

## CHAPTER 545

## MOTIONS AND ORDERS

**545.01 MOTIONS AND ORDERS; SERVICE OF NOTICE.**

It is permissible in the discretion of the court to receive oral testimony upon the hearing of a motion; and upon a motion a trial court's determination upon a question of fact based on conflicting evidence, oral or written, will not be reversed on appeal unless it is palpably contrary to the evidence. *Meddick v Meddick*, 204 M 113, 282 NW 676.

An order denying a motion by a defendant to vacate and set aside service of process upon him is res judicata on the question of jurisdiction and is not subject to collateral attack. *Fersch v Hiller*, 210 M 3, 297 NW 102.

Demurrers to a motion are not recognized and in practice one hearing on a motion is all that will be permitted. *Lenhart v Lenhart*, 211 M 572, 2 NW(2d) 421.

Where the court has jurisdiction of the parties and of the subject matter service of notice of motion which actually comes to the hands of the party to be served within the time required for personal service is equivalent to such service, and the place of mailing thereof is immaterial. *Daw v Daw*, 212 M 507, 4 NW(2d) 313.

Where at the hearing on a motion regularly made by the plaintiff defendant presents a counter-motion without notice and without opportunity to the plaintiff to answer it, the counter-claim should be denied as irregular. *Kafka v O'Malley*; 221 M 490, 22 NW(2d) 845.

**545.02 MOTIONS, WHERE NOTICED AND HEARD.**

Where facts appearing from the complaint supplemented by the more detailed narrative of opening statement to the jury was required, judgment upon the pleadings and statement may be ordered against the plaintiff. *Plotkin v Northland Transportation Co.* 204 M 422, 283 NW 758.

In the instant case an action to quiet title against a defendant who had previously obtained judgments in a quiet title action and in Torrens' registration proceedings, the court did not err in permitting defendant to challenge plaintiff's claim to title by a motion to dismiss the complaint, the judgment roll in the registration proceedings being in the record and before the court. *Dean v Rees*, 208 M 38, 292 NW 765.

The overruling of a demurrer to the complaint does not bar the defendant from questioning the sufficiency of the complaint to state a cause of action by motion for judgment on the pleadings after answer and reply are filed; and in the instant case where the facts pleaded in the complaint and reply show that the case is within the statute of limitations and nothing is shown to forestall its operation, judgment on the pleadings for the defendant may be granted. *Parsons v Town of New Canada*, 209 M 132, 295 NW 909.

It was error on the part of the trial court to order judgment for the plaintiff on the pleadings as amended without giving the defendant an opportunity to answer the amended portion of the complaint. *U. S. F & G v Falk*, 214 M 138, 7 NW(2d) 398.

An order for judgment on the pleadings should be made without findings and conclusion. *Robbinette v Price*, 214 M 521, 8 NW(2d) 800.

In an action for a declaratory judgment determining the rights of the parties under a certain contract for deed where the terms of the contract were unambiguous and there was no indication of any default in the terms of the contract, the court properly granted plaintiff's motion for a judgment on the pleadings. *McReavy v Zeimes*, 215 M 239, 9 NW(2d) 4.

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Plaintiff pleads waiver and estoppel in various ways but in so far as there are conclusions of law as pleaded in the instant case they are ineffectual as against a motion for judgment on the pleadings. *Mayne v American Fraternal Union*, 216 M 303, 12 NW(2d) 615.

A motion for judgment on the pleadings raises a question of the sufficiency of the complaint and the reply to state a cause of action, and for the purposes of the motion, the allegations therein are taken as true. *Vogt v Ganlisle*, 217 M 601, 15 NW(2d) 91.

Motion for directed verdict should not be granted unless there is a complete absence of evidence reasonably sustaining plaintiff's claim, or unless the evidence in support of the claim is wholly incredible and unworthy of belief, or so conclusively overcome by other contradicted evidence as to leave nothing upon which the verdict may stand. The test is not whether the court might in 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) 49; *Cranik v Link*, 219 M 112, 17 NW(2d) 359.

Where the issue involved only an interpretation of the contract and no question of fact was involved no irregularity appears in granting a judgment on the pleadings. *National Surety v Ellison*, 88 F(2d) 399.

### 545.03 EX PARTE MOTIONS.

Since it is clear on the record that defendant violated his duty, the question of contributory negligence under the facts in the instant case was for the jury and should not have been passed upon by the court, and the order by the trial court directing a verdict for defendants is reversed. *Salters v Uhlar*, 208 M 66, 292 NW 762.

The misconduct assigned against the court is not sustained. It is the duty of the court to so guide the trial that the evidence may be confined to the issues in controversy. *Jones v Johnson*, 211 M 124, 300 NW 447.

Where there is a question of fact the case should go to the jury, and it is reversible error to direct a verdict. *Abraham v Byman*, 214 M 355, 8 NW(2d) 231.

An interlocutory order, such as in the instant case, need not be based on findings of fact. *Bliss v Griswold*, 222 M 494, 25 NW(2d) 305.

Proof of crime in a civil proceeding. 13 MLR 556.

Foreign substance of law as determining whether a question is for the court or for the jury. 15 MLR 703.

The respective functions of parties and the court in judicial administration. 20 MLR 19.