochiching v Franson, 91 M 404, 98 NW 98.

Special proceedings usually mean such proceedings as may be commenced independently of a pending action by petition or motion upon notice in order to obtain special relief. Anderson v Langula, 180 M 250, 230 NW 645.

The administration and settlement of a testamentary trust under the orders and supervision of the district court is a special proceeding. In re Rosenfeldt Trusteeship, 184 M 304, 238 NW 687.

The trial court, based on conflicting evidence, denied plaintiff's motion to reopen, vacate, and set aside certain orders previously made, allowing and confirming certain accounts of the trustee. Such order will not be disturbed on appeal. Fleischmann v N. W. National, 194 M 227, 260 NW 310.

A final order is one that ends a proceeding so far as the court making it is concerned. An order of the district court dismissing an appeal from the probate court is a final order in a special proceeding and as such is appealable. Guardianship of Jaus, 198 M 242, 269 NW 457.

Plaintiff's certiorari proceeding was not an "action" within the meaning of section 605.09 (1). Certiorari being limited to a review and correction of the determination made by the civil service commission, the district court's order sustaining the order of the commission was a final one, made in a special proceeding, and as such could be reviewed only upon compliance with section 605.09 (7). Johnson v City of Mpls. 209 M 68, 295 NW 406.

An election contest is a special proceeding and not a civil action. Hanson v Emanuel, 210 M 53, 297 NW 176.

2. Orders appealable

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 M 183 (157); Hutchins v County Commissioners, 16 M 13 (1).

The supreme court is designed to exercise appellate jurisdiction only, and will review the errors of courts alone, not those of the officers of the courts. Their errors may be corrected upon application to the court in which they occur. Masterson v Le Claire, 4 M 163 (108).

An appeal will lie to the appellate court:

In proceedings in contempt other than criminal. Register v State, 8 M 214 (185); Semrow v Semrow, 26 M 9, 46 NW 446; Papke v Papke, 30 M 260, 15 NW 117; Menage v Lustfield, 30 M 487, 16 NW 398; In re Fanning, 40 M 4, 41 NW 1076; State v Leftwich, 41 M 42, 42 NW 598; State ex rel v Willis, 61 M 120, 63 NW 169; Deppe v Ford, 89 M 253, 94 NW 679;

An order vacating the order discharging the relator in a habeas corpus proceeding. State ex rel v Hill, 10 M 63 (45);

Granting leave to issue execution after the statutory time. Entrop v Williams, 11 M 381 (276);

Denying a new trial in condemnation proceedings. Minnesota Valley v Doran, 15 M 230 (179);

Dismissing a motion to compel entry of satisfaction of judgment. Ives v Phelps, 16 M 451 (407);

Denying a motion to vacate a judgment of divorce and allow defendant to answer. Young v Young, 17 M 181 (153);

In condemnation proceedings dismissing an appeal from the award of the commissioners. Warren v First Division, 18 M 384 (343);

But see where special provisions of the charter prevent an appeal. Conter v St. Paul & Sioux City, 24 M 313;

On disclosure in supplementary proceedings directing assignment of claims belonging to debtor and appointing a receiver to collect them. Knight v Nash, 22 M 452;

Appointing or refusing to appoint a receiver in supplementary proceedings. Knight v Nash, 22 M 452; Roeller v Ames, 33 M 132, 22 NW 177;

Denying a motion to vacate a judgment rendered against a party after his decease. Stocking v Hanson, 22 M 542;

Denying a motion to open a tax judgment. Commissioners v Morrison, 25 M 295;

From an order setting aside a judgment in a tax proceeding. Co. of Chisago v St. Paul & Duluth, 27 M 109, 6 NW 454;

Directing sheriff to pay over moneys collected on execution. Coykendall v Way, 29 M 162, 12 NW 453;

Directing receiver to distribute proceeds of estate of insolvent among creditors and setting aside liens of attaching and execution creditors. State ex rel v Severance, 29 M 269, 13 NW 48;

Discharging a person on habeas corpus. State ex rel v Buckham, 29 M 462, 13 NW 902;

Appointing a receiver in insolvency. In re Graeff, 30 M 358, 16 NW 395; In re Jones, 33 M 405, 23 NW 835; Brown v Minn. Thresher, 44 M 322, 46 NW 560;

Allowing a peremptory writ of mandamus. State ex rel v Webber, 31 M 211, 17 NW 339; State ex rel v Copeland, 74 M 371, 77 NW 221; State ex rel v McKellar, 92 M 242, 99 NW 807;

Discharging a garnishee after examination. McConnell v Rakness, 41 M 3, 42 NW 539;

Confirming sale in proceedings to wind up a corporation. Hospes v N. W. 41 M 256, 43 NW 180;

In certiorari proceedings quashing proceedings of county commissioners in forming new school district. Moede v County of Stearns, 43 M 312, 45 NW 435;

Dismissing petition in insolvency proceedings. In re Harrison, 46 M 331, 48 NW 1132;

Denying motion to correct judgment entered by clerk and not conforming to findings. Nell v Dayton, 47 M 257, 49 NW 981;

Directing payment of money in supplementary proceedings. Christensen v Tostevin, 51 M 230, 53 NW 461;

In insolvency proceedings, setting apart to the insolvent exempt insurance money. In re How, 59 M 415, 61 NW 456;

Permitting creditors of insolvent to share in estate without filing releases. Ekberg v Schloss, 62 M 427, 64 NW 922;

Directing sheriff to turn over property in replevin. Elwell v Goodnow, 71 M 390, 73 NW 1095;

In proceedings re paternity of an illegitimate child denying defendant's application for a discharge. State ex rel v District Court, 79 M 27, 81 NW 536;

Assessing stockholders, and in allowing claims, in proceedings in liquidation of a corporation. London v St. Paul Park Co. 84 M 144, 86 NW 872;

Granting attorney's fees in divorce proceedings. Schuster v Schuster, 84 M 403, 87 NW 1014;

Vacating town or village plat. Koochiching v Franson, 91 M 404, 98 NW 98; Schweigert v Abbott, 122 M 386, 142 NW 724;

Denying a motion to modify a judgment. Halvorsen v Orinoco Co. 89 M 470, 95 NW 320.

An appeal lies from a judgment involving only costs and disbursements where these accrued before the cause of action was settled, were excluded from the settlement, and are not trifling in amount. Salo v Duluth Co. 124 M 361, 145 NW 114.

The order expressly states that the new trial was granted to the bank exclusively upon an error occurring at the trial, and is within the statute. Bjorgo v First National, 127 M 108, 149 NW 3.

An order amending a judgment based on a motion made after the entry and satisfaction of the judgment, affects the substantial rights of the parties and is appealable. Mpls. St. Paul v Grimes, 128 M 321, 150 NW 180, 906.

On the death of the defendant, plaintiff secured an order substituting appellants as parties defendant. Such order is appealable. National Council v Weisler, 131 M 365, 155 NW 396.

A district court has jurisdiction to make an order, upon proper notice, vacating an order of dismissal and reinstating the case. Such order is appealable. Rishmiller v Denver Co. 134 M 261, 159 NW 272.

Where an alternative motion is made, an order denying both motions is appealable. Berg v Veit, 136 M 443, 162 NW 522.

An injunction was granted against relator village forbidding certain paving, unless a stated percentage of the cost was assessed against property specially benefited. No appeal was taken. Thereafter an order was made requiring the officers of relator to call requisite meetings, give notice to assess. This order was appealable. State ex rel v District Court, 136 M 461, 161 NW 1055.

An order requiring a county to show cause why a bill against it should not be paid is an appealable order. Gove v County of Murray, 147 M 24, 179 NW 569.

An order dismissing an appeal to the district court from an order establishing a carfway in township highway proceedings for jurisdictional defects, is appealable as a final order in a special proceeding. In re establishment of Cartway, 156 M 229, 194 NW 378.

An order vacating an ex parte order bringing in an additional party defendant is appealable. Lincoln Security v Poppe, 169 M 392, 211 NW 470.

While ordinarily an order for the temporary custody of a minor child should not be considered appealable, in the instant case, the conditions are unusual and the court will review the order. Rice v Rice, 181 M 178, 231 NW 795.

In the matter of a sewer assessment, an order annulling an order vacating an order for an amendment to a judgment is appealable. Wilson v City of Fergus Falls, 181 M 331, 232 NW 322.

The summary adjudication of an attorney's lien by order without entry of judgment was a final determination and appealable. Caulfield v Jewett, 183 M 503, 237 NW 190.

The judgment of dismissal was expressly "on the merits". An order striking therefrom those words is error and appealable. McElroy v Board, 184 M 357, 238 NW 681.

An order of the district court denying the petition for discharge from confinement in the state hospital for the insane of one committed thereto as a result of his acquittal, on the ground of insanity, of a criminal charge is appealable as an order "affecting a substantial right, made in a special proceeding". State ex rel v District Court, 185 M 396, 241 NW 39.

Appeal was taken from the trial court's decision allowing trustee's account more than 30 days after entry of the court's order and notice served on appellants. As the service was not from "adverse party", the statute did not start running to cut off appellant's right of appeal. Malcolmson v Goodhue Bank, 198 M 562, 272 NW 157; 199 M 258, 272 NW 157, 271 NW 455.

The supreme court may remand a case to the trial court to enable appellant to move the court that its memorandum be made a part of the order pending on appeal. State ex rel v Anderson, 207 M 357, 291 NW 605; 208 M 338, 294 NW 219.

An order that modifies or suspends the operation of a judgment or plaintiff's right to enforce it materially affects his legal rights and is appealable. Peterson v Davis, 216 M 60, 11 NW(2d) 800.

3. Not appealable

The following orders are not appealable:

Denying a motion to dismiss petition under the statute relating to dams and mills. Turner v Holleran, 11 M 253 (168);

Granting a new trial in condemnation proceedings. McNamara v Minn. Central, 12 M 388 (269); Witt v St. Paul & N. P. 35 M 404, 29 NW 161;

Denying motion for a new trial after entry of judgment in tax proceedings under the charter of the city of St. Paul. City of St. Paul v Rogers, 22 M 492;

An order preventing a party from intervening who has no direct interest in the cause of action. Bennett v Whitcomb, 25 M 148;

Vacating previous order of dismissal in insolvency proceedings. In re Studdart, 30 M 553, 16 NW 452;

Dismissing appeal from award of water commissioners under Special Laws 1881, Chapter 188. Gurney v City of St. Paul, 36 M 163, 30 NW 661;

An administrative order in an action to wind up a corporation. Brown v Minn. Thresher, 44 M 322, 46 NW 560;

Denying motion to strike out and dismiss objections to allowance of account of trustee. Mpls. Trust v Menage, 66 M 447, 69 NW 224;

Denying motion to set aside report of commissioners in condemnation proceedings. Fletcher v Chgo. St. Paul & Omaha, 67 M 339, 69 NW 1085;

From an order appointing a committee in condemnation proceedings for the purpose of a cemetery. Forest Cemetery v Constans, 70 M 436, 73 NW 153;

Denying a motion to dismiss an appeal from the probate court. Kelly v Hopkins, 72 M 258, 75 NW 374;

Appointing commissioners in condemnation proceedings (overruling In re St. Paul & N. P. 34 M 227, 25 NW 345). Duluth Transfer v Duluth Terminal, 81 M 62, 83 NW 497;

An order of the district court denying a motion to affirm an order of the probate court allowing the account of an executor. McGinty v Kelley, 85 M 117, 88 NW 430;

Order removing a receiver appointed to wind up an insolvent corporation except when it goes beyond the fact of removal and adjudicates the rights of the receiver. Young v Irish, 104 M 367, 116 NW 656;

An order based on an alternative motion, denying the motion for judgment but granting a new trial on the ground the verdict was not sustained by the evidence. Kommerstad v Great Northern, 125 M 297, 146 NW 975.

A foreign administrator, who has no right to maintain an action for wrongful death in the state of his appointment nor in the state where the injury occurred, and hence not in this state, is not aggrieved by an order in a suit brought here by him for the benefit of the next of kin, denying his motion to substitute the next of kin as party plaintiff. Kellogg v Chgo. Rock Island, 126 M 31, 147 NW 667.

An appeal from a non-appealable order and a supersedeas bond given thereon does not deprive the district court of jurisdiction to proceed further in the case. Velin v Lauer Bros. 128 M 10, 150 NW 169.

An order of the district court transferring a cause to the federal district court is not appealable. Ewert v Mpls. & St. Louis, 128 M 77, 150 NW 224.

While from an order imposing punishment for civil contempt there is a right of appeal, from an order imposing punishment for criminal contempt, there is no right of appeal. Red River v Bernardy, 128 M 153, 150 NW 383.

An order denying a motion for judgment notwithstanding the verdict is not appealable. Montee v Great Northern, 129 M 526, 151 NW 1101.

Successive or piecemeal assertions of error resulting in dilatory appeals are not to be tolerated. Noonan v Spear, 129 M 528, 152 NW 270.

An order denying a motion to file an amended and supplemental complaint, made before judgment, is not appealable. Itasca Co. v McKinley, 129 M 536, 152 NW 653.

Where a case is remanded for a new trial, unless defendant consented to a reduction of the verdict, and he immediately makes application for leave to serve and file an amended answer, an order denying the application before a new trial is not appealable. Blied v Barnard, 130 M 534, 153 NW 305.

No appeal lies to the supreme court from an order made by a court commissioner. Sacramento v Niles, 131 M 129, 154 NW 748.

An order denying a motion for such judgment as the moving party may be entitled to upon the files, records, and pleadings in the action, including decision on appeal, is not appealable. National Council v Garber, 132 M 413, 157 NW 691.

Neither a receiver in proceedings to enforce liability of stockholders of an insolvent corporation, nor the creditor upon whose complaint the proceedings are instituted, may appeal from an order granting a rehearing on the allowance of claims. Finch Co. v Le Sueur Co. 134 M 376, 159 NW 826.

The order of the trial court temporarily enjoined the defendant pendente lite, and no appeal lies from the order. County of Lincoln v Curtis, 134 M 473, 149 NW 129.

An order permitting plaintiff to prosecute an action to final determination, and permitting certain parties to plead, and placing the case on the calendar for the next term of court is not appealable. Francis v Heberle, 136 M 463, 161 NW 783.

Jurisdiction over the property gave the trial court power to remove the agent it had appointed and appoint another, and the validity of its order does not depend on notice. No appeal lies from the order. Twin Cities Bank v Anderson Co. 156 M 502, 195 NW 273.

An order refusing to vacate an unauthorized judgment is appealable, but one refusing to vacate a judgment authorized by order is not appealable. In such case, the statutory appeal from the judgment itself is exclusive. Gasser v Spalding, 164 M 445, 205 NW 374.

The provision limiting the time to appeal from the judgment which the home rule charter of the city of St. Paul prescribes shall be entered in assessments for local improvements is valid. In re paving Minnesota Street, 170 M 403, 212 NW 811.

The trial court, on motion of plaintiff's attorneys, vacated a judgment of settlement and dismissal and reinstated the action so as to establish the attorney's lien and ordered judgment against defendants. On defendant's motion, a new trial was granted. This was not appealable. Cook v Byram, 178 M 230, 226 NW 699.

An order pendente lite, impounding attorney's fees in hands of client, secured and to await the order of the court is not appealable. Meacham v Ballard, 180 M 32, 230 NW 113.

The order in foreclosure directing sale in one parcel was a proper procedural order and there is no appeal. Fidelity v Brown, 180 M 173, 230 NW 780.

An order denying a motion to dismiss a proceeding for laches in its prosecution is not appealable. State v Hansen, 183 M 562, 237 NW 416.

There is nothing in clauses (3), (5), or (7), or section 605.09, to indicate that an order granting or denying inspection of books or documents is appealable. Melgaard's Will, 187 M 633, 246 NW 478.

The order denying the motion of the attorney general to strike out the return made by the state auditor to the alternative writ of mandamus, and to strike the names of the attorneys appearing for him from the record is not appealable; but by certiorari, this court may review the order on its merits. State ex rel v District Court, 196 M 44, 264 NW 227.

An order vacating and setting aside unconditionally an order approving settlement of minor's personal injury action and dismissing the action is an appealable order as "affecting a substantial right" under section 605.09 (3) (7). Elsen v State Farmers Mutual, 217 M 565, 14 NW(2d) 860.

VIII. APPEALABILITY OF ORDERS GENERALLY

1. Orders appealable

The following orders have been held appealable:

Vacating an execution sale and ordering an alias to issue. Tillman v Jackson, 1 M 183 (157); Hutchins v Co. Commissioners, 16 M 13 (1);

Unless there is an abuse of discretion, an order striking out a pleading (need not be accepted to). Wolf v Banning, 3 M 202 (133); Starbuck v Dunklee, 10 M 168 (136); Kingsley v Gilman, 12 M 515 (425); Brisbin v American Express Co. 15 M 43 (25); Harlan v St. Paul, Mpls. 31 M 427, 18 NW 147; Vermilye v Vermilye, 32 M 499, 18 NW 832;

Vacating a prior order setting aside a judgment. Marty v Ahl, 5 M 27 (14);

Vacating the appointment of a receiver. Folsom v Evans, 5 M 418 (338);

Setting aside a stipulation in an action between the parties agreeing to the existence of facts in the case. Bingham v Board, 6 M 136 (82);

An order committing for contempt in civil proceedings. Register v State, 8 M 214 (185); Semrow v Semrow, 26 M 9, 46 NW 446; Papke v Papke, 30 M 260, 15 NW 117; Menage v Lustfield, 30 M 487, 16 NW 398; In re Fanning, 40 M 4, 41 NW 1076; State v Leftwich, 41 M 42, 42 NW 598; State ex rel v Willis, 61 M 120, 63 NW 169; Deppe v Ford, 89 M 253, 94 NW 679;

An order discharging a person brought up on a writ of habeas corpus or an order vacating an order discharging, or a final order of a court commissioner directing the granting of relief. State ex rel v Hill, 10 M 63 (45); State ex rel v Buckham, 29 M 462, 13 NW 902; State ex rel v Martin, 93 M 294, 101 NW 303;

Granting leave to issue execution after five years from entry of judgment. Entrop v Williams, 11 M 381 (276);

Refusing to vacate unauthorized judgment. Piper v Johnston, 12 M 60 (27);

Opening a default. Holmes v Campbell, 13 M 66 (58); Peoples' Ice Co. v Schlenker, 50 M 1, 52 NW 219;

Setting aside a stipulation of dismissal. Rogers v Greenwood, 14 M 333 (256);

Order in condemnation proceedings. Minn. Ry. v Doran, 15 M 230 (179); Warren v First Division, 18 M 384 (345); Conter v St. Paul & Sioux City, 24 M 313; In re St. Paul v N. P. 34 M 227, 25 NW 345;

Dismissing a motion to compel the satisfaction of a judgment. Ives v Phelps, 16 M 451 (407);

Denying a motion to vacate a judgment of divorce and to allow defendant to answer. Young v Young, 17 M 181 (153);

Refusing to appoint a receiver. Grant v Webb, 21 M 39;

Orders granting or denying a new trial; granting or denying, dissolving or refusing to dissolve, an injunction; vacating or refusing to vacate an attachment; sustaining or overruling a demurrer; in insolvency proceedings. Knight v Nash, 22 M 452; Roeller v Ames, 33 M 132, 22 NW 177; In re Evan Jones, 33 M 405, 23 NW 835; In re Harrison, 46 M 331, 48 NW 1132; In re How, 59 M 415, 61 NW 456; Eckberg v Schloss, 62 M 427, 64 NW 922; Richter v Merchants Bank, 65 M 237, 67 NW 995;

Denying an application to vacate a judgment against a party after his decease. Stocking v Hanson, 22 M 542;

Denying motion to open a tax judgment. Commissioners v Morrison, 25 M 295;

Order setting aside a tax judgment. County of Chisago v St. Paul & Duluth, 27 M 109, 6 NW 454;

Order directing sheriff to pay over money. Coykendall v Way, 29 M 162, 12 NW 452;

Orders in supplementary proceedings. In re Graeff, 30 M 358, 16 NW 395; In re Jones, 33 M 405, 23 NW 835; Christensen v Tostevin, 51 M 230, 53 NW 461;

Directing sheriff to deliver property levied on, or taken in replevin, to a receiver in insolvency. In re Jones, 33 M 405, 23 NW 835; Elwell v Goodnow, 71 M 390, 73 NW 1095;

Allowing council fees in divorce proceedings. Wagner v Wagner, 34 M 441, 26 NW 450; Schuster v Schuster, 84 M 403, 87 NW 1014;

Allowing amendment of complaint after judgment and directing issues to be placed on the calendar for trial. North v Webster, 36 M 99, 30 NW 429;

Dismissing appeal from order of town supervisors laying out a highway. Town of Haven v Orton, 37 M 445, 35 NW 264;

An order discharging a garnishee. McConnell v Rakness, 41 M 3, 42 NW 539; Cummings v Edwards, 95 M 118, 103 NW 709, 106 NW 304;

In proceedings to wind up corporations. Hospes v N. W. Car Co. 41 M 256, 43 NW 180; 84 M 144, 86 NW 872;

Quashing proceedings of county commissioners informing new school district. Moede v Co. of Stearns, 43 M 312, 45 NW 435;

Denying a motion to correct a judgment entered by the clerk. Nell v Dayton, 47 M 257, 49 NW 981;

Appointing a receiver in foreclosure proceedings. State ex rel v Egan, 62 M 280, 64 NW 813;

Allowing a creditor to share in estate without filing release. Ekberg v Schloss, 62 M 427, 64 NW 922;

For judgment notwithstanding the verdict under Laws 1895, Chapter 320. Kernan v St. Paul City Ry. 64 M 312, 67 NW 71; Noble v G. N. 89 M 147, 94 NW 434; Peterson v Mpls. St. Ry. 90 M 52, 95 NW 751;

Denying application for a discharge in a proceeding relative to the paternity of an illegitimate child. State ex rel v District Court, 79 M 27, 81 NW 536;

Denying a motion to strike from the files a settled case or bill of exceptions. Baxter v Coughlin, 80 M 322, 83 NW 190;

An order of the district court, vacating its previous order, affirming on the merits an order of the probate court refusing to vacate its order allowing the account of a guardian. Levi v Longini, 82 M 324, 84 NW 1017, 86 NW 333;

Striking a case from the calendar because transferred to another court. Chadbourne v Reed, 83 M 447, 86 NW 415;

Denying a motion to set aside service of a summons. Plano v Kauffert, 86 M 13, 89 NW 1124;

Denying a motion to modify a judgment. Halvorsen v Orinoco Co. 89 M 470, 95 NW 320;

Adding new parties defendant. Sundberg v Goar, 92 M 143, 99 NW 638;

Revised Laws 1905, Section 4365, as amended by Laws 1913, Chapter 474 (section 605.09), does not contemplate certifications of questions to this court, but merely saves the right of appeal from an order overruling a demurrer upon the conditions prescribed thereby, the case being reviewable in supreme court the same as prior to the amendment. Benton v County, 125 M 325, 146 NW 1110;

From an order requiring the officers of the village to call requisite meetings, give the required notices, and assess a stated percentage of the cost of paving on benefited property. State ex rel v Dist. Ct. 136 M 462, 161 NW 1055;

An order refusing to vacate an unauthorized judgment is appealable. Kelly v Anderson, 156 M 71, 194 NW 102.

An order of the district court merging several public and private tile drains, is a final order reviewable by certiorari. State ex rel v Dist. Ct. 159 M 428, 199 NW 883.

An order directly committing a person for constructive civil contempt is appealable. Laff v Laff, 161 M 122, 200 NW 936.

An order denying a motion for judgment and also for a new trial except on a single issue, is appealable. Morton v Griggs, 162 M 436, 203 NW 218.

The order of the district court directing the railroad and warehouse commission to make a return is appealable to the supreme court. City of St. Paul v Rd. & Warehouse, 163 M 274, 203 NW 972.

An order vacating an order dissolving an attachment and levy and reinstating the same is appealable. Van Dam v Baker, 164 M 130, 204 NW 633.

An inadvertent error in the findings should be corrected on motion by the trial court. Sprandel v Nims, 165 M 293, 206 NW 434.

Under the circumstances of the instant case, the rule that an order refusing to vacate a non-appealable order is not appealable is not applicable. Carlson v Stafford, 166 M 481, 208 NW 413.

In a complaint stating a cause of action for fraud, an order granting a motion to strike that part supporting such cause of action and letting it stand as embracing only a cause of action for money had and received, was error, and such order is appealable. Simos v Clark, 168 M 277, 209 NW 904.

An order vacating an ex parte order bringing in an additional party defendant is appealable. Lincoln Co. v Poppe, 169 M 392, 211 NW 470.

Where an alternative motion is made, an appeal may be taken from the whole order disposing of the motion, but not from that part granting or denying judgment. Rieke v St. Albans, 179 M 393, 229 NW 557.

An order granting a new trial after judgment vacates the verdict and judgment and is appealable. Ayer v Chgo. & Milwaukee, 189 M 359, 249 NW 581.

Though an appeal will not lie from an order dismissing an action, but only from judgment entered pursuant thereto, an order striking a complaint as sham is appealable, as such is an order striking a pleading or a portion of a pleading. Long v Mutual Trust Co. 191 M 163, 253 NW 762.

An order appointing an administrator is appealable. Firle's Estate, 191 M 233, 253 NW 889.

An order of the probate court made on notice and after hearing allowing the account of a guardian covering a period of 13 years, is appealable. Guardianship of Hoffman, 197 M 524, 267 NW 473.

2. Not appealable

The following orders have been held not appealable:

Dismissing an action before trial on motion of the plaintiff. Fallman v Gilman, 1 M 179 (153); Jones v Rahilly, 16 M 177 (155);

Modifying a prior order granting a new trial. Chouteau v Parker, 2 M 118 (95);

Opening a judgment because of an error in practice only, and where the merits of the case are in no way involved. Westervelt v King, 4 M 320 (236);

Refusing to set aside garnishment proceedings for insufficieny of affidavit, and granting plaintiff leave to file supplemental complaint. Prince v Heenan, 5 M 347 (279);

Granting or refusing amendment of pleadings on trial. Fowler v Atkinson, 5 M 505 (399); White v Culver, 10 M 192 (155); City of Winona v Minnesota Co. 25 M 328; Macauley v Ryan, 55 M 507, 57 NW 151; Hauley v Board, 87 M 209, 91 NW 756;

Refusing leave to serve statement of the case after expiration of statutory limit of time. Irvine v Myers, 6 M 558 (394);

Denying motion for change of venue. Mayall v Burke, 10 M 285 (224); Carpenter v Comfort, 22 M 539; Allis v White, 59 M 97, 60 NW 809;

Statement filed (trial to the court) of the court's findings of fact and law. Von Glahn v Sommer, 11 M 203 (132);

"Ex parte" of the judge of the district court at chambers. Hoffman v Mann, 11 M 364 (262); Schurmeier v First Division, 12 M 351 (228); McNamara v Minn. Central, 12 M 388 (269); State ex rel v Dist. Court, 52 M 283, 53 NW 1157; Fuller v Schutz, 88 M 372, 93 NW 118; Sundberg v Goar, 92 M 143, 99 NW 638;

Admitting or excluding evidence on trial. Hulett v Matteson, 12 M 349 (227);

Denying motion on trial for judgment on the pleadings. McMahon v Davidson, 12 M 357 (232); Lockwood v Bock, 46 M 73, 48 NW 458; State ex rel v McKellar, 92 M 242, 99 NW 807;

Refusing to dismiss action on trial for insufficiency of evidence, or for insufficiency of pleading, or for want of jurisdiction. McMahon v Davidson, 12 M 357 (232); Pillsbury v Foley, 61 M 434, 63 NW 1027;

Requiring payment of costs as condition of continuance. Fay v Davidson, 13 M 298 (273);

Granting motion on trial for judgment on pleadings. Lamb v McKenna, 14 M 513 (385); Rogers v Holyoke, 14 M 514 (387); Hodgins v Heaney, 15 M 185 (142); Lockwood v Bock, 46 M 73, 48 NW 458; U.S. Co. v Ahrens, 50 M 332, 52 NW 898; Co. of Renville v City of Mpls. 112 M 487, 128 NW 669;

Determining a party's right to costs. Minn. Valley Co. v Flynn, 14 M 552 (421); Closen v Allen, 29 M 86, 12 NW 146;

Dismissing action on trial for insufficiency of evidence. Hodgins v Heaney, 15 M 185 (142); Searles v Thompson, 18 M 316 (285); Gottstein v St. Jean, 79 M 232, 82 NW 311;

"Decision" of the court. Wilson v Bell, 17 M 61 (40); Johnson v N. P. 39 M 30, 38 NW 804;

Mere "opinion" of the court. Thompson v Howe, 21 M 1;

Denying a motion to set aside complaint because not conforming to notice in the summons. Board v Young, 21 M 335;

Refusing to dismiss appeal from probate to district court. Rabitte v Nathan, 22 M 266; Kelley v Hopkins, 72 M 258, 75 NW 374;

Denying new trial after judgment in tax proceedings under St. Paul charter. City of St. Paul v Rogers, 22 M 492;

Denying motion for removal from state to federal court. St. Anthony v King, 23 M 186;

Refusing to strike out allegations claimed to be irrelevant and redundant. Rice v First Division, 24 M 447; Vermilye v Vermilye, 32 M 499, 18 NW 832;

Denying a motion to intervene. Bennett v Whitcomb, 25 M 148;

In proceedings for criminal contempt. Semrow v Semrow, 26 M 9, 46 NW 446; Menage v Lustfield, 30 M 487, 16 NW 398; In re Fanning, 40 M 4, 41 NW 1076; State v Leftwich, 41 M 42, 42 NW 598; State ex rel v Willis, 61 M 120, 63 NW 169;

Discharging order to show cause and restraining order. Baldwin v Canfield, 26 M 62, 1 NW 585;

Denying motion for settlement of case. State ex rel v Cox, 26 M 214, 2 NW 494; State ex rel v McDonald, 30 M 98, 14 NW 459; Richardson v Rogers, 37 M 461, 35 NW 270; State ex rel v Baxter, 38 M 137, 36 NW 108;

Directing judgment on appeal from justice court on law alone. Chesterson v Munson, 26 M 303, 3 NW 695;

Setting aside taxation of costs and ordering retaxation. Felber v Southern Ry. 28 M 156, 9 NW 635; Herrick v Butler, 30 M 156, 14 NW 794;

On default under Rule 10 of the district court. Dols v Baumhoefer, 28 M 387, 10 NW 420; Thompson v Haselton, 34 M 12, 24 NW 199;

Affirming taxation of costs in justice court. Closen v Allen, 29 M 86, 12 NW 146;

Denying motion to amend or change conclusions of law. Shepard v Pettit, 30 M 119, 14 NW 511; Wheadon v Mead, 71 M 322, 73 NW 975; Savings Bank v St. Paul Plow, 76 M 7, 78 NW 873; Lamprey v St. Paul & Chicago, 86 M 509, 91 NW 29;

Vacating previous order of dismissal and reinstating petition in insolvency proceedings. In re Studdart, 30 M 553, 16 NW 452;

In condemnation proceedings. Minn. Central v Peterson, 31 M 42, 16 NW 456; Fletcher v Chgo. & St. Paul, 67 M 339, 69 NW 1085; Duluth Transfer v Duluth Terminal, 81 M 62, 83 NW 497;

For insufficiency of pleadings. Thorp v Lorenz, 34 M 350, 25 NW 712;

Refusing to strike out portions of pleadings for duplicity. Exley v Berryhill, 36 M 117, 30 NW 436;

Refusing to dismiss appeal from award of water commissioners under St. Paul Charter. Gurney v City of St. Paul, 36 M 163, 30 NW 661;

Refusing to strike out a pleading as sham. Natl. Bank v Cargill, 39 M 477, 40 NW 570;

Granting or denying a motion to vacate a nonappealable order. Brown v Minn. Thresher, 44 M 322, 46 NW 560; Lockwood v Bock, 46 M 73, 48 NW 450;

Requiring a bill of particulars to be made more specific. Van Zandt v Wood, 54 M 202, 55 NW 863;

Denying motion for new trial on an issue of law (justice court appeal). St. Cloud Council v Karels, 55 M 155, 56 NW 592;

Directing compulsory reference. Bond v Welcome, 61 M 43, 63 NW 3;

Vacating a prior order vacating a judgment. State v Crossley Park, 63 M 205, 65 NW 268;

Granting leave to file claim in insolvency proceedings after time limited. Richter v Merchants Natl. 65 M 237, 67 NW 995;

Denying motion to strike out and dismiss objections filed to allowance of account of trustee. Mpls. Trust v Menage, 66 M 447, 69 NW 224;

Dismissing an appeal from the justice court. Graham v Conrad, 66 M 470, 69 NW 215; Taylor v Red Lake Falls, 81 M 492, 84 NW 301;

Denying or granting a motion for judgment notwithstanding the verdict. St. Anthony v Graham, 67 M 318, 69 NW 1077; Oelschlegel v Chgo. Great Western, 71 M 50, 73 NW 631; Sanderson v N.P. 88 M 162, 92 NW 542; Peterson v Mpls. St. Ry. 90 M 52, 95 NW 751;

Denying a stay of proceedings. Graves v Bachus, 69 M 532, 72 NW 811;

Granting receiver leave to bring action to enforce statutory liability of stockholders. Bank v Anderson, 70 M 414, 73 NW 175;

Appointing a committee in condemnation proceedings for cemetery. Forest Cemetery v Constans, 70 M 436, 73 NW 153;

Denying motion for additional or amended findings. Rogers v Hedemark, 70 M 441, 73 NW 252; Lamphrey v St. Paul & Chgo. 86 M 509, 91 NW 29;

Denying a motion to make pleadings more definite and certain. American Book v Kingdom, 71 M 363, 73 NW 1089; State v O'Brien, 83 M 6, 85 NW 1135;

Denying motion for judgment on findings after reversal on appeal. Fulton v Town of Andrea, 72 M 99, 75 NW 4;

Granting peremptory writ of mandamus. State ex rel v Copeland, 74 M 371, 77 NW 221; State ex rel v McKellar, 92 M 242, 99 NW 807;

Setting and allowing a case. Arine v Mpls. & St. Louis, 76 M 201, 78 NW 1108, 1119;

Dismissing action for want of prosecution. Gottstein v St. Jean, 79 M 232, 82 NW 311;

Opening case and permitting party to offer further evidence. Sunvold v Melby, 82 M 544, 85 NW 549;

Striking or refusing to strike from the calendar. Chadbourne v Reid, 83 M 447, 86 NW 415;

Conditional order before complying with condition. Swanson v Andrus, 84 M 168, 87 NW 363, 88 NW 252;

Refusing to discharge garnishee. Duxbury v Shanahan, 84 M 353, 87 NW 944;

District court denying a motion to affirm an order of the probate court allowing the account of an executor. McGinty v Kelley, 85 M 117, 88 NW 430;

Denying motion to amend a notice of an election contest. Hanley v Board, 87 M 209, 91 NW 756;

Granting or denying motion for inspection of documents. Harris v Richardson, 92 M 353, 100 NW 92;

Denying motion to consolidate separate actions. Webster v Bader, 109 M 146, 123 NW 289.

An order based upon an alternative motion, denying the motion for judgment but granting a new trial on the ground that the verdict was not sustained by the evidence is not an appealable order; the former rule of the court sustaining the right of appeal from such orders was abrogated by Laws 1913, Chapter 474. Kommerstad v G.N. 125 M 297, 146 NW 975; Greenberg v National Council, 132 M 84, 155 NW 1053.

An order granting a new trial is not appealable, unless it appears therefrom, or from a memorandum attached, that it is granted exclusively on the ground of errors of law occurring at the trial. When it appears that misconduct is one of the grounds, it is not appealable. Heide v Lyons, 128 M 488, 151 NW 139.

An order denying a motion for judgment notwithstanding the verdict is not appealable. Montee v G.N. 129 M 527, 151 NW 1101; Snure v Schlitz Brewing Co. 139 M 516, 166 NW 1068.

The statutory period having expired, no appeal lies from an order made before judgment denying a motion for a new trial. Harcum v Benson, 135 M 23, 160 NW 80.

An order for judgment on the pleadings is not appealable. The appeal lies from the judgment. Arnoldy v Northwestern Bank, 142 M 449, 172 NW 699.

It is elementary that the supreme court can only pass on questions that have been actually or presumably considered and determined in the court below. Delasca v Grimes, 144 M 70, 174 NW 523.

The rule that the supreme court refuse to entertain an appeal from an ex parte order applies equally to an order made by the trial court on its own motion; and in the instant case, the same rule applies to a writ of certiorari. In re Judicial Ditch, 156 M 401, 194 NW 1023.

An order denying a motion for leave to file an amended complaint is not appealable. Swanson v Alworth, 157 M 312, 196 NW 260.

An order denying a motion to strike is not appealable. Wade v Citizens Bank, 158 M 232, 197 NW 277.

The drainage law does not give the petitioners the right to appeal from an order of the district court dismissing proceedings to establish a ditch. The remedy is by certiorari. Jensen v Co. Board, 159 M 140, 198 NW 455.

Inasmuch as the writ of mandamus is designed to compel the exercise of a judicial function, but not the manner of its exercise, it cannot be resorted to for the purpose of reviewing an order of the district court determining the manner of the trial of a civil action. Swanson v Alworth, 159 M 193, 198 NW 453.

A motion to amend findings is not appealable, though coupled with a motion for a new trial. Nash v Kirschoff, 161 M 409, 201 NW 617; Taylor v Chgo. & Great Western, 163 M 46, 203 NW 434; State ex rel v Probst, 165 M 361, 206 NW 642.

Appeal from an order opening divorce judgment for purposes of taking testimony to ascertain whether defendant concealed himself from service of process at time of bringing action, was dismissed, because order is interlocutory and not appealable. Thomas v Thomas, 161 M 523, 201 NW 304.

An order refusing to vacate a judgment authorized by order is not appealable. Gosser v Spalding, 164 M 443, 205 NW 374; Matchan v Phoenix, 165 M 479, 205 NW 637.

An order concerning the custody of minor children, pendente lite, is not appealable. Brunn v Brunn, 166 M 283, 207 NW 616.

An order denying a motion to amend the conclusions of law is not appealable. Farmers Bank v Groves, 167 M 511, 210 NW 37.

An order denying a motion to strike out a portion of a pleading as immaterial, irrelevant, and redundant, is not appealable. Lowe v Nixon, 170 M 391, 212 NW 896.

An order for judgment is not appealable. Palmer v First Trust Co. 179 M 381, 230 NW 257, 258.

An order denying a new trial is appealable; but when no ground for a new trial is stated in the motion, no question is raised, and the order stands for affirmance. Hoyt v Kittson Bank, 180 M 93, 230 NW 269.

Record does not show judgment, and the orders complained of in the notice of appeal are not appealable. Merchants Bank v Hanson, 181 M 627, 231 NW 617.

An order refusing to amend findings of fact and conclusions of law by adding to, or striking out, or inserting others in lieu of those made is not appealable; but the error claimed is reviewable when properly presented for appeal from an appealable order or judgment. Dow v Bittner, 185 M 499, 241 NW 569.

An order of the district court dismissing an appeal from probate court is not appealable. Ploetz Estate, 186 M 395, 243 NW 383.

Order denying the motion for judgment notwithstanding the findings is not appealable, so review is only on the motion for new trial. Gunderson v Anderson, 190 M 247, 251 NW 815.

An order of the probate court denying a motion to revoke a prior order appointing an administrator is not appealable. Firle's Estate, 191 M 233, 253 NW 889.

In an accounting by a trustee, a determination of the trial court based on conflicting affidavits should not be disturbed on appeal. Fleischmann v Northwestern Bank, 194 M 227, 260 NW 310.

The appeal not being taken from the whole order disposing of an alternative motion, and no judgment having been entered, the appeal must be dismissed. Mallery v Northfield Seed Co. 194 M 236, 259 NW 825.

Plaintiff's appeal from the separate orders granting each defendant judgment non obstante must be dismissed as not appealable. Selover v Selover, 201 M 562, 277 NW 205.

An order discharging an order to show cause and dismissing a criminal contempt proceedings can only be reviewed by certiorari. Spannaus v Lueck, 202 M 497, 279 NW 216.

3. Miscellaneous

An order striking out as sham and frivolous and granting judgment in favor of plaintiff, is appealable only as to that part which eliminates the pleading. Weisman v Cohen, 160 M 440, 200 NW 636.

A motion to vacate an order striking out an answer as sham must be made returnable before the time to appeal from the original order expires. U.S. Co. v Melin, 160 M 530, 200 NW 807.

Plaintiff, upon an adverse ruling vacating a judgment and setting aside a personal service made without the state, does not waive his right to appeal from such ruling by filing a new affidavit and causing another personal service to be made without the state. Haney v Haney, 163 M 114, 203 NW 614.

It is doubtful whether an appeal can be taken from an order denying a motion to vacate an order dismissing an appeal from a judgment of a justice court. Hershman v Razkin, 168 M 31, 209 NW 488.

The question presented is in the nature of a moot one, and the appeal is dismissed. Works v Tiber, 169 M 172, 210 NW 877.

The provision limiting the time to appeal from the judgment which the home rule charter of the city of St. Paul prescribes shall be entered in assessments for local improvements is valid. In re Minnehaha St. 170 M 403, 212 NW 811.

The following orders are not appealable:

(1) A discretionary order; (2) An order refusing to vacate a nonappealable order, and (3) An order refusing to vacate an order granting a new trial on the ground of misconduct. Davis v Royce, 174 M 611, 219 NW 928.

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. LaRue v Village of Nashwauk, 176 M 117, 222 NW 527.

By paying the costs and damages awarded plaintiff, in an action in ejectment, a defendant does not destroy his right to appeal from the judgment of restitution. Patnode v May, 182 M 348, 234 NW 459.

An order denying a motion to vacate an ex parte order bringing in an additional party is appealable. Sheehan v Hall, 187 M 582, 246 NW 353.

When the object of a proceeding in contempt is to impose punishment merely, the order is reviewable on certiorari; but when the object is to enforce the doing of something in aid of civil proceedings, review is on appeal. Proper v Proper, 188 M 15, 246 NW 481.

An order denying a motion to correct a verdict so as to include erroneously omitted interest is not appealable. Newberg v Conley, 190 M 459, 252 NW 221.

An order refusing findings is not appealable, nor is an order denying a motion for amended findings. Nichols v Village of Morristown, 192 M 510, 257 NW 82; White v Mazal, 192 M 522, 257 NW 281.

A motion, after judgment was entered, to set aside or reduce the amount of the verdict and judgment on a ground presented to and passed upon at the trial, and again on an alternative motion, cannot be maintained, and an order denying such motion is not appealable. Lavelle v Anderson, 197 M 169, 266 NW 445.

Plaintiff sued defendants for false imprisonment. When the case was reached, the plaintiff being absent, the case was dismissed without prejudice. Later, another attorney moved to vacate the dismissal, and the motion was denied, and no appeal was taken. Later, still another moved to vacate, and again denied. An appeal lies from the order. Hoffer v Fawcett, 204 M 612, 284 NW 873.

An appeal lies from an order denying a motion to vacate an order striking out an answer as sham, but the motion to vacate must be made returnable before the expiration of the time to appeal from the original order. Johnson v Kruse, 205 M 237, 285 NW 715.

An order denying a motion to vacate a nonappealable order is not appealable. Seorum v Maruda, 216 M 364, 12 NW(2d) 779.

IX. RELATIVE TO SPECIAL CASES

1. Application to special proceedings

The appeal from the assessment of damages made by the commissioners to the district court, and the power of such district court to grant a new trial is not like the right to appeal in a civil action conferred by statute. Such power is inherent in courts of general jurisdiction, not given, but regulated by statute. McNamara v Minn. Central, 12 M 388 (269); Conter v St. Paul & Sioux City, 24 M 313.

Special Laws 1878, Chapter 150, being "an act to authorize the location of an avenue around Lake Phalen", gives an appeal from the district to the supreme court. Co. of Ramsey v Stees, 27 M 14, 6 NW 401.

Prior to judgment, a railroad company may abandon condemnation proceedings. Witt v St. Paul & Northern, 35 M 404, 29 NW 161.

A judgment vacating a town or village plat is appealable as a "final order affecting a substantial right", but must be taken within 30 days from notice. Koochiching v Franson, 91 M 404, 98 NW 98.

2. Appeal from several orders

An ex parte order adding new parties defendant to an action is not appealable; but an order denying a motion to vacate such an order is appealable. Sundberg v Goar, 92 M 143, 99 NW 638.

3. Orders vacating non-appealable orders

The merits of a non-appealable order made by a district court cannot be reviewed in supreme court by means of an appeal from an order vacating and setting it aside, or refusing to do so. Brown v Minn. Thresher, 44 M 322, 46 NW 560; Lockwood v Bock, 46 M 73, 48 NW 458.

4. Who may complain

After a transcript of the judgment for costs in the supreme court had been filed, and the trial court had made its order allowing the fees and expenses of the attorneys for plaintiff, the said attorneys appealed, making the defendant a party. As the defendant is in no way concerned with the distribution of the amount they are to pay, the appeal as to the defendant was properly dismissed. Jensen v Chgo. Milwaukee, 160 M 124, 199 NW 579.

As a representative of the creditors of a corporation, a receiver may enforce their rights against stockholders and appeal from an order disposing of money in his custody, if there are corporate creditors whose rights are prejudiced thereby. Peterson v Darelius, 168 M 365, 210 NW 38.

Where a vendee, who has deposited a part of the purchase price with a third party to be delivered to the vendor on performance on his part, obtains a judgment against the vendor, and such third party for the return of the deposit, the third party having no interest in the fund cannot question the correctness of the judgment on appeal. Goodspeed v Bowler, 169 M 123, 210 NW 859.

Appeals from orders denying motions for new trials were taken by and in the name of the plaintiff after it had been adjudged a bankrupt, and a receiver of its property had been appointed. Respondents moved to dismiss. Thereupon the receiver applied to the supreme court for an order substituting him as appellant, and the application was granted. The motion to dismiss was denied. Taney v Hodson, 170 M 230, 212 NW 196.

The defendant, Tee Pee Company, is not in a position to complain of the verdict in favor of its codefendant, the transportation company. Erickson v Northland Co. 181 M 406, 232 NW 715.

Amount cannot be questioned on appeal as defendant had made a commitment as to the amount in case liability was found. Bashaw v City Market, 187 M 548, 246 NW 358.

When on motion of the plaintiffs, the verdicts were amended by taking the allowance for medical care from the verdict in favor of the wife and adding to that of the husband, the record being in proper order, there is no ground for review. Krinke v Gramer, 187 M 595, 246 NW 376.

An appellant cannot successfully predicate error on trial procedure in which he asquiesced without objection. Borowski v Sargent, 188 M 102, 246 NW 540.

County board, acting as the tribunal to hear and pass upon a petition to detach land from one school district and attach it to another, is not an aggrieved party and cannot appeal. Kirchoff v Board, 189 M 226, 248 NW 817.

The administrator of an estate may appeal in his representative capacity and without appeal bond from an order of the probate court, surcharging and settling his final account. Peterson Estate, 197 M 344, 267 NW 213.

An order of the probate court, made on notice and after hearing, allowing the account of a guardian covering a period of 13 years is an appealable order. Guardianship of Hoffman, 197 M 524, 267 NW 473.

A trustee whose resignation has been accepted by the court, its final account settled and a new trustee appointed, in the interim between the appointment and the qualification of the new trustee is not an aggrieved party and cannot appeal from the court's order requiring it to pay over moneys in its possession. Malcolmson v Goodhue Bank, 199 M 258, 271 NW 455.

A pretermitted grandchild who by contract with the children of the testator acquired an interest in the residue of the estate is a party aggrieved by an order of the probate court allowing a claim, and may appeal to the district court. Burton's Estate, 203 M 275, 281 NW 1.

The corporation appealed in the representative suit. On account of the anomalous position of a corporation in such suit, and although it is not aggrieved party, it should be before the appellate court and the motion to dismiss is denied. Keough v St. Paul Milk Co. 205 M 99, 285 NW 809.

As the representative of the creditors of the corporation, a receiver may enforce their rights against stockholders and appeal from an order disposing of money in his custody. Peterson v Darelius, 168 M 365, 210 NW 38.

Where a stockholder brings action against officers and others for wrong to the estate, and the receiver takes over the suit, and judgment is rendered against the receiver, who abandons the case, and does not appeal, the stockholder is denied the right to appeal. Singer v Allied Factors, 216 M 443, 13 NW(2d) 378.

5. Scope of act

If a jury trial is wrongfully denied, the error can be reviewed only on appeal. Mandamus is designed to compel the exercise of a judicial function, but not to control the manner of its exercise. Swanson v Alworth, 159 M 193, 198 NW 453.

Where the court has jurisdiction and erroneously denies an application for a change of judge, the remedy is by appeal. Defendant is not entitled to be discharged on a writ of habeas corpus. State ex rel v McNaughton, 159 M 403, 199 NW 103.

Whether an appeal from a judgment in a judicial ditch proceeding upon an audit made pursuant to Laws 1919, Chapter 471, lies directly to the supreme court, quaere. Gove v Co. of Murray, 161 M 66, 200 NW 833.

Appeal from an order denying an injunction against the clerk of the district court to prevent his entry of judgment pursuant to an order is affirmed, but the procedure is questionable. Berker v Segal, 169 M 116, 210 NW 868.

Orders made under the statute allowing claims against an insolvent corporation and assessing its stockholders, are final, and do not require the entry of judgment thereon; and must be appealed from if at all, within 30 days from notice. In re Olivia Cooperative Co. 169 M 131, 210 NW 628.

An order denying motion to vacate information filed by county attorney is not appealable. State v Saha, 169 M 514, 211 NW 469.

Jurisdiction cannot be conferred by stipulation where the court has only appellate jurisdiction. Where the surety on the bond of a public local grain warehouse appealed from the allowance of certain claims, but served notice of appeal on only one, the appeal was dismissed as to other claimants. Anderson v Krueger, 170 M 225, 212 NW 198.

Where it appears from appellant's brief that only one finding is questioned, the insufficiency of the assignment may be overlooked. Taney v Hodson, 170 M 230, 212 NW 196.

An order for assessment of corporate stock made after a hearing under section 316.18 is conclusive only as to total amount, propriety, and necessity of assessment. Findings in such order relative to personal defenses are not final. McCabe v Farmers Supply Co. 172 M 33, 214 NW 764.

No appeal lies from an order for judgment. Brochin v Lifson, 172 M 51, 215 NW 180.

An appeal from a judgment does not bring up proceedings taken subsequent to its rendition, but only those which resulted in the judgment. Bergman v Williams, 173 M 253, 217 NW 127.

An order settling the final account of a receiver is a final appealable order. Duncan v Barnard Cope, 176 M 470, 223 NW 775.

Exclusion of a statement of facts from a bill of exceptions as inaccurate is not reviewable on appeal from order denying a new trial. State v Phillips, 176 M 472, 223 NW 912.

The appeal is not frivolous, and the motion to dismiss is denied. Gale v Pearce, 176 M 631, 220 NW 156; 175 M 622, 221 NW 681.

An appeal from the order of the court affirming the action of the clerk in denying a motion to tax costs is a frivolous appeal. An order denying a motion to vacate a non-appealable order is not appealable. Thompson v Chgo. Northwestern, 178 M 232, 226 NW 700.

An appeal does not lie to review a decision of the juvenile court acting under Chapter 260. State v Zenzen, 178 M 394, 227 NW 356.

Jurisdiction on appeal must affirmatively appear from the record. It cannot be conferred by consent of litigants. Elliott v Retail Insurance Co. 181 M 573, 233 NW 316.

The power of the district court to review and vacate an appealable order made before judgment, or to permit renewal or repetition of the motion, is not lost because of expiration of the time for appeal. Barrett v Smith, 183 M 431, 237 NW 15.

The administration and settlement of a testamentary trust under the orders and supervision of the district court is a special proceeding. No appeal is provided. Rosenfeldt's Will, 184 M 303, 238 NW 687.

Certiorari will not lie to review an intermediate order of the lower court. Saltere v Uhlir, 196 M 541, 265 NW 333.

Judgment in an action by the mortgagor under moratorium statute denying relief and granting foreclosure is appealable. It is not subject to review on certiorari. Flakne v Metropolitan Life, 198 M 471, 270 NW 566.

Granting plaintiff's motion to substitute personal representative of deceased defendant is appealable. O'Keefe v Scott, 201 M 51, 275 NW 370.

An order for inspection of books and papers is an intermediate order and not reviewable by certiorari. Asplund v Brown, 203 M 571, 282 NW 473.

The supreme court has jurisdiction to remand a case to the trial court to enable appellant to move that court that its memorandum be made a part of the order pending on appeal. State ex rel v Anderson, 207 M 357, 291 NW 605.

There was sufficient evidence of contributory negligence to go to the jury, so the verdict must stand. Repplinger v Hajek, 209 M 135, 296 NW 23.

An order of the district court in certiorari proceedings which finally disposes of administrative proceedings by ordering that the administrative decision be set aside and vacated is appealable, though in the form of an order for judgment. State ex rel v Board, 213 M 550, 7 NW(2d) 544.

Finality of judgment for purposes of appeal in federal courts is not controlled by procedure in state courts, but governed by federal statutes and procedure rules and decisions. U.S. v Nordbye, 75 F(2d) 744.

605.10 BOND OR DEPOSIT FOR COSTS.

HISTORY. R.S. 1851 c. 81 s. 12; P.S. 1858 c. 71 s. 12; G.S. 1866 c. 86 s. 9; G.S. 1878 c. 86 s. 9; G.S. 1894 s. 6141; R.L. 1905 s. 4366; G.S. 1913 s. 8002; G.S. 1923 s. 9499; M.S. 1927 s. 9499.

An appeal to the district court, from an order of the probate court, does not stay the operation of such order while the appeal is pending. Dutcher v Culver, 23 M 415.

Where an order of the district court requiring the payment of money is appealed to the supreme court, and a stay bond executed conditioned "to abide and satisfy the judgment or order which the appellate court may give herein", 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. Erickson v Elder, 34 M 370, 25 NW 804.

A defective bond may be amended or a new bond substituted. Watier v Buth, 87 M 205, 91 NW 756, 92 NW 331.

Does not operate as a stay. Cummings v Edwards, 95 M 118, 103 NW 709, 106 NW 304.

The supreme court has jurisdiction, after an appeal to it has been perfected, to direct the appellant to give a new supersedeas bond, and, in case of his default, to vacate the stay whenever it is made to appear that the original bond is clearly insufficient. Bock v Sauk Center, 100 M 71, 110 NW 257.

An ordinary cost bond, such as authorized by this section, conditioned on the payment of costs and charges which may be awarded against appellant on the appeal, does not operate as a supersedeas. Schofield v Scheoffe, 104 M 127, 116 NW 211.

The proper procedure to obtain money deposited with the court on an appeal in lieu of the statutory bond, under this section, is to apply to the court having jurisdiction of the fund for an order directing its application. Spear v Johnson, 111 M 74, 126 NW 402.

Deposit of $250.00 in lieu of an appeal bond is authorized by statute, and no order of the court is necessary. Thwing v McDonald, 134 M 148, 156 NW 780, 158 NW 820.

The stipulation signed by the city attorney to stay all proceedings until the conclusion of the appeal, subjected the defendants to the same liability for damages as would exist had a supersedeas bond been given. Roerig v Houghton, 144 M 231, 175 NW 542.

A bond on appeal conditioned to pay damages sustained by reason thereof is enforceable according to its terms as a common law bond though such bond may not have been necessary to secure a stay. Miller v Reiter, 155 M 110, 192 NW 740.

After the filing of an approved supersedeas bond in the supreme court, a prior garnishment or levy under execution may be vacated and released by order of the supreme court under its inherent powers. Barrett v Smith, 184 M 107, 237 NW 881.

To effect a stay of proceedings on appeal by defendant from judgment for restitution in a forcible entry case, the bond on appeal must conform to the provisions of section 605.15. Gruenberg v Saumweber, 188 M 567, 248 NW 38.

On certiorari to the industrial commission, the supreme court is invested with jurisdiction upon the filing of a bond fixed and approved by the commission and payment of $10.00 to its secretary for transmission to the clerk of the supreme court. Nelson v Krause, 201 M 123, 275 NW 624.

Inasmuch as a representative, in conduct of an action for wrongful death, acts for the district court and not at all for the probate court or the estate of the deceased, he is not acting in his capacity as executor or administrator, and therefore is not relieved from the necessity of furnishing an appeal bond or undertaking, or depositing cash in lieu thereof. Sworski v Colman, 203 M 545, 282 NW 276.

The bond was inadequate, but the supreme court permitted the appeal and all records to stand on condition appellant file, within ten days, a proper bond, duly approved, in the sum of $2,000, or deposit cash in lieu thereof. Geddes v Broman, 209 M 603, 295 NW 518.

605.11 APPEAL FROM ORDER; SUPERSEDEAS.

HISTORY. R.S. 1851 c. 81 s. 11; P.S. 1858 c. 71 s. 11; 1861 c. 22 s. 1; G.S. 1866 c. 86 s. 10; G.S. 1878 c. 86 s. 10; G.S. 1894 s. 6142; R.L. 1905 s. 4367; G.S. 1913 s. 8003; G.S. 1923 s. 9500; M.S. 1927 s. 9500.

Illustrations of cases involving an appeal from decisions in actions to enforce liability on an appeal bond. Galloway v Yates, 10 M 75 (53); First Nat'l v Rogers, 13 M 407 (376); Menage v Newcome, 33 M 143, 22 NW 182; Erickson v Elder, 34 M 370, 25 NW 804; Reitan v Goebel, 35 M 384, 29 NW 6; Friesenhohn v Merrill, 52 M 55, 53 NW 1024; Kimball v Southern Land, 57 M 37, 58 NW 868; Estes v Roberts, 63 M 265, 65 NW 445; Vent v Dul. Trust Co. 77 M 523, 80 NW 640.

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 by Laws 1861, Chapter 22, and it is improper for the plaintiff to enter judgment before the end of the ten days. The effect of a stay is limited to the order from which the appeal was taken. Yale v Edgerton, 11 M 271 (184).

An appeal was taken to the supreme court from an order striking out certain portions of the answer. Judgment affirming the order was entered in the supreme court and the mandate transmitted to the district court on Nov. 7, 1865. Notice of trial in the district court (at the general term commencing Nov. 9, 1865) was served Oct. 29, 1865. Such notice was premature, and defendant not appearing, the trial had in pursuance of said notice was premature. Starbuck v Dunklee, 12 M 161 (97).

The effect of an appeal from a judgment is not to supersede the proceedings taken prior to the appeal, but only to suspend such proceedings in the con-

dition they exist at the time of the appeal, and prevent any further step during its pendency. Robertson v Davidson, 14 M 554 (422).

The effect of a stay bond on appeal from an order allowing a peremptory mandamus is to "stay all proceedings" upon the order and "save all rights thereby affected". State ex rel v Webber, 31 M 211, 17 NW 339.

Under Ex. Laws 1881, Chapter 10, Section 1, amending General Statutes 1878, Chapter 34, Section 47, at any time after the making of the order prescribing the location and manner of the crossing of one railroad by another, the petitioning corporation is entitled to proceed immediately to make and operate the same upon filing the bond prescribed in section 1, notwithstanding the adverse party has heretofore, and before the meeting of the commissioners, perfected an appeal from the order appointing them, by executing a stay bond. State ex rel v District Court, 35 M 461, 29 NW 60.

Illustrations of the effect of a stay bond on appeal in injunction proceedings. Sullivan v Wiebeler, 37 M 10, 32 NW 787; State v Duluth St. Ry. 47 M 369, 50 NW 332; State ex rel v District Court, 52 M 283, 53 NW 1157; Graves v Backus, 69 M 532, 72 NW 811; State ex rel v District Court, 78 M 464, 81 NW 323.

An appeal from an order refusing, except on terms, to open a default and allow an answer to be made, is not effectual to stay the entry of judgment upon the default. Exley v Berryhill, 37 M 182, 33 NW 567.

Upon the dissolution of a writ of attachment, the officer is not bound to retain the property to enable the plaintiff to appeal from the order dissolving it, and give a stay bond. Ryan Drug v Peacock, 40 M 470, 42 NW 298.

Upon an appeal from an order, proceedings on it are stayed, and rights under it saved, only as to the date of filing the supersedeas bond. The supersedeas does not relate back to the date of the order so as to annul proceedings already had, or to restore rights under it which had previously expired. Waalfolk v Bruns, 45 M 96, 47 NW 460.

Where a defendant attempts to plead in abatement the pending of a former action, which has been dismissed by the court below, but which he pleads is pending in the supreme court, it is essential to allege at least that such appeal was taken and a supersedeas bond filed prior to the commencement of the present suit. Althen v Tarbox, 48 M 18, 50 NW 1018.

Effect on appeal from order sustaining a demurrer but allowing adverse party to plead over. Stickney v Jordain, 50 M 258, 52 NW 861.

An appeal from an order refusing a new trial, the stay bond being filed, is effectual as a stay, and suspends the right to enter judgment in the trial court. (See Exley v Berryhill, 37 M 182, 33 NW 567). St. Paul & Dul. v Village of Hinckley, 53 M 102, 54 NW 940.

When an appeal is taken from an order appointing a receiver pendente lite, and a supersedeas bond is duly executed and filed, the power of the receiver is suspended in reference to the order appealed from, and the order remains inoperative pending appeal. First Nat'l v Backus, 63 M 115, 65 NW 255.

The appeal of the plaintiffs from the order vacating the judgment in the former action did not reinstate the judgment so as to give it operation as an estoppel. Hershey v Meeker Co. 71 M 255, 73 NW 967.

A bond for costs does not operate as a stay. Cummings v Edwards-Woods Co. 95 M 118, 103 NW 709, 106 NW 304.

The supreme court has jurisdiction, after an appeal to it has been perfected, to direct the appellant to give a new supersedeas bond, and, in case of his default, to vacate the stay whenever it is made to appear that the original bond is clearly insufficient. Bock v Sauk Center Co. 100 M 71, 110 NW 257.

Where a prisoner, after conviction and sentence to imprisonment, but before commitment, obtains a writ of habeas corpus, and after hearing thereon, is remanded to custody, an appeal by him from an order discharging the writ and so remanding him does not stay the criminal proceedings, and so deprive the court of authority to issue a commitment upon such conviction pending the appeal. State ex rel v McDonald, 123 M 84, 142 NW 1051.

Where a party taking an appeal by agreement gives a common law bond to pay any judgment rendered in the action, an agreement to stay proceedings and forbear entering judgment pending the appeal, is a sufficient valid consideration. First Bank v Stevens, 123 M 218, 143 NW 355.

An appeal from a nonappealable order and a supersedeas bond given thereon does not deprive the district court of jurisdiction to proceed further in the case. Velin v Lauer, 128 M 10, 150 NW 169.

A deposit of $250.00 in lieu of an appeal bond, conditioned to pay costs on appeal, does not stay proceedings on the judgment. Thwing v McDonald, 134 M 148, 156 NW 780, 158 NW 820.

An unapproved supersedeas bond does not stay proceedings. Sweeney v Village of Ellsworth, 135 M 474, 159 NW 1067.

The supreme court has the power to protect a respondent during the pending of an appeal against inadequate or improvident stay bonds approved and filed in the trial court. Oxford v Western Syndicate, 141 M 412, 168 NW 97, 170 NW 587.

Where the building inspector stipulated to be charged with the same liability as if a bond was given, and plaintiff did not demand a supersedeas bond, said inspector could not be held liable in damages. Roerig v Houghton, 144 M 232, 175 NW 542.

A bond on appeal conditioned to pay damages sustained by reason thereof is enforceable according to its terms as a common law bond though such bond may not have been necessary. Miller v Rieter, 155 M 110, 192 NW 740.

The trial court made and filed an order refusing to vacate the writ of attachment unless the defendant file a bond in the sum of $4,000, conditioned for payment of any judgment obtained. The bond was furnished, and also appealed, furnishing a cost bond. The original bond was in the nature of supersedeas and carries liability as such. General Woodwork v Northwest Body, 155 M 509, 193 NW 595.

No supersedeas bond having been given, the respondent entered judgment on the findings of the trial court. This made necessary a modification of the supreme court's opinion and mandate. Hansen v Wilmers, 162 M 145, 202 NW 708.

In an action on the supersedeas bond given on appeal from a decision in an injunction suit, affirmed in supreme court, holding plantiff therein not entitled to an injunction, there can be no defense to the actual damages caused the defendants therein, except such equitable defenses as are available in ordinary actions on contract. Ind. School v Oliver Mining Co. 169 M 15, 208 NW 952, 210 NW 856.

An appeal from an order denying a motion for a new trial, unaccompanied by a supersedeas bond as required by statute, does not prevent entry of judgment. Blythe v Kujawa, 177 M 79, 224 NW 464.

In an unlawful detainer action, defendant gave two stay and appeal bonds, one from the justice to the district court and the other on appeal to the supreme court. Both sets of bondsmen were properly joined in one action. Roehrs v Thompson, 185 M 154, 240 NW 111.

To effect a stay of proceedings on appeal by defendant from a judgment for restitution in a forcible entry and unlawful detainer case, the bond on appeal must conform to the provisions of section 605.15. Gruenberg v Saumweber, 188 M 566, 248 NW 38.

Where the district court has reversed a rate-fixing order of the railroad and warehouse commission, an appeal by the state and the applicant does not stay entry of judgment unless so directed either by the supreme or the district court. State ex rel v District Court, 189 M 487, 250 NW 7.

By not giving a supersedeas bond, the garnishee proceedings were not stayed, and no rights against the garnishee were preserved. Ridgeway v Mirkovich, 192 M 618, 256 NW 521.

Where the respondent or appellee procures the dismissal of an attempted appeal from a judgment in an unlawful detainer case as premature, because taken before entry of the judgment, the obligors on a supersedeas bond given on appeal

under section 605.11 are not liable for rents accuring between the dates of the appeal and the dismissal, because of the invalidity of the appeal and lack of consideration for the bond. Hampshire Arms v St. P. Mercury, 215 M 60, 8 NW(2d) 413.

The defendant entered judgment pending appeal, there being no supersedeas bond. Of this the plaintiff cannot complain. Kane v Locke, 218 M 488, 16 NW (2d) 545.

605.12 MONEY JUDGMENT; SUPERSEDEAS.

HISTORY. R.S. 1851 c. 81 s. 13; P.S. 1858 c. 71 s. 13; G.S. 1866 c. 86 s. 11; G.S. 1878 c. 86 s.11; G.S. 1894 s. 6143; R.L. 1905 s. 4368; G.S. 1913 s. 8004; G.S. 1923 s. 9501; M.S 1927 s. 9501.

No contest for office of register of deeds, though the petitioner furnishes a proper bond, the respondent is entitled to hold the office pending the appeal to the supreme court. Allen v Robinson, 17 M 113 (90).

An appeal to the district court, from an order of the probate court, does not stay the operation of such order while the appeal is pending. Dutcher v Culver, 23 M 415.

Where an order of the district court requiring the payment of money is appealed to the supreme court, and a stay bond executed, conditioned under General Statutes 1878, Chapter 86, Section 10 (section 605.11), "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 required to be paid by the order appealed from, with interest thereon. Erickson v Elder, 34 M 370, 25 NW 804.

Neither General Statutes 1894, Section 6143, (section 605.12), nor any other statute regarding supersedeas bonds on appeals in civil actions are applicable to an appeal in paternity cases involving paternity of illegitimate children. State v Allrick, 63 M 328, 65 NW 639.

In proceedings under workmen's compensation act, an injured workman recovered a judgment against the insurer of his employer. A writ of certiorari was issued to review, defendant executing an undertaking conditioned as a supersedeas bond. Such undertaking obligated the surety for defendant to pay the judgment and not merely the costs and damages. Carlson v American Fidelity, 149 M 114, 182 NW 985; Miller v Reiter, 155 M 110, 192 NW 740.

After judgment had been entered in district court canceling a deed given in consideration of a promise to support grantor, defendants appealed to the supreme court and furnished no supersedeas bond. Before decision in the supreme court had been rendered, defendants filed a petition in bankruptcy under the Frazier-Lemke act. Under facts in action to recover possession, defendants had neither title, right to possession, nor any equity in the real estate at the time the petition in bankruptcy was filed. Manemann v West, 218 M 603, 17 NW(2d) 74.

Appeal from judgment; stay of execution. 24 MLR 816.

605.13 CUSTODY OF CHATTELS PENDING STAY.

HISTORY. R.S. 1851 c. 81 s. 14; P.S. 1858 c. 71 s. 14; G.S. 1866 c. 86 s. 12; G.S. 1878 c. 86 s. 12; G.S. 1894 s. 6144; R.L. 1905 s. 4369; G.S. 1913 s. 8005; G.S. 1923 s. 9502; M.S. 1927 s. 9502.

See cases cited under section 605.12.

605.14 DIRECTING CONVEYANCE STAY.

HISTORY. R.S. 1851 c. 81 s. 15; P.S. 1858 c. 71 s. 15; G.S. 1866 c. 86 s. 13; G.S. 1878 c. 86 s. 13; G.S. 1894 s. 6145; R.L. 1905 s. 4370; G.S. 1913 s. 8006; G.S. 1923 s. 9503; M.S. 1927 s. 9503.

See, Dutcher v Robinson, 23 M 415; Miller v Reiter, 155 M 110, 192 NW 740; section 605.12.

605.15 FOR SALE OF REAL PROPERTY; SUPERSEDEAS.

HISTORY. R.S. 1851 c. 81 s. 16; P.S. 1858 c. 71 s. 16; G.S. 1866 c. 86 s. 14; G.S. 1878 c. 86 s. 14; G.S. 1894 s. 6146; R.L. 1905 s. 4371; G.S. 1913 s. 8007; G.S. 1923 s. 9504; M.S. 1927 s. 9504.

A bond on appeal conditioned to pay damages sustained by reason thereof is enforceable according to its terms as a common law bond though such bond may not have been necessary to secure a stay. Under such bond loss of profits from interruption of business may be recovered. Miller v Reiter, 155 M 110, 192 NW 740.

To effect a stay of proceedings on appeal by defendant from a judgment for restitution in a forcible entry and unlawful detainer case, the bond on appeal must conform to the provisions of section 605.15. Filing of a St. Paul sinking fund certificate is not sufficient in lieu of a bond. Gruenberg v Saumweber, 188 M 566, 248 NW 38.

605.16 EXTENT OF STAY.

HISTORY. R.S. 1851 c. 81 s. 17; P.S. 1858 c. 71 s. 17; G.S. 1866 c. 86 s. 15; G.S.1878 c. 86 s. 15; G.S. 1894 s. 6147; R.L. 1905 s. 4372; G.S. 1913 s. 8008; G.S. 1923 s. 9505; M.S. 1927 s. 9505.

In case of a levy the stay contemplated by the act does not supersede the execution so as to annul what has been done under it, but simply checks the sheriff from proceeding further. N.W. Express v Landes, 6 M 564 (400); First Nat'l v Rogers, 13 M 407 (376).

The effect of a stay is to preserve proceedings in existing condition. N. W. Express v Landes, 6 M 407 (376); First Nat'l v Rogers, 13 M 407 (376); Robertson v Davidson, 14 M 554 (422); Allen v Robertson, 17 M 113 (90); State ex rel v Young, 44 M 76, 46 NW 204.

The district court will not entertain a motion for a new trial in an action while an appeal from a judgment in such action is pending in the supreme court. McArdle v McArdle, 12 M 122 (70).

Effect on a judgment lien. Allen v Robertson, 17 M 113 (90).

Effect of stay of mandamus proceedings on the district court. State ex rel v Webber, 31 M 211, 17 NW 339.

Appeal from order with supersedeas; attempted enforcement of order; remedy. The appeal does not oust the jurisdiction of the trial court. State ex rel v Young, 44 M 76, 46 NW 204; Briggs v Shea, 48 M 218, 50 NW 1037.

Effect of bond when order or judgment is not appealable. The filing of a supersedeas bond is not effectual to stay or suspend the operation of the order. State ex rel v District Court, 52 M 283, 53 NW 1157.

A cash deposit of $250.00 as security for costs does not stay proceedings in the trial court on a judgment. Manemann v West, 218 M 602, 17 NW (2d) 74.

605.17 BOND TO VACATE STAY ON MONEY JUDGMENT.

HISTORY. R.S. 1851 c. 81 s. 18; 1856 c. 5 s. 19; P.S. 1858 c. 71 s. 18; G.S. 1866 c. 86 s. 16; G.S. 1878 c. 86 s. 16; G.S. 1894 s. 6148; R.L. 1905 s. 4373; G.S. 1913 s. 8009; G.S. 1923 s. 9506; M.S. 1927 s. 9506.

605.18 BONDS MAY BE IN ONE INSTRUMENT; HOW SERVED.

HISTORY. R.S. 1851 c. 81 s. 19; P.S. 1858 c. 71 s. 19; G.S. 1866 c. 86 s. 17; G.S. 1878 c. 86 s. 17; G.S. 1894 s. 6149; R.L. 1905 s. 4374; G.S. 1913 s. 8010; G.S. 1923 s. 9507; M.S. 1927 s. 9507.

The trial court properly dismissed an appeal from an order of the probate court in which there was no service of the bond. Interpreting the terms of Laws 1935, Chapter 72, (chapter 525), new probate code. Estate of Van Sloun, 199 M 434, 272 NW 261.

605.19 JUSTIFICATION OF SURETIES.

HISTORY. R.S. 1851 c. 81 s. 20; P.S. 1858 c. 71 s. 20; G.S. 1866 c. 86 s. 18; G.S. 1878 c. 86 s. 18; G.S. 1894 s. 6150; R.L. 1905 s. 4375; G.S. 1913 s. 8011; G.S. 1923 s. 9508; M.S. 1927 s. 9508.

Laws 1885, Chapter 3, Section 7, making it lawful for an "annuity safe deposit and trust company" to become sole surety upon any bond or undertaking "without justification or qualification" is only permissive, and does not make it compulsory on the court to accept it as surety without justification, or deprive the court of the power to require it to justify, if its sufficiency as surety is excepted to. State ex rel v District Court, 58 M 351, 59 NW 1055.

The sureties had a right to refuse to justify upon such undertaking, which refusal would render the undertaking inoperative. The court has no mandatory power to compel them to testify. Esch v White, 76 M 220, 78 NW 1114.

Section 605.03 authorizes the supreme court to allow a defective appeal bond to be corrected, or a new one substituted therefor. Watier v Buth, 87 M 205, 91 NW 756, 92 NW 331.

Motion to dismiss appeal was denied on condition that defect in appeal bond be remedied within ten days. Hadler v Mountain, 176 M 632, 221 NW 642, 224 NW 239.

605.20 STAY IN OTHER CASES; PERISHABLE PROPERTY.

HISTORY. R.S. 1851 c. 81 s. 21; P.S. 1858 c. 71 s. 21; G.S. 1866 c. 86 s. 19; G.S. 1878 c. 86 s. 19; G.S. 1894 s. 6151; R.L. 1905 s. 4376; G.S. 1913 s. 8012; G.S. 1923 s. 9509; M.S. 1927 s. 9509.

An appeal to the district court from an order of the probate court does not stay the operation of such order while appeal is pending. Dutcher v Culver, 23 M 415.

An order discharging a garnishee for any cause is appealable. Such order releases all property of defendant in the hands of the garnishee, and, if no supersedeas bond be given on appeal from the order, the appeal does not affect the right of the defendant to demand from the garnishee the property in his hands. Except as here provided, a bond for costs does not operate as a stay. Cummings v Edwards-Wood, 95 M 118, 103 NW 709, 106 NW 304.

See, Miller v Reiter, 155 M 110, 192 NW 740.

605.21 DISMISSAL NOT TO PRECLUDE ANOTHER APPEAL.

HISTORY. R.S. 1851 c. 81 s. 31; P.S. 1858 c. 71 s. 31; G.S. 1866 c. 86 s. 20; G.S. 1878 c. 86 s. 20; G.S. 1894 s. 6152; R.L. 1905 s. 4377; G.S. 1913 s. 8013; G.S. 1923 s. 9510; M.S. 1927 s. 9510.

A party cannot take a second appeal from an order or judgment while a former valid appeal therefrom by him is pending in the supreme court. Cruzen v Mchts. Bank, 109 M 303, 123 NW 666.

605.22 DEATH OF RESPONDENT; SUBSTITUTION.

HISTORY. 1876 c. 47 s. 1; G.S. 1878 c. 86 s. 21; G.S. 1894 s. 6153; R.L. 1905 s. 4378; G.S. 1913 s. 8014; G.S. 1923 s. 9511; M.S. 1927 s. 9511.

The court has power to relieve an appellant, and reinstate an appeal where it has been dismissed. Baldwin v Rogers, 28 M 68, 9 NW 79.

The administrator was properly substituted for two reasons. It was defendant's duty, as appellant's, as a condition precedent to the hearing of their appeal, to have the administrator substituted as respondent. Again the administrator had the right to be substituted so as to prosecute this appeal to set aside the order granting a new trial and to restore the verdict in favor of the plaintiff, the verdict being an asset of the estate. Anderson v Fielding, 92 M 49, 99 NW 357.

A judgment or determination for or against a decedent when jurisdiction was acquired prior to his death, is not void; if decedent was dead, the action is void.

Upon a suggestion of the death of a party, the supreme court will not hear the case without substitution. The respondents are not entitled to a remand for further hearing in trial court. When a widow dies prior to an allowance, the right of selection survives to her personal representatives. Paupore v Stone, 132 M 410, 157 NW 648.

605.23 DEATH OF PARTY AFTER SUBMISSION OF APPEAL.

HISTORY. 1876 c. 47 s. 2; G.S. 1878 c. 86 s. 22; G.S. 1894 s. 6154; R.L. 1905 s. 4379; G.S. 1913 s. 8015; G.S. 1923 s. 9512; M.S. 1927 s. 9512.

When the husband dies after the judgment of divorce in his favor and pending an appeal in the supreme court, and property rights are involved, his personal representative will be substituted and the case reviewed notwithstanding the general rule as to abatement of divorce actions by the death of either party. Swanson v Swanson, 182 M 492, 234 NW 675.